

HIGH COURT DECISIONS
on
INDIAN RAILWAY CASES.

HIGH COURT DECISIONS

OF

INDIAN RAILWAY CASES

WITH

AN APPENDIX CONTAINING SELECT DECISIONS OF THE HIGH
COURTS THE INDIAN RAILWAY ACTS THE CARRIERS ACT
OF 1865 THE LATAI ACCIDENTS ACT XIII OF 1893
THE FLOODS ACT IV OF 1897 AS AMENDED
BY ACT IV OF 1903 WITH AN APPENDIX

BY

M. TIRUVENKATACHARIAR,

Proceeding Inspector, (Retired) S. I. Ry.

2ND EDITION

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PRINTED AT THE LAWRENCE ASSURANCE

MADRAS

1912

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THE SECOND EDITION IS RESPECTFULLY DEDICATED
TO
THE RAILWAY BOARD.
(Government of India)
IN GRATEFUL ACKNOWLEDGMENT OF
KINDNESS AND ASSISTANCE RECEIVED FROM THEM.

HIGH COURT DECISIONS

(1)

INDIAN RAILWAY CASES.

OPINIONS ON THE

First Edition.

The Hon'ble Sir C. ARKOT WARR, Kt., Chief Justice, High Court of Judicature, Madras —

* * * *

You appear to have selected your cases with judgment and discrimination.

The Index appears to be full and well arranged—a very important matter in a work of this kind.

I have not the least doubt that the work will prove useful to Judges and Practitioners as well as to all concerned in Railway administration.

The Hon'ble Sir S. SUBRAMANIA AIAI, Esq., Kt., C.J., Judge, High Court of Judicature, Madras —

* * * *

I have no doubt the book will prove very handy and useful to all who have to consult the decisions bearing on Railway matters in this country.

C. R. PATTABHADRAN, Esq., B.A., F.L., Judge, City Civil Court, Madras —

I have very little doubt that your compilation will prove highly useful to those for whom it is intended. Your idea is a very good one and you have to be congratulated on the way in which you have worked it out. I hope that your undertaking will turn out to be remunerative.

The Hon'ble Sir V BHASHYAM IYANGAR I A, B L, Kt C I E, Vakil and formerly Judge, High Court of Judicature Madras —

I have looked through the copy of "High Court Decisions of Indian Railway Cases" which you kindly sent me. I have no doubt it will be of great use to Judges and Practitioners as a book of reference.

The Hon'ble Mr P ANANDA CHARIE, B L, C I E. Rm Bahadur, Vakil, High Court Madras and Additional Member, Legislative Council, Calcutta —

I have fairly gone through your "High Court Decisions of Indian Railway Cases," and I have no hesitation in saying that it must be of invaluable service. To the lawyer it will be a saving of time while, to laymen who may need information on this head of law, it will be a ready repository of accurate information. Such books are never too much. The index to your book is well prepared and it not only enhances but is really the essential value of such a work as yours. I have always thought that —though I have not been a soldier—a book of reference without an ample index is like a sword without a handle.

The Madras Law Journal — This book is a collection of all important decisions of the High Courts of India bearing upon the law of Railways. The various Railway Acts are printed in the Appendix. The Cases have been arranged under convenient heads, and we hope the publication will be found to be a convenient book of reference.

The Bombay Law Reporter — High Court Decisions of Indian Railway Cases needed to be compiled in one volume. Some years ago the Government of India collected them in the shape of an official publication, but its scarcity and incompleteness in point of date render the present volume particularly welcome. The Compiler has gathered together nearly all the cases bearing on Railways, from the reports of the Indian High Courts and of the Chief Court of the Punjab. They are arranged in convenient groups treating of the responsibility as carriers of goods, the responsibility as carriers of passengers, suit by Railway administration, suit against Railway administration, land to be taken for the railway, attachment, jurisdiction of Criminal Courts and criminal prosecution. The appendix reproduces Railway Act XV III of 1851, IV of 1870, IV of 1883 and IX of 1890. Carriers Act III of 1865, and Act XIII of 1855. The index at the end is copious. The Compilation is well adapted to become a handy book of ready reference on the Indian Railway Laws.

the various reports of decisions in relation to the law of railway carriers. The appendix at the end, which contains all the Railway Acts, the Carriers' Act and Act XIII of 1855, adds to the usefulness of the work. We have no doubt that the legal profession and the mercantile community in this country will derive considerable help from this publication. The arrangement of the reprints of decisions shows great discrimination. Cases are classified and grouped under minor subject headings to facilitate reference. The index, so far as we could see, is full. A great deal of the work of prosecuting offenders against the railway laws, falls on railway officials, and there is a large number of those in various railway administrations of this country who have necessarily to be conversant with the special legislation and the case law on the subject. The present volume, therefore, will, we hope, be just the book they may need for their purposes. All Indian Railway administrations will do well to arrange to furnish each of their officials as have to do with railway law and offences with copies of this useful publication.

Mr P. J. N. SINGH, formerly Consulting Engineer for Railways,
Madras —

I got Mr. Teruvankatti Chariar's admirable compilation when on tour with Mr. Pindlebury, the Agent of the Nizam's Guaranteed State Railway, and we agreed that it is a book that has long been very much wanted.

* * * *

I think every Traffic officer in India ought to have a copy of this book on his table and another in his office.

I shall bring the book to the notice of Government in the Judicial Department.

The Bombay Law Reporter —The compilation of High Court Decisions of Indian Railway Cases was published in May 1901. Since then a great many number of decisions have been reported in the official and private series of law reports in India. These are collected and published in a handy volume styled the Supplemental volume. The Appendix contains revised Risk Note forms B and II which have been sanctioned by the Governor General in Council for adoption on all lines of Railways from 1st April 1907. The publication of cases relating to Railways in a separate volume has been a great convenience to persons who deal exclusively with this branch of the law.

The Madras Mail —Mr M. Teruvonkatchiar, Prosecuting Inspector, S. I. Railway, has brought out a supplement to his volume of "High Court Decisions of Indian Railway Cases," published in 1901. With the rapid expansion of railways in this country has also increased the number of cases relating to the administration of the Railways Act, and the need for a work exclusively devoted to these cases was met by the author by the publication of his original volume seven years ago. The present volume includes all the important decisions of the Indian High Courts bearing upon the law of carriers by Railways, up to June, 1907. In the appendix at the end of the book are reproduced revised Risk Note forms B and II, which were sanctioned by the Governor General in Council for adoption on all lines of railway from the 1st April last. Mr Teruvonkatchiar's publication is a useful work of reference to those engaged in the conduct of railway cases, and is well printed by the St. Joseph's College Press, Trichinopoly.

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 will continue to be refer-

Mr F J F SRIINO, formerly Consulting Engineer for Railways,
Madras —

* * * *

I notice that the supplement brings the decisions up to June 1907, and that it includes copies of the latest authorised alternative Risk Note Forms

In my opinion the compilation will be found of great service by Railway Administrations as well as by those doing business with Railways. For, without some such aid it must be very difficult to find decisions on cases similar to those that may arise at any time. I wish your book a successful sale

Sir HENRY KIMBLE, Bart, Chairman, South Indian Railway Company,
Limited —

Will you please express my best acknowledgments to Mr M Tera-
venkatchariar for his valuable treatise on the High Court Decisions of
Indian Railway Cases, which reached me in good order last mail



PREFACE

The Residency,
O C.

AT the suggestion of the Railway Board this Second Edition of High Court Decisions of Indian Railway Cases has been compiled by me. The work contains all important Rulings, reported and unreported, brought up to date, and also in Appendix A certain select decisions of inferior tribunals, while certain overruled cases which appeared in the First Edition have been omitted. Appendix B contains all the Indian Railway Acts, The Carriers' Act, III of 1865, The Fatal Accidents Act, XIII of 1855 and the Provident Funds Act, IX of 1897, as amended by Act IV of 1903. Appendix C contains all Risk Note Forms used on Indian Railways.

I am deeply grateful to the Railway Board, without whose kind assistance, both financial and other, the Second Edition could not have been issued by me.

My sincere gratitude is also due to the Hon'ble Sir Charles Arnold White, Kt, Chief Justice of Madras, for the permission kindly accorded to me to use the High Court Library and for the interest taken by him in my work.

I wish to tender my best thanks to the Editors of The Madras Law Times, The Bombay Law Reporter, The Allahabad Law Journal, The Calcutta Weekly Notes, The Punjab Law Reporter, The Chief Court of Lower Burma and The Judicial Commissioners of The Central Provinces and Upper Burma for their kindness in permitting me to take extracts of such Railway Cases as have appeared in their Reports.

Lastly, though not least, I wish gratefully to acknowledge the invaluable help I have received from Mr. Vernon B F Bayley, Solicitor, Bombay, and to thank him for his many valuable hints and suggestions.

MADRAS, }
1st June 1912. }

M. T.



LIST OF ABBREVIATIONS.

A

| | | |
|--------------------|---|---------------------------------------|
| Al | { | (Indian Law Reports) Allahabad Series |
| Al | { | |
| A C | } | Appeal Cases |
| App Cas | } | |
| A & E. | } | Adolphus and Ellis' Reports |
| Ad & E. | } | |
| Ala | | Alabama |
| Am Dec | | American Decisions |
| Atl | | Atlantic |

B

| | | |
|----------------------|---|------------------------------------|
| B | { | (Indian Law Reports) Bombay Series |
| Bom | } | |
| B & B | | Brodrip and Bingham's Reports |
| B & C | | Barnwall and Cresswell's Reports |
| B & S | | Best and Smith's Reports. |
| B or Bom | } | Bombay High Court Reports |
| H C R | } | |
| B L R | } | Bengal Law Reports. |
| Beng L R. | } | |
| Ben. | } | Beavan's Reports |
| Beav | } | |
| Bell C C | | Bell's Crown Cases |
| Bing | | Bingham's Reports |
| Blatchford | | Blatchford's Reports |
| Bos & P | } | Bosanquet and Puller's Reports |
| Bos & Pul | } | |
| B | } | Bombay Law Reporter |
| Bom L R | } | |

C

| | | |
|---------------------|---|--------------------------------------|
| C | { | (Indian Law Reports) Calcutta Series |
| Cal | } | |
| C B | | Common Bench Reports |
| C or Cal L R | | Calcutta Law Reports |
| C & K | | Carrington and Kirwan's Reports |
| C & P | } | Carrington and Payne's Reports |
| Car & P | } | |
| C P | | Common Pleas |
| C P D | | Common Pleas Division |
| C or Cal W N | | Calcutta Weekly Notes |
| C D | } | Chancery Division |
| Ch D | } | |
| Div | } | |

| | | |
|--------------|---|----------------------------------|
| Ch | | Cases in Chancery. |
| Ch Ca | | Chancery Appeals |
| Ch App | | Chancery Reports |
| Cooper's Rep | | Cooper's Reports |
| Coryton | | Coryton's Reports |
| Cox C C | } | Cox's Criminal Cases |
| Cox Cr Ca | | |
| C C | | Cases in Chancery or Crown Cases |
| Cr J | | Criminal Judgment Cases No |
| C R | | Criminal Rulings |

D

| | | |
|------------|--|--|
| De G M & C | | De Gex Macnaghten and Gordon's Reports |
| Douglas | | Douglas's Reports |

E

| | | |
|------------|---|--------------------------------|
| E & E | | Ellis and Ellis's Reports |
| East | } | East Term Reports |
| E T | | |
| Eq | | Equity |
| Ex | } | Exchequer Reports |
| Exch | | |
| E & I. App | | English and Irish Appeal Cases |

F

| | | |
|---------|--|-----------------------------|
| F & F | | Foster and Fildes's Reports |
| Fed Cas | | Federal Cases |

H

| | | |
|----------------|---|--------------------------------------|
| H & C | | Hurstone and Colman's Reports. |
| H & N | | Hurstone and Norman's Reports |
| H C R | } | High Court Reports |
| Rep | | |
| H L | } | House of Lords Cases |
| H L C | | |
| H L (Eng & Ir) | | House of Lords (England and Ireland) |
| Hyde | | Hyde's Reports |

I

| | | |
|-------------|---|--|
| I A | } | (Law Reports) Indian Appeals |
| Ind App | | |
| I J N S | } | Indian Jurist New Series |
| In Jur N S | | |
| I L R | | Indian Law Reports |
| Ind Ry Cas | } | High Court Decisions of Indian Railway Cases 2nd Edition |
| 2nd Ed | | |
| Iowa | | Iowa |
| Irish C L R | | Irish Common Law Reports |
| Ir Law Rep | | Irish Law Reports. |
| Ir Rep | } | Irish Reports |
| Irish Rep | | |
| Ir L T R | | Irish Law Times Reports |

VIA

J

| | | |
|---------|---|-----------------------|
| Jur | } | <i>Jurist Reports</i> |
| Jr Rep | | |
| Jur Rep | | |

K

| | |
|-----|--------------------|
| K B | <i>Kings Bench</i> |
|-----|--------------------|

L

| | |
|--------------------------------|-------------------------------|
| L R A | <i>Law Reports, Atlanta</i> |
| L B R | <i>Lower Burma Rules</i> |
| L J | <i>Law Journal</i> |
| L R | <i>Law Reports</i> |
| L T | <i>Law Times</i> |
| L T L T R Law) Times Rep) | <i>Law Times Reports</i> |
| La Ann | <i>Lawyers Annual Reports</i> |
| Ld Raym | <i>Lord Raymond's Reports</i> |
| Leach Cr C | <i>Leach's Crown Cases</i> |

M

| | | |
|---------------|---|---|
| M | } | (Ind an Law Reports) Malacca Series |
| Mad | | |
| M & C | } | Manning and Crampton's Reports |
| Man & Cr | | |
| M & S or Sci | | Macle and Selwyn's Reports |
| M & W | | Meeson and Welby's Reports |
| Martin N S La | | Martin's Reports New Series Labrador |
| Martin O S La | | Martin's Reports Old Series Labrador |
| M C C | } | Moody's Crown Cases |
| Moo Cr Ca | | |
| M I A | } | Moore's Indian Appeals to Privy Council |
| Moore I A | | |
| Moo App | | Moore's Appeal Cases |
| Mass | | Massachusetts |
| Moo P C N S | | Moore's Privy Council, New Series |
| Moore & Scott | | Moore and Scott's Reports |

N

| | | |
|--------------|---|------------------|
| N S | New Series | |
| N L R | Nagpur Law Reports | |
| N W P H C R | North West Provinces High Court Reports | |
| N Y Rep | } | New York Reports |
| New York Rep | | |

O

| | |
|-----|-----------------------|
| O C | <i>Original Civil</i> |
| O C | <i>Ordnance Cases</i> |

P

| | | |
|--------|---|-----------------------|
| P C | } | Privy Council Reports |
| Priv C | | |
| P D | | |
| P D | | Probate and Divorce |

| | | |
|--------------|---|----------------------------------|
| Ch | | Cases in Chancery. |
| Ch Ca | | Chancery Appeals |
| Ch App | | Cooper's Reports |
| Cooper's Rep | | Coryton's Reports |
| Coryton | | Cox's Criminal Cases |
| Cox C C | } | Cases in Chancery or Crown Cases |
| Cox Cr Ca | | |
| C C | | Criminal Judgment Case No |
| Cr J | | Criminal Rulings |
| C R | | |

D

| | | |
|------------|--|--|
| De G M & G | | De Gex Macnaghten and Gordon's Reports |
| Douglas | | Douglas' Reports |

E

| | | |
|------------|---|--------------------------------|
| E & E | | Ellis and Ellis' Reports |
| East | } | East Term Reports. |
| E T | | |
| Eq | | Equity |
| Ex | } | Exchequer Reports |
| Exch | | |
| E & I. App | | English and Irish Appeal Cases |

F

| | | |
|---------|--|-------------------------------|
| F & F | | Foster and Finlason's Reports |
| Fed Cas | | Federal Cases |

H

| | | |
|----------------|---|--------------------------------------|
| H & C | | Hurlstone and Coltman's Reports. |
| H & N | | Hurlstone and Norman's Reports |
| H C R | } | High Court Reports |
| Rep | | |
| H L | } | House of Lords Cases |
| H L C | | |
| H L (Eng & Ir) | | House of Lords (England and Ireland) |
| Hyde | | Hyde's Reports |

I

| | | |
|-------------|---|--|
| I A | } | (Law Reports) Indian Appeals |
| Ind App | | |
| I J N S | } | Indian Jurist, New Series |
| In Jur N S | | |
| I L R | | Indian Law Reports |
| Ind Ry Cas | } | High Court Decisions of Indian Railway Cases 2nd Edition |
| 2nd Ed | | |
| Iowa | | Iowa |
| Irish C L R | | Irish Common Law Reports |
| Ir Law Rep | | Irish Law Reports |
| Ir Rep | } | Irish Reports |
| Irish Rep | | |
| Ir L T R | | Irish Law Times Reports |

J

| | | |
|---------|---|----------------|
| Jur. | } | Jurist Reports |
| Jr Rep | | |
| Jur Rep | | |

K

| | |
|-----|-------------|
| K B | Kings Bench |
|-----|-------------|

L

| | |
|------------------------------|-------------------------|
| L R A | Law Reports, Atlantic |
| L B R | Lower Burma Ratings |
| L J | Law Journal |
| L R | Law Reports |
| L T | Law Times |
| L T., L T R Law Times Rep | Law Times Reports |
| La Ann | Lawyer's Annual Reports |
| Ld Raym | Lord Raymond's Reports |
| Leach Cr C | Leach's Crown Cases |

M

| | | |
|---------------|---|---|
| M | } | (Ind on Law Reports) Madras Series |
| Mad | | |
| M & G | } | Manning and Grainger's Reports |
| Man & Cr | | |
| M & S or Sel | | Maise and Selwyn's Reports |
| M & W | | Meehan and Welby's Reports. |
| Martin N S La | | Martin's Reports New Series, Labrador |
| Martin O S La | | Martin's Reports, Old Series, Labrador |
| M C C | } | Moody's Crown Cases |
| Moo Cr Ca | | |
| M I A | } | Moore's Indian Appeals to Privy Council |
| Moore I A | | |
| Moo App | | Moore's Appeal Cases |
| Mass | | Massachusetts |
| Moo P C N S | | Moore's Privy Council, New Series |
| Moore & Scott | | Moore and Scott's Reports. |

N

| | |
|--------------|---|
| N S | New Series |
| N L R | Nagpur Law Reports |
| N W P H C R | North-West Provinces High Court Reports |
| N Y Rep | New York Reports |
| New York Rep | |

O

| | |
|-----|----------------|
| O C | Original Civil |
| O C | Oudh Cases |

P

| | | |
|--------|---|-----------------------|
| P C | } | Privy Council Reports |
| Priv C | | |
| P D | | |

| | |
|----------|---|
| P. C App | Privy Council Appeals |
| P & D | Perry and Davison's Reports, Queen's Bench. |
| P R | Punjab Record |
| P St | Pennsylvanian State |

Q

| | |
|-------|-------------------------|
| Q B | Queen's Bench |
| Q B | Queen's Bench Reports. |
| Q B D | Queen's Bench Division. |

R

| | |
|----------|-------------------|
| R R | Revised Reports |
| Rail Cas | } Railway Cases |
| Ry Cas | |
| Rettle. | Rettle's Reports. |

S

| | |
|------------|----------------------------|
| Salk | Salkeld's Reports |
| Scott N S | Scott's Reports New Series |
| Sim | Simon's Reports |
| Sim and St | Simon and Stuart's Reports |
| Sm L. C | } Smith's Leading Cases |
| Smith | |

T

| | |
|---------------|-----------------------|
| T L R | Times Law Reports |
| T | } Term Reports |
| T R | |
| Taunt. Rep | } Taunton's Reports |
| Times L R | |
| Tex | Texas |
| Tu L R | Tudor's Leading Cases |

W

| | |
|------------|--|
| W R | } Weekly Reporter |
| W Rep | |
| Wendel N Y | Wendel's New York Reports |
| West Rept | } West's Cases in the time of Lord Hardwicke |
| Hard W | |

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ERRATA

| | | | |
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| Page 10 | Line 31 | <i>for</i> or the Railway lines | <i>read</i> or the other Railway lines |
| " 13 | " 26 | of the Madras Railway | , on the Madras Railway |
| " 52 | " 1, 8 | (32 L J Ex, 137) | (32 L J, Ex, 187) |
| " 208 | " 1 | Vol VIII | " Vol, XVIII |
| " 226 | " 5 | " prevents | " prevents |
| " 201 | { Foot-note (1) } | " 1 L R, 2 C P 318 | " (1) L R, 2 C P 318 |
| " " | { Foot-note () } | 30 L J, C P 232 | , (3) 80 L J, C P 232 |
| 303 | " 17 | , never | " ever |
| " 303 | { Foot-note (9) } | , L R, 8 Q B, 168 | " L R, 8 Q B, 186 |
| " 879 | Line 24 | , South | " North |
| " 400 | | Omit footnote (4) | |
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| " 566 | Line 29 | " responsibly | " reasonably |
| " 574 | " 32 | " the ticket carrier, barred | <i>read</i> the ticket barrier, carried |
| " 576 | " 19 | " that the defendants | " for the defendant |
| " 593 | { in Marginal note } | " Ratanbai | " Ratanbai |
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| " 836 | Line 18 | " provison | " provision |
| " 864 | " 22 | " Fund 5 Act | " Funds Act |
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Page 885 { Margin
note } for October 4 read October 14

„ 903 { in foot-
note(1) } „ I. L. R., Mad. 201 „ I. L. R., 6 Mad., 201

„ 910 Line 1 „ remain up „ remain down

„ 936 „ 39 „ Shankar Balakrishna v. King Emperor (2)
read Shankar Balakrishna v. King Emperor (1)
Omit footnote (2)

„ 1020 { foot-
note(3) } „ III Cox C. C. 489 read 1 Bell. C. C. 1

App. A. Page 79 in the heading for Damage to goods caused by fire
read Damage to cotton caused by fire.

HIGH COURT DECISIONS OF INDIAN RAILWAY CASES.

The Residency;
O.C.

The Agra High Court Reports, Vol. II. (N.W.P.)
Series, Page 200.

Before Morquin, C. J., and Roberts, J.

SUNTOKH RAI (APPELLANT)

v.

EAST INDIAN RAILWAY COMPANY (RESPONDENTS).

Railway Company, Liability of—Loss of goods—Risk Note—Default of the terms—Burden of proof

1867
March, 18

The Company, though protected from certain risks by the "Risk Note" is not absolved from all liability or able to impose on the consignor the burden of proving that the loss or non delivery of the goods was caused by some default for which the defendants are liable

This was a reference from the Sub Judge of the Small Cause Court of Allahabad under the provisions of Section 22, Act XI of 1865.

Case stated by the Judge of the Small Cause Court —

Suntokh Rai sued East Indian Railway Company for Rupees 106-12-6, the value of certain bags of sugar and grain lost in transit between Delhi and Allahabad

The Railway Company admit the loss, but reply that they are absolved from all responsibility by a "Risk Note" held by them and signed by plaintiff's agent Plaintiff admits the "Risk Note," which runs as follows — "These goods are sent in open trucks

* See Risk Note Form C set out in Appendix C

Suntokh Rai at my request, and I accept all risks from fire, water, or any other
 P I Ry cause arising from my goods being sent in open wagons " It is
 ————— pleaded by the plaintiff that there is no proof that the loss
 occurred through the goods being sent in open wagons

The defendants reply that though they are not in a position to show how the loss actually occurred, yet, that, owing to the goods being sent in open instead of closed wagons it was so much easier for them to be stolen or lost and that there is the strongest presumption that they were lost because they were sent in open wagons

Plaintiff replies with much truth that goods are continually lost from closed wagons as well as from open ones I found that it lay with the defendants to prove that the loss had occurred owing to the goods being sent in open instead of closed wagons, and that, as they could not prove that point, they were liable for the loss At the request of the defendants, who state that the point is one of great importance to the Company, I made my decision subject to the decision of the High Court upon this reference The question I refer is this —

Looking to the terms of the "*Risk Note*," is it sufficient for the defendants to show that the loss most probably occurred owing to the goods being sent in open wagons, or must they prove that it actually occurred in consequence of their being so sent?

By the High Court —The defendants are responsible for the safe carriage of the goods except so far as they have protected themselves from responsibility by the terms of the "*Risk Note*," but it does not absolve them from all liability or enable them to impose on the plaintiff the burden of proving that the loss or non delivery of the goods was caused by some default (not covered by the "*Risk Note*") for which the defendants are liable

It is for the defendants in the first instance to show by adducing such evidence, direct or presumptive, as they are able, that the non delivery is owing to the risk incidental to the goods having been sent in open wagons

In the Chief Court of the Punjab.

CIVIL REVISION

Before Mr Justice Rattigan

GANESH FLOUR MILLS COMPANY, LIMITED, DELHI
(Plaintiff), PETITIONER

THE GREAT INDIAN PENINSULAR RAILWAY
COMPANY, BOMBAY (Defendant), RESPONDENT

Civil Revision No 252 of 1907

Responsibility of Railway Administration as carriers—Risk Note Form B (old)—Exemption from liability—Railways Act 1890, Section 72 (2)*

1908
June, 23

In a suit against a Railway Company for damages caused to the goods by their having been loaded and despatched in an open wagon held that the defendant Company cannot be held liable to the claim of the plaintiff inasmuch as he executed a Risk Note in Form B exonerating them from all liability

APPLICATION for revision of the order of Khawaja Tasadaq Husain, Judge, Small Cause Court, Delhi, dated 7th October 1907

Chuni Lal, for Petitioner

Turner for Respondent

The Judgment of the learned Judge was as follows —

RATTIGAN, J.—The facts of this case as disclosed in the pleadings and evidence are as follows —

On the 11th June 1906 the plaintiff Company, the Ganesh Flour Mills Company, Limited, of Delhi, delivered 138 bags of flour for carriage by the defendant Railway Company from Delhi to Secunderabad. In respect of this consignment the plaintiff executed a written agreement with the defendant

* Risk Note Forms B and H have been revised and sanctioned by the Governor General in Council for adoption on all lines of Railway with effect from 1st April 1907. They are set out in full in Appendix C

Ganesh Flour
Mills Com
pany Ltd
Delhi
v
G I I Rv

Company in the form of Risk Note "B," which has been approved by the Governor-General in Council under Section 72 (2) (b) of Act IX of 1890. A copy of this form will be found set out at page 280 of Russell and Bryley's Indian Railways Act, 1890 (2nd Edition). It is admitted that the plaintiff Company paid a reduced rate for the conveyance of the said consignment. It is also not denied by the defendant Company that the said bags of flour were sent from Delhi in open wagons and were seriously damaged by rain, and that the plaintiff Company sustained a loss of Rs 158-8 0 by reason of such damage. These facts are not contested. It has also been found as a fact by the Judge of the Small Cause Court and his finding cannot be challenged on revision, that the bags were loaded in open wagons to the knowledge and with the acquiescence of plaintiff's accredited agent, Muhammad Ismail.

The question before the learned Judge of the Court below was whether upon these facts the defendant Company was in law bound to recompense the plaintiff Company for the loss admittedly suffered by them. He held that in view of the fact that the plaintiff Company had, through its agent, signed the "Risk Note" Form B, the defendant Company were relieved of all liability in respect of damage caused to the said goods from any cause whatsoever, and he therefore dismissed the claim. From this decision the plaintiff Company have preferred an application for revision under Section 20 of Act IX of 1887. Their learned Pleader, Mr Chuni Lal, conceded that the plaintiff Company must be taken to have duly executed the "Risk Note" in Form B, and that they could not plead any such ground as fraud, mistake, misrepresentation, undue influence, etc., as invalidating the said agreement. He also admitted that ordinarily a person who executes an agreement in form B cannot claim damages against a Railway Company for damage to goods, even though such damage has been occasioned by the negligence of the Railway Company or its servants or agents. But he contends that in a case (such as the present) where goods are damaged owing to the fact that they are being conveyed in open wagons the Railway Company cannot rely on the terms of the agreement as contained in Form B, because such cases are

specially provided for by Form C (page 28b of the work above referred to). I confess I was not able to follow the argument of the learned counsel. Form C applies to cases where at the "sender's request open wagons, etc., are used for the conveyance of goods liable to damage, and the terms of this Form provide that in such cases where the sender makes such request and executes an agreement in the terms of that Form the Railway Company is not responsible for any destruction or deterioration of, or damage to, the said consignment which may arise by reason of the consignment being conveyed in open wagons, etc. In the present case it is not asserted that the goods were conveyed in open wagons at the request of the consignor, and it is admitted that the consignor actually executed an agreement in Form B and not in Form C, and that reduced fees for the conveyance of the consignment were paid by the consignor. A consignor who wishes to send goods in open wagons may possibly induce the Railway Company at times to accept goods for conveyance in this manner at reduced terms and no doubt the Railway Company is occasionally agreeable to accept goods for conveyance upon such terms, provided the consignor executes an agreement in Form C. But I cannot see how this fact affects the question when it is admitted that the consignor has, in consideration of special rates executed an agreement with full knowledge and consent, in Form B, for if he does so, he agrees to relieve the Railway Company from responsibility for any loss, destruction or deterioration of, or damage to the said consignment "from any cause whatever, before, during and after transit." These words are certainly wide enough to include damage to the consignment caused by the goods being carried in open wagons. I can understand a consignor who agrees to his goods being conveyed in open wagons, being at the same time unwilling to relieve the Railway of all responsibility for loss of, or damage to, his goods. In such a case the consignor is at liberty to select Form C. But if he does not do so—if on the contrary he executes an agreement in Form B with full knowledge and consent—he cannot, in my opinion, claim damages from the Railway Company because the loss, etc., was due to the fact that the goods were conveyed

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in open wagons. An agreement in Form B. relieves the Railway Company from liability in respect of any claim for compensation, no matter how the loss, destruction, deterioration or damage was caused, and the mere fact that such loss, etc., was due to the goods being negligently loaded in open wagons does not affect the question. According to the authorities in this country the Railway Company is in such cases relieved of all responsibility quite irrespective of the alleged nature of the negligence (it would seem) or wilful misconduct on the part of the Railway or its servants which caused such damage [See *Moheswar Das v Carter* (1) *Pippanna v. The Southern Mahratta Railway Company*, (2) *Balaram Harichand v The Southern Mahratta Railway Company, Limited*, (3) *East Indian Railway Company v Bunyad Ali*, (4) *Toonya Ram v East Indian Railway Company*, (5) and *Uolji Dhanji Seth v The Southern Mahratta Railway Company* (6). It was also argued by Mr Chuni Lal that in a case of this kind when goods are to be conveyed in open wagons, there is some sort of obligation on the part of the Railway Company, if they wish to relieve themselves of liability in respect of damage to such goods caused by their being so conveyed, to bind the consignor down by an agreement in Form C. I confess I am unable to see that there is any such obligation. If the consignor is ready and willing, in consideration of being allowed to pay reduced fees, to execute an agreement in Form B which covers every form of negligence (and possibly even of misconduct) on the part of the Railway or its servants, there is nothing to prevent the Railway Company from taking advantage of the fact. The consignor is, of course, not bound or compelled to agree to those terms. He can undoubtedly insist on executing an agreement in Form C. But this is a matter for his consideration, and if instead of Form C he executes an agreement in Form B, he must, in my opinion, be held bound by its terms.

In the present case the plaintiff Company have, upon the facts as found by the Lower Court, no case whatever. They are fully conversant with the law on the subject, and they know the distinction between the Forms B and C. They actually

(1) I L R, 10 Cal, 210

(2) I L R, 17 Bom, 417

(3) I L R, 19 Bom, 159

(4) I L R, 18 All, 42

(5) I L R, 30 Cal, 257

(6) Ind Ry Cas, 25

executed an agreement in Form B and paid the specially reduced rates for the conveyance of the goods, and though they did not "request" the defendant Company to send the goods in open wagons their agents acquiesced in the goods being so conveyed. Further the Lower Court finds that in point of fact there was no negligence on the part of the Railway. In any case, therefore I do not think that they would have had an enforceable claim against the Railway. But, be this as it may, they certainly cannot succeed in view of the fact that they accepted an agreement in Form B.

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I have referred to the rulings of the High Courts in this country with regard to the meaning and effect of "Risk Notes" in Form B. I would, however, in this connection, refer also to the decision of KENNEDY J., in the case of *Hirschel and Mayer v Great Eastern Railway*, at page 151 of volume 96 of the Law Times Reports, where the learned Judge holds that the words "at owner's risk" or "solely at owner's risk," do not by themselves confer a right to immunity where goods have been lost or damaged in the course of the carriage and where the mischief has arisen solely or in part through the negligence of the carrier or his servants. This decision is not in conflict with the Indian authorities, for the learned Judge concedes that when a person requests the carrier to carry goods at reduced rates in consideration of his holding the carrier free from liability for any loss or damage he is bound by such agreement. In my opinion therefore the order of the Lower Court was correct and I accordingly dismiss this application with costs.

Application dismissed.

The Indian Law Reports, Vol. X. (Calcutta) Series,
Page 210

APPELLATE CIVIL

Before Sir Richard Garth, Knight, Chief Justice,
Mr Justice Prinsep, Mr. Justice Wilson,
and Mr. Justice O'Kinealy.

MOHESWAR DAS (PLAINTIFF)

v.

CARTER (DEPENDANT)

1883
March, 12

*Railway Company liability of for loss—Special contract—Railway Act
(IV of 1879) S 10—Contract Act (IX of 1872) Ss 151, 161—Carriers*

The plaintiff despatched certain goods by the E I Railway Company for carriage to A, and signed a special contract, in conformity with the form approved by the Governor General in Council under Section 10 of Act IV of 1879 holding the Company harmless and free from all responsibility in regard to any loss destruction deterioration of, or damage to, the said consignment from any cause whatever before during and after transit over the said Railway or other Railway lines working in connection therewith. The goods were short delivered, and the plaintiff brought a suit to recover their value.

Held,—Per GARTH C J, PRINSEP, J, and WILSON J.—That the Railway Company could not be held liable to account to the consignee for any loss from any cause whatever during the whole time that the goods were under their charge inasmuch as the plaintiff had entered into a special contract to hold them harmless in accordance with Section 10 of Act IV of 1879.

Held—Per O'KINEALY, J. that it was doubtful whether Ss 151 and 161 of the Contract Act applied to carriers by rail, but even assuming that these sections did not apply, the Railway Company would be in the position of carriers before the passing of the Carriers' Act, and were entitled to protect themselves from liability by special contract.

THIS was a reference under S. 617 of the Civil Procedure Code

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The suit was brought by the plaintiff against "Mr Carter, Traffic Manager, on behalf of the East Indian Railway Company" for damages for the loss of 21½ seers of ghee

It was admitted that twelve canisters containing 6½ maunds of ghee had been delivered to the Railway Company for carriage from Agra to Ahmedpore, and it was proved that the plaintiff before taking delivery, caused the canisters to be weighed, and found that there was a deficiency of 21½ seers, and soaping that one of the canisters had been cut open by a knife, caused the two facts to be noted on the back of the receipt given to the Company. The defendant (not taking the objection, that the Railway Company and not himself were the proper parties to be sued), contended that the special contract entered into by the plaintiff exonerated the Company from all claim to damages. The special contract or 'Risk Note' * was as follows — "I hold the Railway Company harmless and free from all responsibility in regard to any loss, destruction, or deterioration of, or damage of or to the said consignment from any cause whatever, before, during, and after transit over the said Railway or other Railway lines working in connection therewith." This agreement was drawn up in the form prescribed by the Governor-General under Act IV of 1879, S. 10.

The Munsiff held the defence to be a good one and dismissed the suit.

The plaintiff appealed to the Subordinate Judge of Beerhoom. At a late stage of the appeal the defendant raised the objection of non joinder of the Railway Company as a defendant, but preferred no cross appeal nor filed any cross objection. The Subordinate Judge gave the plaintiff a decree contingent on the opinion of the High Court as to whether, on the facts disclosed, the defendant or the East Indian Railway Company could claim exemption from liability by reason of the special contract.

* Risk Note Forms B and H have been revised and sanctioned by the Governor General in Council for adoption on all lines of Railway with effect from 1st April 1907. They are set out in full in Appendix C.

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Page 210

APPELLATE CIVIL

Before Sir Richard Garth, Knight, Chief Justice,
Mr Justice Prinsep, Mr Justice Wilson,
and Mr. Justice O'Kinealy.

MOHESWAR DAS (PLAINTIFF)

v.

CARTER (DEFENDANT)

1883
March, 12

Railway Company, liability of for loss—Special contract—Railway Act (IV of 1879) S 10—Contract Act (IX of 1872) Ss 151, 161—Carriers

The plaintiff despatched certain goods by the E I Railway Company for carriage to A, and signed a special contract in conformity with the form approved by the Governor General in Council under Section 10 of Act IV of 1879 holding the Company harmless and free from all responsibility in regard to any loss destruction deterioration of or damage to the said consignment from any cause whatever before during and after transit over the said Railway or other Railway lines working in connection therewith. The goods were short delivered and the plaintiff brought suit to recover their value.

*Held—Per GARTH C J, PRINSEP, J and WILSON, J—*That the Railway Company could not be held liable to account to the consignee for any loss from any cause whatever during the whole time that the goods were under their charge inasmuch as the plaintiff had entered into a special contract to hold them harmless in accordance with Section 10 of Act IV of 1879.

Held—Per O KINEALY J that it was doubtful whether Ss 151 and 161 of the Contract Act applied to carriers by rail but even assuming that these sections did not apply the Railway Company would be in the position of carriers before the passing of the Carriers Act and were entitled to protect themselves from liability by special contract.

THIS was a reference under S. 617 of the Civil Procedure Code

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* Risk Note Forms B and H have been revised and sanctioned by the Governor General in Council for adoption on all lines of Railway with effect from 1st April 1907. They are set out in full in Appendix C.

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At the hearing of the reference the defendant waived his objection to the non-joinder of the Railway Company as a defendant

Baboo Kali Churn Banerjee for the plaintiff

The Advocate General (Mr Paul) and *Mr Evans* for the defendant

The following Judgments were delivered —GARTH, C J, (PRINSEP and WILSON, J J, concurring) —This is a case referred under S 617 of the Civil Procedure Code. It is unnecessary for us to express any opinion on any of the points which arise, except on that referring to the relations between the parties arising out of the Risk Note, which was the agreement under which the goods were received and despatched by the Railway Company, because the learned counsel on behalf of the Company in the present case has agreed to waive any objections to the suit as brought against the Traffic Manager, in order that he may obtain our opinion on the main point in issue.

It appears that twelve tins containing $6\frac{1}{2}$ maunds of ghee were consigned to the Railway Company at Agra for delivery at Ahmedpore. It has been found that, when these tins were delivered, one had been cut open by a knife, and there was consequently a deficiency of some $21\frac{1}{2}$ seers in the quantity of ghee contained in them.

For the defendants, it is contended that, under the terms of the Risk Note, signed by the plaintiff, they are in no way liable for the loss.

The Risk Note runs as follows —‘I hold the Railway Company harmless and free from all responsibility in regard to any loss, destruction, or deterioration of, or damage of or to, the said consignment, from any cause whatever, before, during and after transit over the said Railway or the Railway lines working in connection therewith.’ By S 2 of Act IV of 1879 nothing in the Carriers Act 1865, applies to carriers by Railway. By S 10 it is declared that “every agreement purporting to limit the obligation or responsibility imposed on a carrier by Railway by the Indian Contract Act of 1872, Ss 151 and 161, in the case of loss, destruction, or deterioration of, or damage to, property,

shall, in so far as it purports to limit such obligation or responsibility, be void, unless (a) it is in writing signed by or on behalf of, the person sending or delivering such property, and (b) is otherwise in a form approved by the Governor General in Council "

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This agreement, which was signed by the plaintiff, is in a form approved by the Governor General in Council under Act IV of 1879, S. 10 and its terms leave us no alternative but to hold, that in no case would the Railway Company be liable to account to the consignee for any loss from any cause whatever during the whole time that the goods were in their charge. Similar contracts have frequently been construed by English Courts and full effect has been given to their provisions.

The Legislature in this country has, in respect to the matter specified in S. 10 Act IV of 1879, imposed upon the Government the duty of determining beforehand the propriety of any proposed form of contract between any Railway Company and its customers, instead of leaving this to be decided subsequently by Courts of Justice.

Under such circumstances, we think the suit should be dismissed by the Judge of the Small Cause Court

O'NEALEY, J.—I agree in the decision delivered by my learned colleague, but I am not quite sure that I agree in all the reasons on which it is based, as I feel some hesitation in assuming that the Contract Act applies to carriers. There is no doubt, if Railway carriers are subject to the provisions of Ss. 151 and 161 of the Indian Contract Act, that the conditions required by S. 10 of the Railway Act have been properly complied with. The Risk Note is admittedly signed by or on behalf of the plaintiff, and is in a form approved by the Governor-General in Council. On the other hand, if Ss. 151 and 161 do not apply to carriers by Railway, the Railway Companies are in the position of carriers before the passing of the Carriers' Act. Whichever view, therefore, is taken of the case, the question for decision is narrowed to this, *viz.*, whether a Railway Company, which is not subject to the Carriers Act can protect itself by contract from liability for the negligence or misconduct of its agents and servants "

Moheswar
Das
&
Carter

This very question was elaborately discussed in the case of *Peck v The North Staffordshire Railway Company* (1). There Mr Justice BLACKBURN gave as his opinion that "the cases decided in our Courts between 1832 and 1854 established that a carrier might, by a special notice, make a contract limiting his responsibility even in the cases here mentioned of gross negligence, misconduct or fraud on the part of his servants."

This view of the Law has been adopted in several later cases. And it may now be taken as settled in England that a carrying Company, when not subject to limitation by Act of Parliament, may contract itself from all responsibility arising from the acts of its agents or servants. Looking, then at the cases already referred to, I think that, under the "Risk Note" in this case, the owner undertook all risks of conveyance and loss however caused by the servants and agents of the Company during the journey, and that the latter is not responsible for the abstraction of the plaintiffs' goods. Under these circumstances, our answer to the learned Subordinate Judge should be that the Railway Company is protected by the Risk Note in question, and that neither it nor the Traffic Manager is liable unless either one or the other has committed some independent wrong in connection with the property, and as no such allegation has been made that the suit should be dismissed.

Suit dismissed

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Page 417.

APPELLATE CIVIL

Before Mr. Justice Bayley, Acting Chief Justice,
and Mr. Justice Candy

TIPPANNA (Plaintiff)

2

THE SOUTHERN MARATHA RAILWAY COMPANY

(Defendants) †

Railway Company—Exemption from liability—Special Contract—Risk Note (old)—Railways Act (IX of 1900), Sec. 4, Cl. (1) Sec. 72 Cls. (a), (b), Sub Cls. (2) and (3)—Carriers Act 1803*

1892
July, 7

The plaintiff sued the defendants (a Railway Company) for damages for short delivery of goods consigned to him. The defendants pleaded a special contract signed by the consignor which in consideration of their carrying the goods at a special reduced rate instead of the ordinary tariff rate exempted them from liability for loss or damage to the goods from any cause whatever before, during and after transit over their Railway or other Railway working in connection therewith. Held that under the contract the defendants were not liable to the plaintiff.

THIS was a reference from Rao Saheb Vinayak Vithal Tilak, Subordinate Judge of Bagalkot, in his Small Cause jurisdiction under Section 617 of the Civil Procedure Code (Act XIV of 1882).

The reference was as follows:—

3 On the 21st April, 1891, a certain man at Salem (a station of the Madras Railway), consigned 230 bags of cocoanuts (each bag containing 100 nuts) for delivery to plaintiff at Bagalkot (a station on the Southern Maratha Railway). The two Railways work in connection with each other. The defendants having

† Civil Reference, No. 3 of 1892

* Risk Note Forms B and H have been revised and sanctioned by the Governor General in Council for a option on all lines of Railway with effect from 1st April 1907. They are set out in full in Appendix C.

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delivered only 229 bags to the plaintiff, the latter has sued to recover damages (Rs 4) for the short delivery.

4 Under Section 76(1) of the Railways Act (IX of 1890) it is not necessary for the plaintiff to prove how the loss of one bag was caused. Nor have the defendants produced any evidence on the point.

5 The defendants rely on Section 72(2) of the Railway Act and on * * the Risk Note(3) (Exhibit 7), which is signed by the consignor and attested by witnesses. They contend that the special contract contained in the Risk Note exonerated them from all liability to damages.

(1) Section 76 of the Indian Railways Act (IX of 1890) —In any suit against a Railway administration for compensation for loss, destruction or deterioration of animals or goods delivered to a Railway administration for carriage by Railway it shall not be necessary for the plaintiff to prove how the loss, destruction or deterioration was caused.

(2) Section 2 of the Indian Railways Act (IX of 1890) —(1) The responsibility of a Railway Administration for the loss, destruction or deterioration of animals or goods delivered to the Administration to be carried by Railway shall, subject to the other provisions of this Act, be that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872. (2) An agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void unless it (a) is in writing, signed by or on behalf of the person sending or delivering to the Railway Administration the animals or goods and (b) is otherwise in a form approved by the Governor-General in Council. (3) Nothing in the Common Law of England or in the Carriers' Act, 1865 regarding the responsibility of the common carriers with respect to the carriage of animals or goods shall affect the responsibility (as in the section defined) of a Railway Administration.

(3) RISK NOTE

(To be used when the sender elects to despatch, at a 'special reduced' or owner's risk rate articles for which an alternative 'ordinary' or 'Railway risk' rate is quoted in the tariff)

Whereas the consignment of _____ Station 21st April 1891
Order No _____ tendered by me as per forwarding
of this date for despatch by the Madras Railway to
Station and for which I have received Railway receipt No _____ of the same
date is charged at a special reduced rate instead of at ordinary tariff rate charge-
able for _____. I the undersigned do in consideration of such lower charge
agree and undertake to hold the said Railway harmless and free from all respon-
sibility for any loss, destruction or deterioration of or damage to the said
consignment from any cause whatever before, during and after transit over the
said Railway or other Railway lines working in connection therewith.

6 It is admitted that the Risk Note is in the form approved by the Governor-General in Council

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S M Ry

The Subordinate Judge referred the following question —

“Can the defendant claim exemption from liability by reason of the special contract contained in the Risk Note?”

The opinion of the Subordinate Judge was in the negative, though he considered that the decision of the Calcutta High Court in *Moheshwar Das v Carter* (1) supported the defendants' contention. Daji Abaji Kharc (*amicus curiae*), for the plaintiff, relied on *Chogimul v The Commissioners for the Improvement of the Port of Calcutta* (2). Mahideo Bhaskar Chavhal (*amicus curiae*), for the defendants, relied on *Moheshwar Das v Carter* (1).

PER CURIAM — In this case the Subordinate Judge of Bagilkoat has referred the following question — “Can the defendants claim exemption from liability by reason of the special contract contained in the Risk Note which the plaintiff has signed?” His opinion was in the negative. The Risk Note, as the Subordinate Judge states in paragraph 6 of his reference, is admittedly in the form approved of by the Governor-General in Council.

This case comes within the Railways Act (IX of 1890). By Section 54, (3) Clause (1) of that Act, subject to the control of the Governor-General in Council, a Railway Administration may impose conditions not inconsistent with the Act, or with any general rule thereunder, with respect to the receiving, forwarding or delivering of any animals or goods. By Section 72, sub clause (2), an agreement purporting to limit the responsibility of a Railway Administration for the loss of goods delivered to be carried by Railway shall, in so far as it purports to effect such limitation, be void unless it (a) is in writing signed by or on

(1) I L R, 10 Calc, 210

(2) I L R, 18 Calc, 427

(3) Section 54 of the Indian Railways Act (IX of 1890) — (1) Subject to the control of the Governor General in Council, a Railway Administration may impose conditions, not inconsistent with this Act or with any general rule thereunder, with respect to the receiving, forwarding or delivering of any animals or goods (2) The Railway Administration shall keep at each station on its Railway a copy of the conditions for the time being in force under sub section (1) at the station, and shall allow any person to inspect it free of charge at all reasonable times

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v
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behalf of the person sending or delivering to the Railway Administration the goods, and (b) is otherwise in a form approved by the Governor General in Council. There is a further sub-clause (3) which is as follows —“ Nothing in the Common Law of England or in the Carriers' Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility, as in this section defined, of a Railway Administration ”

Mr Khare, who argued this case for the plaintiff, contended that there is something in the Common Law of India which will enable him to recover damages notwithstanding the terms of the Risk Note. In our opinion, as there is a Risk Note in this case signed by the plaintiff which is in the form approved by the Governor General in Council, his contention must fail. This Risk Note says “ To be used when the sender elects to despatch, at a ‘ special reduced ’ or ‘ owner's risk ’ rate, articles for which an alternative ‘ ordinary ’ or ‘ Railway risk ’ rate is quoted in the tariff ” The Risk Note states that, whereas the consignment is charged at a special reduced rate instead of at the ordinary tariff rate charged for the goods (230 bags of coconuts), the plaintiff does, in consideration of such lower charge, agree and undertake to hold the said Railway harmless and free from all responsibility for any loss, destruction, or deterioration, or damage to the said consignment from any cause whatever before, during, or after transit over the said Railway or other Railway lines working in connection therewith. As pointed out by GARTH, C J, (PRINSEP and WILSON, J J, concurring) and by O’KINEALLY, J, in *Moheswar Das v Carter* (1) similar contracts have frequently been construed by English Courts and full effect has been given to their provisions. We cannot understand the doubts of the Subordinate Judge when, moreover, he had a ruling of the Calcutta High Court to guide him. The recent decision of the Calcutta High Court in *Chojemul v The Commissioners for the Improvement of the Port of Calcutta* (2) so strongly relied upon by Mr Khare, has no application in the present case, as there was no special contract signed by or on behalf of the consignor of the

goods The present case turns upon the provisions of the Risk Note, which, in our opinion, shows that the defendants have a complete defence to this action

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Mr Khare further argued that, apart from the measure of the general responsibility of Railways as defined by clause (1) of Section 72, and the non-applicability thereto of the Common Law of England or the Carriers Act 1865, there was a Common Law of India untouched by the section, and that under that Law defendants could not claim exemption by reason of the Risk Note. We are unaware of such a law. The Common Law, which came to govern the duties and liabilities of common carriers throughout India, was the Common Law of England (*see* remarks by Privy Council in *The Irrawaddy Flotilla Company v. Bugian* (as to) The effect of that law, as regards railways, is restricted by Section 72 of Act IX of 1890. In answer, therefore, to the question referred by the Subordinate Judge, we are of opinion that the defendants can claim exemption from liability by reason of the special contract contained in the Risk Note

Order accordingly

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Series, Page 42**

Before *Knoor, Officiating Chief Justice, and*
Mr Justice Akhman

EAST INDIAN RAILWAY COMPANY (DEFENDANT)

BUNYAD ALI (PLAINTIFF) *

Act No IX of 1890 (Indian Railway Act) Sec 72—Contract saving liability of Company for loss of goods carried by it— Risk Note (old) †

1895
July, 12

(1) 1 I R 18 Calc 620

* Miscellaneous No 173 of 1893. *Per resce* under S 117 of Act No XIV of 1892 by Pandit Bansa Dhar Subordinate Judge of Saharanpur

† Risk Note Forms B and H have been revised and sanctioned by the Governor General in Council for adoption on all lines of Railway with effect from 1st April 1907. They are set out in full in Appendix C

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Bunyas Ali.

The contract, embodied in what is commonly known as a "Risk Note," is, a contract whereby, in consideration of goods being carried by a Railway Company at a reduced rate, the consignor agrees that the Company shall be free of all responsibility for any loss or damage to the goods: is a valid and a legal contract within the terms of S 72 of Act No IX of 1890 *Suntokh Rai v East India Railway Company* (1) distinguished.

In this case the plaintiff-respondent sued to recover from the East Indian Railway Company a sum of Rs 110 as the value of certain boxes of *ghee*, which had been made over by the plaintiff to the Company at Kburja, for transmission to Sabaranpur, and had not reached their destination. The goods were despatched at owner's risk, and what is known as a "Risk Note" was taken from the consignor. A "Risk Note" contains the terms of a special agreement whereby the consignor, paying a lower freight than he would otherwise be bound to pay, "in consideration of such lower charge, agrees and undertakes to hold the said Railway harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment, from any cause whatever, before, during, and after transit over the said Railway or other Railways working in connection therewith." The loss of the goods in question was admitted by the defendant-Company, but they pleaded that they were absolved from liability by the terms of the contract entered into by the plaintiff. The Court of first instance (Munsif of Sabaranpur) decreed the plaintiff's claim. The defendant appealed, and the appellate Court (Subordinate Judge of Sabaranpur) referred the question of the validity of the contract relied upon by the defendant to the High Court under S 617 of the Code of Civil Procedure. That Court was of opinion that, inasmuch as the ordinary liability of a Railway Company for loss of goods delivered to them for transmission was, by S 72 of Act No IX of 1890, that of a bailee under the Indian Contract Act, 1872, Ss. 151, 152 and 161, the Company could not contract itself out of all liability, since even a gratuitous bailee was not absolved from all liability from any cause whatever. The lower Court referred to the case of *Suntokh Rai v East Indian Railway Company*(1) and *Tippanna v The Southern Mahāratta Railway* (2)

(1) N W P, H O Rep 1867, p 200 & (2) I L R. 17 Bom. 417,

The Honourable Mr. Colvin, for the appellant

Pandit Sundar Lal, for the respondent

E I Ry
Bunyal Ali

KNOX, Officiating C J., and AIKMAN, J.—The Subordinate Judge of Meerut had before him an appeal in which his decree would be final, and entertaining doubt as to the construction of a document, which construction affected the merits of the appeal before him, he has referred a statement of the facts of the case for the decision of this Court. The document, regarding the construction of which the Subordinate Judge entertained doubt, is what is ordinarily known as a "Risk Note", in other words, it is a document purporting to limit the responsibility of the East Indian Railway Company for the loss, destruction or deterioration of goods delivered to the said Company to be carried by Railway. It is admitted by both the parties to the appeal that the agreement is in writing, signed by the persons sending the goods, and is otherwise in the form approved by the Governor General in Council. It falls clearly within the provisions of Section 72 of Act No. IX of 1890, and no attempt is made by the learned Vakil for the respondents to take the agreement out of the provisions of Section 72 of Act No. IX of 1890. Under this agreement, the consignor, who had the option of forwarding his goods at an ordinary rate, in which case the Railway Administration would have been responsible for their loss, elected, instead of paying that ordinary rate, to pay a lower charge, and in consideration of such lower charge agreed and undertook to hold the East Indian Railway Company harmless and free from all responsibility for any loss, destruction or deterioration of the said consignment from any cause whatever, before, during or after transit over the said Railway. In the present case the goods delivered to the Railway Company for transit over their line were lost, and in spite of the agreement entered into by him, the consignor sued the Railway Company for damages on account of such loss. The doubt entertained by the Subordinate Judge is really a doubt as to whether such an agreement is morally defensible. He seems to consider it wrong on the part of the Railway Company to tempt the public to incur such risk, and he seeks to fortify his opinion by a ruling

E I Ry
Bunyak Ali.

The contract, embodied in what is commonly known as a "Risk Note," is a contract whereby, in consideration of goods being carried by a Railway Company at a reduced rate, the consignor agrees that the Company shall be free of all responsibility for any loss or damage to the goods, is a valid and a legal contract within the terms of S 72 of Act No. IX of 1890 *Suntokh Rai v East India Railway Company* (1) distinguished.

In this case the plaintiff-respondent sued to recover from the East Indian Railway Company a sum of Rs. 110 as the value of certain boxes of *ghee*, which had been made over by the plaintiff to the Company at Khurja, for transmission to Saharanpur, and had not reached their destination. The goods were despatched at owner's risk, and what is known as a "Risk Note" was taken from the consignor. A "Risk Note" contains the terms of a special agreement whereby the consignor, paying a lower freight than he would otherwise be bound to pay, "in consideration of such lower charge, agrees and undertakes to hold the said Railway harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment, from any cause whatever, before, during, and after transit over the said Railway or other Railway working in connection therewith." The loss of the goods in question was admitted by the defendant-Company; but they pleaded that they were absolved from liability by the terms of the contract entered into by the plaintiff. The Court of first instance (Munsif of Saharanpur) decreed the plaintiff's claim. The defendant appealed, and the appellate Court (Subordinate Judge of Saharanpur) referred the question of the validity of the contract relied upon by the defendant to the High Court under S 617 of the Code of Civil Procedure. That Court was of opinion that, inasmuch as the ordinary liability of a Railway Company for loss of goods delivered to them for transmission was, by S 72 of Act No IX of 1890, that of a bailee under the Indian Contract Act, 1872, Ss. 151, 152 and 161, the Company could not contract itself out of all liability, since even a gratuitous bailee was not absolved from all liability from any cause whatever. The lower Court referred to the case of *Suntokh Rai v. East Indian Railway Company*(1) and *Tippanna v The Southern Mahratta Railway*.(2)

(1) N. W P, H O Rep., 1867, p 200 & (2) I L R, 17 Bom., 417,

The Honourable Mr Colvin, for the appellant

Pandit Sundar Lal for the respondent

E I Ry

Bunyard Al

Knox, Osherling C J and Aikman, J—The Subordinate Judge of Meerut had before him an appeal in which his decree would be final, and entertaining doubt as to the construction of a document, which construction affected the merits of the appeal before him, he has referred a statement of the facts of the case for the decision of this Court. The document, regarding the construction of which the Subordinate Judge entertained doubt is what is ordinarily known as a "Risk Note", in other words, it is a document purporting to limit the responsibility of the East Indian Railway Company for the loss, destruction or deterioration of goods delivered to the said Company to be carried by Railway. It is admitted by both the parties to the appeal that the agreement is in writing, signed by the persons sending the goods, and is otherwise in the form approved by the Governor General in Council. It falls clearly within the provisions of Section 72 of Act No IX of 1890, and no attempt is made by the learned Vakil for the respondents to take the agreement out of the provisions of Section 72 of Act No IX of 1890. Under this agreement, the consignor, who had the option of forwarding his goods at an ordinary rate, in which case the Railway Administration would have been responsible for their loss, elected, instead of paying that ordinary rate, to pay a lower charge, and in consideration of such lower charge agreed and undertook to hold the East Indian Railway Company harmless and free from all responsibility for any loss, destruction or deterioration of the said consignment from any cause whatever, before, during or after transit over the said Railway. In the present case the goods delivered to the Railway Company for transit over their line were lost, and in spite of the agreement entered into by him, the consignor sued the Railway Company for damages on account of such loss. The doubt entertained by the Subordinate Judge is really a doubt as to whether such an agreement is morally defeasible. He seems to consider it wrong on the part of the Railway Company to tempt the public to incur such risk, and he seeks to fortify his opinion by a ruling

E I Ry
v
Bunyas Ali

The contract, embodied in what is commonly known as a "Risk Note" is a contract whereby, in consideration of goods being carried by a Railway Company at a reduced rate the consignor agrees that the Company shall be free of all responsibility for any loss or damage to the goods is a valid and a legal contract within the terms of S 72 of Act No IX of 1890 *Suntokh Rai v East India Railway Company* (1) distinguished

IN this case the plaintiff respondent sued to recover from the East Indian Railway Company a sum of Rs 110 as the value of certain boxes of *ghee*, which had been made over by the plaintiff to the Company at Kharja, for transmission to Saharanpur, and had not reached their destination. The goods were despatched at owner's risk, and what is known as a "Risk Note" was taken from the consignor. A "Risk Note" contains the terms of a special agreement whereby the consignor, paying a lower freight than he would otherwise be bound to pay, "in consideration of such lower charge, agrees and undertakes to hold the said Railway harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment, from any cause whatever, before, during, and after transit over the said Railway or other Railways working in connection therewith." The loss of the goods in question was admitted by the defendant-Company, but they pleaded that they were absolved from liability by the terms of the contract entered into by the plaintiff. The Court of first instance (Munsif of Saharanpur) decreed the plaintiff's claim. The defendant appealed, and the appellate Court (Subordinate Judge of Saharanpur) referred the question of the validity of the contract relied upon by the defendant to the High Court under S 617 of the Code of Civil Procedure. That Court was of opinion that, inasmuch as the ordinary liability of a Railway Company for loss of goods delivered to them for transmission was, by S 72 of Act No IX of 1890, that of a bailee under the Indian Contract Act, 1872, Ss 151, 152 and 161, the Company could not contract itself out of all liability, since even a gratuitous bailee was not absolved from all liability from any cause whatever. The lower Court referred to the case of *Suntokh Rai v East Indian Railway Company* (1) and *Tippanna v The Southern Mahratta Railway* (2)

(1) N W P H C Rep 1867, p 200 (2) I L R. 17 Bom. 417

The plaintiff despatched at Muzaffarpore on three different dates consignments of tins of ghee for transmission to Howrah and Burdwan through the Bengal and North Western Railway and the East Indian Railway. When consigning the goods, the plaintiff in each case signed an agreement known as "Risk Note, Form B," the terms of which are set out in the judgment of the High Court. The said consignments were delivered to the consignees at Howrah and Burdwan short of the number despatched, the total number of tins delivered being 285 out of 329 tins despatched, 44 tins being lost in transit. Thereupon the plaintiff instituted the present suit for compensation for loss of goods against both the Bengal and North Western Railway Company and the East Indian Railway Company in the Court of Small Causes at Tirhoot, the amount claimed being Rs. 388.

The Lower Court dismissed the suit as against the Bengal and North-Western Railway Company on the ground that the plaintiff had not proffered any claim to the Company as required by law, but decreed the suit against the East Indian Railway Company. It held that the Risk Notes did not absolve the Railway Company from all liability to the plaintiff, that the position of the defendant Company was that of a bailee under Ss. 151, 152, and 161 of the Indian Contract Act, and that the Risk Notes could only cover trifling losses, whereas the present was a case of deliberate pilfering.

Babu Mahendra Nath Ray for the petitioners. —In view of the Risk Notes signed by the plaintiff, the Lower Court should have held that the Company, the petitioners, were not bailees of the goods consigned, but that they were absolved from all liability for loss resulting from any cause whatsoever, even if due to criminal misappropriation by the servants of the Railway Company. The Risk Notes were valid documents, authorised by S. 72, cl. (2) of the Indian Railways Act and sanctioned by the Governor General in Council. See *Molecular Das v. Carter*,⁽¹⁾ *Tippanna v. The Southern Mahratta Railway Company*,⁽²⁾ *East Indian Railway Company v. Bunyad Ali*,⁽³⁾ and *Balaram Harichand v. The Southern Mahratta Railway Company* ⁽⁴⁾

Toonya Ram
F I Ry

(1) (1853) 1 L.R. 10 Cal. 210

(2) (1892) 1 L.R. 17 Bom. 417

(3) (1891) 1 L.R. 18 All. 49

(4) (1891) 1 L.R. 19 Bom. 159

E I Ry
v
Banyad Ali

of this Court in *Suntokh Rai v East Indian Railway Company* (1). The Risk Note in that case was quite different. The law prevailing at that time was quite different, and the ruling has no bearing on the facts of the case.

The provisions of Section 72 of Act No IX of 1890, are quite clear and free from all ambiguity, and it is not open to any Court to take a case out of the provisions of the Statute when the case clearly falls within those provisions.

Our answer to the reference is in the affirmative. The defendant Company is absolved from all liability, under the circumstances set out, for the non delivery of the plaintiff-respondent's goods. A copy of this judgment under the signature of the Registrar will be transmitted to the Court by which the reference has been made.

**The Indian Law Reports, Vol. XXX. (Calcutta) Series,
Page 257.**

CIVIL RULE

TOONYA RAM

v

EAST INDIAN RAILWAY COMPANY.*

*Indian Railways Act (IX of 1890), S 72—Risk Note, Form B (old)†—
Indian Contract Act (IX of 1872) Ss 151, 152, 161—Railway Company—
Goods, loss of—Bailee—Suit for compensation*

1902
Decr, 34

A special agreement, known as "Risk Note, Form B," sanctioned by the Governor General in Council under S 72, cl (3) of the Indian Railways Act, absolves a Railway Company from all liability for loss of goods from any cause whatsoever.

The Company in such a case is not a bailee under the Indian Contract Act.

RULE granted to the defendants, the East Indian Railway Company, under S 25 of the Provincial Small Cause Courts Act.

(1) W P, H C Rep 1867, p 200

* Civil Rule No 2199 of 1902

† Risk Note Forms B and H have been revised and sanctioned by the Governor General in Council for adoption on all lines of Railway with effect from 1st April 1907. They are set out in full in Appendix C.

The plaintiff despatched at Munzafferpoore on three different dates consignments of tins of ghee for transmission to Howrah and Burdwan through the Bengal and North Western Railway and the East Indian Railway. When consigning the goods, the plaintiff in each case signed an agreement known as "Risk Note, Form B," the terms of which were set out in the Judgment of the High Court. The said consignments were delivered to the consignees at Howrah and Burdwan short of the number despatched, the total number of tins delivered being 285 out of 329 tins despatched, 44 tins being lost in transit. Thereupon the plaintiff instituted the present suit for compensation for loss of goods against both the Bengal and North-Western Railway Company and the East Indian Railway Company in the Court of Small Causes at Tirhoot, the amount claimed being Rs. 388.

The Lower Court dismissed the suit as against the Bengal and North-Western Railway Company on the ground that the plaintiff had not proffered any claim to the Company as required by law, but decreed the suit against the East Indian Railway Company. It held that the Risk Notes did not absolve the Railway Company from all liability to the plaintiff, that the position of the defendant Company was that of a bailee under Ss. 151, 152, and 161 of the Indian Contract Act, and that the Risk Notes could only cover trifling losses, whereas the present was a case of deliberate pilfering.

Babu Mahendra Nath Ray for the petitioners.—In view of the Risk Notes signed by the plaintiff, the Lower Court should have held that the Company, the petitioners, were not bailees of the goods consigned, but that they were absolved from all liability for loss resulting from any cause whatsoever, even if due to criminal misappropriation by the servants of the Railway Company. The Risk Notes were valid documents, authorised by S. 72, cl. (2) of the Indian Railways Act, and sanctioned by the Governor-General in Council. See *Molesuar Das v. Carter*,⁽¹⁾ *Tippanna v. The Southern Mahratta Railway Company*,⁽²⁾ *East Indian Railway Company v. Bunyad Ali*,⁽³⁾ and *Balaram Harichand v. The Southern Mahratta Railway Company* ⁽⁴⁾

Toonya Ram
E I R

(1) (1893) I L R, 10 Cal. 210

(3) (1899) I L R 18 All. 42

(2) (1892) I L R, 17 Bom. 417

(4) (1895) I L R 19 Bom. 139

Toony Ram *Dr Ashutosh Mukherjee* (with him *Babu Jnanendra Nath Bose*)
 E I Ry for the opposite party. Under S 72 of the Indian Railways Act, a special agreement can only *limit* the liability of the Company, but not *extinguish* it, although, no doubt, the present authorities are against this view

GHOSE and HENDERSON, J J —The subject matter of this rule is a decree passed by the Subordinate Judge of Muzafferpore exercising the powers of a Judge of the Small Cause Court, against the East Indian Railway Company, for compensation on account of short delivery of certain goods that were consigned to that Company at Muzafferpore for despatch to Burdwan and Howrah

The consignor, at the time that the said goods were made over to the Railway Company at Muzafferpore, signed what is known as a "Risk Note" prescribed by the Governor General in Council under Section 72 of the Indian Railways Act (IX of 1890). The consignor paid a special reduced rate, instead of the ordinary tariff rate chargeable for such consignments, and he agreed as follows —

I, the undersigned do, in consideration of such lower charge, agree and undertake to hold the said Railway administration and all other Railway administrations working in connection therewith and also all other transport agents or carriers employed by them respectively, over whose Railways or by whose transport agency or agencies the said goods or animals may be carried in transit from — station to — station harmless and free from all responsibility for any loss destruction or deterioration of or damage to the said consignment from any cause whatever before, during and after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment

The Railway Company, however, were not in a position to deliver to the consignee the whole of the goods that were consigned to their care, and, as we have already indicated, the plaintiff, the consignor, brought a suit for compensation against the Railway Company for such short delivery of goods

The Judge of the Small Cause Court, viewing the position of the Railway Company as purely one of a bailee under the Indian Contract Act, has held that, in the absence of any evidence

on the part of the Railway Company that they had taken in the matter of these goods the ordinary care which a bailee is bound to take, they are bound to make good to the plaintiff all loss that he has sustained by reason of the short delivery

Toonya Ram
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The section of the Railways Act, which bears upon this matter, is Section 72, which runs as follows —

(1) "The responsibility of a Railway Administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by Railway, shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152, and 161 of the Indian Contract Act 1872

(2) "An agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void unless it (a) is in writing signed by or on behalf of the person sending or delivering to the Railway administration the animals or goods, and (b) is otherwise in a form approved by the Governor General in Council

(3) "Nothing in the common law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility, as in this section defined, of a Railway Administration "

No doubt, as defined in the first portion of this section, the responsibility of the Railway Company is that of a bailee under the Indian Contract Act, but it is subject to the other provisions of the Act, one of the provisions being found in the latter part of the same section, and this prescribes that an agreement purporting to limit that responsibility, namely, the responsibility as specified in the earlier part of the section shall be void unless it is in writing signed by the consignor and is in the form prescribed by the Governor General in Council

It appears to us that the Judge of the Small Cause Court hardly appreciated the bearing and relevancy of the second part of Section 72, which we have just quoted. As already stated, the consignor paid a special reduced rate instead of the ordinary tariff rate chargeable for the consignment in question and it was

the East Indian Railway Company is wrong in law, and ought to be set aside. The rule is accordingly made absolute with costs. Poonya I am
v
E I Ry

Rule made absolute

In the High Court of Judicature at Madras.

*Before Sir Charles Arnold White, Chief Justice, and
Mr. Justice Moore*

MULJI DHANJI SEIT AND ANOTHER,
PLAINTIFFS, (APPELLANTS),*

1

THE SOUTHERN MAHRATTA RAILWAY COMPANY,
LIMITED, BY ITS AGENT AND MANAGER AT DHARWAR,
AND THE MADRAS RAILWAY COMPANY,
BY ITS AGENT AND MANAGER AT MADRAS,
DEFENDANTS (RESPONDENTS)

*Railway Company—Risk Note (Old)†—Goods lost in transit—Exemption
from liability—Onus of proof*

1903
August, 20

Where goods are carried by a Railway Company under the terms of a Risk Note (by which the Railway Company is not liable for any loss, destruction or deterioration of or damage to the goods before, during, or after transit) the Railway Company is not liable for failure to deliver the goods if they are lost in transit.

If the consignor should assert that the goods were not lost but were delivered to a wrong person, the *onus* lay upon him to prove his case.

The *onus* is on the plaintiff (consignor) to show that the circumstances under which the goods disappeared were not such as to amount to "loss" within the meaning of the 'Risk Note'.

The Railway Company is not bound to show by affirmative evidence that it has lost the goods.

* S A No 1076 of 1901

† Risk Note forms B and H have been revised and sanctioned by the Governor General in Council for adoption on all lines of Railway with effect from 1st April 1907. They are set out in full in Appendix C.

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Seit
S M & M
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—

SECOND appeal from the decree of the District Court of South Malabar in A S No 42 of 1901, presented against the decree of the Court of the Additional District Munsif of Calicut in O S No 220 of 1900

J. G. Smith for appellants

C. F. Napier (with *Barclay, Orr, David, Brightwell*, and *Moresby*) for respondents

The Court delivered the following

JUDGMENTS.—THE CHIEF JUSTICE.—The first question for determination in this appeal is whether on the facts found, the defendant Companies are protected from liability by reason of the terms of the special contract described as a "Risk Note" Form B subject to which the plaintiff's goods were carried by the defendants. The contract is in these terms —

"T K STATION, 5 10 99

"Whereas the consignment of 162 bags grain tendered by me (us), as per forwarding order No 4 of this date, for despatch by the S M. Railway Administration or their transport agents or carriers to Calicut Station and for which I (we) have received Railway Receipt No 4 of same date is charged at a special reduced rate instead of at the ordinary tariff rate chargeable for such consignment I (we) the undersigned, do in consideration of such lower charge agree and undertake to hold the said Railway Administration, and all other Railway Administrations working in connection therewith and also all other transport agents and carriers employed by them respectively, over whose Railways or by or through whose transport agency or agencies the said goods or animals may be carried in transit from Tumkur Station to Calicut Station harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever before, during and after transit over the said Railway or other Railway lines working in connection therewith or, by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignments

"Signature of *Sandu Basappa*

The first defendant (Company) in their written statement admit that 161 bags of ragi and one bag of cholam were received by them from the 2nd plaintiff at Tumkur for carriage to Calicut. They say that the consignment reached Bangalore and was there transhipped into the wagons of the second defendant

Company The second defendant Company in their written statement deny that the plaintiff's goods arrived at Calcut on October 16th as alleged in the plaint. They admit that a consignment of grain loaded in a wagon, the number of which had been changed from 352 to 1327 in accordance with instructions received from the Bangalore City Station reached Calcut, and that the first plaintiff's agent claiming the goods in wagon No 1327 and producing a receipt note for 161 bags of grain, they began to deliver the goods to the plaintiff, that after the delivery to the plaintiff had commenced, one Abdul Karim claimed the bags as his, pointing out that they bore his private marks. They say that the Bangalore City station subsequently telegraphed to the Station master at Calcut that the consignment in Invoice No 25 (the plaintiff's invoice) had been loaded in wagon No 352 and not in wagon No 1327 and that the latter contained the goods of Abdul Karim and they further say "the consignment under Invoice No 25 does not appear to have ever arrived at Calcut Station." The Receipt Note referred to in the written statement is "Railway Receipt No 4" mentioned in the "Risk Note."

The plaintiff's invoice shows that his goods, viz, 161 bags of ragi and 1 bag of cholam rice loaded into wagon 352, and the second defendant Company appear to admit in their written statement that the original number of the wagon which carried the goods, which were delivered to Abdul Karim at Calcut was 352. It is not stated in the written statement when the number was changed into 1327 or why it was changed, and there does not appear to be any evidence on the point. The plaintiff's case as set up in their plaint was that the goods were fraudulently delivered to Abdul Karim by the servants of the second defendant Company, but the case of fraudulent delivery does not seem to have been seriously pressed in either of the lower Courts. The lower appellate Court finds as a fact that the plaintiff's goods were lost in transit. The onus was on the plaintiffs to prove their case, viz, that the goods which reached Calcut and were delivered to Abdul Karim, were their goods. They failed to do this. Section 76 of the Indian Railways Act, no doubt, provides that in a suit against a Railway Administration for loss of goods,

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Mulji Dhanji it shall not be necessary for the plaintiff to prove how the loss was
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 S M & M inasmuch as they were misdelivered and that the Company are
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 hable notwithstanding the special contract. We cannot in second
 appeal disturb the finding of fact of the lower appellate Court
 unless we are satisfied there is no evidence to support it. The
 evidence adduced on behalf of the defendants by which they
 sought to prove the circumstances in which the plaintiff's goods
 were lost, is no doubt meagre and confused, but, seeing that the
 plaintiffs failed to prove the case upon which they relied, viz,
 wrongful delivery at Calcutta, and that it is admitted that the
 plaintiff's goods at any rate got as far as Bangalore, I do not
 think it can be said that there is no evidence to support the
 finding that the goods were lost in transit.

The 'Risk Note' in question in the present case is in the form
 approved by the Governor General in Council in accordance with
 Section 72 of the Indian Railways Act, 1890, and has been
 frequently before the Courts in this country. See for example,
 the cases reported in *Mohsuar Das v Carter*,⁽¹⁾ *Tippanna*
v Southern Mahabta Railway Company,⁽²⁾ *Balasam Hur-*
cland v S M Railway Company,⁽³⁾ *East Indian Railway*
Company v Bunyad Ali⁽⁴⁾, and the decisions are uniform
 that where a Railway Company carries subject to the terms
 of the 'Risk Note' and fails to make delivery, the Company
 is exempt from liability. It is, no doubt, difficult to believe
 that wagon bags 162 in number, could have been 'lost' in the
 ordinary acceptation of the term, but when goods are carried
 subject to the terms of the "Risk Note" no distinction can be
 drawn on principle between the loss of the whole and of a
 portion of the goods. As a matter of fact, in the Allahabad
 case, the whole of the consignment was lost.

It was contended on behalf of other appellants that non-
 delivery was no evidence of loss and that it was for the defend-
 ants to show, by affirmative evidence, that they had lost the
 goods. I do not think that this is so. This contention does not

(1) 11 I 10 Cal 210

(2) 11 B 19 Bom 150

(3) 11 B 17 Bom, 417

(4) 11 P, 18 All 47

appear to have been put forward in any of the reported cases where the Company claimed to be exempt from liability by reason of their special contract and it may be observed that in the case reported in *Tijjan Lal v. Southern Mahratta Railway Company* (1), it is expressly stated that there was no evidence on the one side or the other as to how the goods disappeared. The basis of the plaintiffs' claim is non delivery of goods which the defendants agreed to carry subject to the terms of the 'Risk Note'. There is no doubt a *prima facie* liability on the defendants to deliver but if the defendants set up their special contract and allegations (and I think it must be taken that there is an allegation by the second defendant Company of loss though it is a very half hearted one), I think it is for the plaintiffs to show that the circumstances in which the goods disappeared were not such as to amount to 'loss' within the meaning of the special contract. The frame of the plaint in the present case and the terms of the 7th issue in the case show that the plaintiffs' advisers were fully alive to this. In the present case the plaintiffs sought to show that the goods were not lost inasmuch as they were wrongly delivered but the lower Courts were against them on the facts. The two cases under the Limitation Act to which the learned Counsel of the appellants referred, *Molansing Chavan v. Herjilal* (2) and *Daniull v. British India Steam Navigation Company* (3) have really no bearing on the question before us. In these cases it was held that for the purposes of the Limitation Act non delivery was no proof of loss. It was for the defendants who set up the plea of limitation in these cases to show affirmatively that the goods were lost at a time before the statutory period of limitation. The fact that they were not delivered would not of course show this. The defendants in these cases had to prove the time of the loss, not the mere fact of the loss.

On the findings of fact by the lower Courts, I think we have no alternative but to dismiss this appeal with costs.

MOORE, J.—I concur

(1) I L R 17 Bom 417

(2) I L R 7 Bom 478

(3) I L R 12 Cal 477

The Nagpur Law Reports, Vol. II, Page 125.

CIVIL REFERENCE

*Before H. V. Drake-Brockman, Esq., I. C. S.,
Additional Judicial Commissioner, Central Provinces.*

HIRALAL (PLAINTIFF)

v

BENGAL NAGPUR RAILWAY CO (DEFENDANT).

1905
June, 24

Railways Act IX of 1890, S 72—Risk Note (Old)—Misdelivery of
Goods—Suit for damage*

The plaintiff sued the defendants, the Bengal Nagpur Railway Company for damages. A servant of the Company, under circumstances showing gross negligence on his part had delivered to another person goods consigned to the plaintiff and on recovery they were found short in quantity and deteriorated in condition. The defendants pleaded a special contract known as Risk Note which had been entered into with them by the consignor in the form approved by the Governor General in Council under S 72 Indian Railways Act 1890, holding the Company "harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever before during and after transit over the said Railway."

Held,—That the 'Risk Note' absolved the Company from all liability for the damage.

This is a case referred under Section 617 of the Civil Procedure Code.

The Plaintiff sued the Bengal Nagpur Railway Company for the price of a consignment of wool (24 maunds 32 seers) and for damages arising out of loss (5 maunds 14 seers) and deterioration resulting from a misdelivery by one of the

* Risk Note Forms B and H have been revised and sanctioned by the Governor-General in Council for adoption on all lines of Railway with effect from 1st April 1907. They are set out in full in Appendix C.

Company's servants. The suit included also the claim in respect of certain excess charges for freight which the Company admitted and which the first Court decreed. The rest of the claim was dismissed on the strength of the special contract which the plaintiff's consignor entered into with the Company. This contract is embodied in the Risk Note (Ex D 3) by which the consignor in consideration of having the wool carried at a rate below the ordinary tariff rate, agreed to hold the Company 'harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever before during and after transit over the said Railway.' The plaintiff having appealed, the District Judge has referred the following questions for the decision of this Court —

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(1) Inasmuch as the goods arrived safely at Raipur and the Railway Company was in a position to deliver the goods to the plaintiffs in their original condition, is the Railway Company exonerated from liability to the plaintiff for damage caused to the goods by the provisions of the 'Risk Note'?

(2) Would the Risk Note still exonerate the Railway Company from any liability to the consignee, though the Goods Clerk had misdelivered the goods under circumstances which amount to gross negligence on his part and such misdelivery had changed the condition and weight of the goods?

(3) In spite of the Risk Note can the Railway Company be held liable to the plaintiff for damages consequent on misdelivery on any grounds?

The Risk Note constitutes an agreement which admittedly conforms in every respect to the requirements of Section 72 (2) of the Indian Railways Act, 1890. That sub-section in effect reproduces the provisions of Section 10 of the previous Railways Act (No IV of 1879), and the present case is practically on all fours with *Malasuardas v Carter* (1). There, one of the several tins of ghee was cut open *en route* and there was consequently a deficiency of some 21½ seers in the quantity of ghee delivered as compared with the quantity consigned.

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GARTH, C J (PRINSEP and WILSON, J J, concurring), said —

“ This agreement, which was signed by the plaintiff, is in a form approved by the Governor-General under Act IV of 1879, Section 10, and its terms leave us no alternative but to hold, that in no case would the railway Company be liable to account to the consignee for any loss from any cause whatever during the whole time that the goods were in their charge. Similar contracts have frequently been construed by English Courts and full effect has been given to their provisions.

“ The legislature in this case has, in respect to the matter specified in Section 10, Act IV of 1879, imposed upon the Government the duty of determining beforehand the propriety of any proposed form of contract between any Railway Company and its customers, instead of leaving this to be decided subsequently by Courts of Justice.”

The concluding reference to subsequent decision of disputes by the Courts of law shows that the learned Chief Justice was thinking of the Railway and Canal Traffic Act (17 and 18 Vict. C. 31), which, while maintaining the right of carriers to make special contracts with their customers, provides that no one shall be bound by any such contract with the Railway or Canal Company unless it is adjudged by the Court, before which any question relating thereto is tried, to be just and reasonable.

The later reported cases are all under the Act of 1890. They are in chronological order —

- (i) *Tippanna v. The Southern Mahratta Railway Company* (1)
- (ii) *Balaram Harichand v. The Southern Mahratta Railway Company* (2)
- (iii) *East Indian Railway Company v. Bunyad Ali* (3)
- (iv) *Toonya Ram v. East Indian Railway Company* (4)

In all the terms of the Risk Note relied on by the Company concerned are identical with those now under consideration

(1) 1 L. R. 17 Bom., 417

(2) 1 L. R. 19 Bom. 159

(3) 1 L. R. 18 All. 42

(4) 1 L. R. 30 Cal., 257

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In No (i) there was unexplained short delivery, in No (ii) non-delivery of the entire parcel consigned owing to theft by a guard, in No (iii) unexplained non delivery, and in No (iv) short delivery owing to 'loss in transit'. In each case the Company was absolved from liability to pay damages in respect of the loss. The fact that in the present case the wool arrived safely at Raipur its destination, affords no reason for refusing to follow this sort of precedents inasmuch as the Risk Note in express terms protects the Railway Company in respect of loss or deterioration occurring *after* transit. The plaintiff's learned Advocate is unable to cite any authority in a contrary sense and I have therefore no hesitation in answering the first two questions in the affirmative and the last in the negative.

I would add that apart from the Risk Note regarded as a contract specially enforceable under the Statute Law there would seem to be no reason for refusing to enforce it on the general principles of justice equity and good conscience. The plaintiff's learned Advocate frankly admits that the ordinary tariff rate for wool is a fair one, if the Railway Company is to be fixed with the responsibility of a bailee under sections 151, 152 and 161 of the Indian Contract Act, which Section 72 of the Railways Act, 1890 declares to be its normal position. In the words of Mr Justice MATHEW in *Brown v The Manchester, Sheffield and the Lincolnshire Railway Company* (1) which were endorsed by Lord Fitzgibbon in the House of Lords (2) —

'It is perfectly clear that the customer was free if he chose to have gone to the Company and demanded that they should carry his goods as common carriers. In that state of things they would be liable in the ordinary way for all the risks of the carriage. But the Company in lieu of the contract which rendered them liable for all the risks of the journey, proposed to the customer other terms, and in consideration of his accepting those terms, they proposed to carry his goods at one-fifth less than the ordinary rate, and the customer agreed to those terms.'

(1) 51 L J Q B 599

(2) 53 L J Q B 124 at page 133

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Lord FITZGERALD concluded his judgment with the following words —

“ Why should the plaintiff be relieved from the contract he has deliberately accepted ? There was full and ample consideration, there is an absence of any fraud, and he has not been overreached. He elected to send his goods at the lower rate ; the alternative offered him was fair and I can discover no ground on which we can relieve him from the consequences of this special contract ”

In conclusion, I desire to point out that this reference and the opinion thereon relate solely to the claim for damages in respect of the shortage in quantity and deterioration in quality which had occurred by the time the Company was in a position to offer delivery to the real consignee. This Court has not been asked to pronounce nor does it pronounce any opinion on the question of how (if at all) the plaintiff's suit is affected by his refusal to take delivery of what the Company offered him.

I allow Rs. 15 as Counsel's fee. The costs of this reference will be costs in the case.

In the High Court of Judicature at Fort William
in Bengal.

APPELLATE CIVIL JURISDICTION

*Before the Hon'ble Robert Fulton Rampin, Actg. Chief
Justice, and The Hon'ble Syed Sharfuddin, J*

R. W. EGERTON,

MANAGER OF THE OGDH AND ROHILKHAND RAILWAY,

(DEFENDANT), PETITIONER,

+

RAM CHANDRA GHOSE, (PLAINTIFF), OPPOSITE PARTY

*In the matter of Suit No 2 of 1907 of the Court of the Sub Judge of
Alulua exercising the powers of the Court of Small Causes*

*In the Railways Act, IX of 1890 S 72 (2)—Risk Note Form B—Liability
of Railway Company*

1907
July, 2

A Railway Company who undertakes to carry goods at a special reduced rate and obtained a Risk Note in Form B (Old)* under S 72 (2) of Act IX of 1890 is absolved from all liability for their loss

For Applicant—*Babu Ram Chandra Mitra*

For Opposite Party—*Babu Surendra Chandra Sen*

No 2058

We think that we must make this Rule absolute and set aside the decree of the Subordinate Judge, dated the 7th March 1907

It is clear that the Railway Company is not liable for the loss of the four tins of butter, seeing that the plaintiff signed a Risk Note in the B form sanctioned by the Governor-General in

* Risk Note Forms B and H have been revised and sanctioned by the Governor-General in Council for adoption on all lines of Railway with effect from 1st April 1907. They are set out in full in Appendix C

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Council under Section 72, clause (2) of the Indian Railways Act (IX of 1890) This Risk Note absolves the Company from all liability, the tins of butter having been despatched at a reduced rate under the terms of a special contract. The matter is quite clear. We need only cite the case of *Moheshwar Das v. Carter* (I L R. 10 Calcutta, 210), and the case of *Tonya Ram v. the East Indian Railway* (I L R 30 Cal 257).

In the High Court of Judicature at Bombay.

SMALL CAUSE COURT REFERENCE.

Before Sir Basil Scott, Kt, Chief Justice, and Mr.
 Justice Batchelor

MAGANLAL PURSHOTAM AND ANOTHER, (PLAINTIFFS),
 v.

THE BOMBAY, BARODA AND CENTRAL INDIA
 RAILWAY COMPANY (DEFENDANTS).*

1909
 Sept 7.

Indian Railways Act (IX of 1890)—Risk Note Form B (revised)†—Goods—Loss of complete consignment—Negligence negatived—Onus of proof of loss

The plaintiff delivered two tins of ghee to the Railway Company at Bhotana for carriage to Bombay and in respect of which he signed a Risk Note, Form B (revised)† The Railway Company failed to deliver the goods and the plaintiff filed this suit to recover the value of the same

The lower Court found as a fact that the Railway Company had proved affirmatively that the loss was not due to the neglect of the Railway Company, or its servants and that the Railway Company took all the care of the goods which could reasonably be expected

* Small Cause Court Suit No 15,151 of 1908

† The Risk Note here referred to is one of those sanctioned by the Governor General in Council for adoption on all lines of Railway and is set out in full in Appendix C to this book

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Held—That the loss of the goods was a fact that the loss was not due to the neglect of the Railway Company the Railway Company in order to avoid liability was to be bound under the circumstances of the case to tender the terms of the Risk Note to prove affirmatively that the loss was due to fire or robbery from a running train or any other unforeseen event and admit within the meaning of the Risk Note Form B.

CASE stated for the opinion of the High Court under Section 69 of the Presidency Small Cause Courts Act XX of 1882 as amended by Act IV of 1906 Section 4 by N. W. KEMP Chief Judge of the Court of Small Causes at Bombay.

'1 In this case the learned Second Judge differs from me on a question of law arising on an application to the Full Court against his judgment in the case and this reference to the High Court is consequently necessitated.

'2 The facts of the case are as follows.—On the 11th the plaintiff carried two tins of ghee at Jhotana under a Risk Note in Form B under the Indian Railways Act (IX of 1890) for carriage by the defendant Railway from that station to Bombay. The Risk Note the terms of which are very material, is hereto annexed and marked A. It appears that goods consigned from Jhotana to Bombay are transhipped at Mahanadi and travel thence via Dongarwa, Punsar and Kalol to Bombay. The defendant have failed to deliver the goods and this suit is for the non delivery. The particular consignment in this case was loaded in wagon No. 554 on the 37 Up train from Abu Road station. The wagon was then closed and sealed. On arrival of the train at Kalol station the door of the wagon was found open and six tins of ghee of which two are the consignment in this case missing. The evidence adduced on behalf of the Railway shows that the wagon was last examined and the seals found intact at Dongarwa which is a station at a distance, according to the B B and C I Railway time table of 10 miles from Kalol. It is clear therefore, that the tins were lost somewhere between Dongarwa and Kalol.

'3 At the first hearing before the Second Judge on 25th September 1908 the defendants denied liability on the ground of the execution of the Risk Note by the plaintiff whereby

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 Ram Chandra Ghose (IX of 1890) This Risk Note absolves the Company from all liability, the tins of butter having been despatched at a reduced rate under the terms of a special contract. The matter is quite clear. We need only cite the case of *Moheshwar Das v. Carter* (I L R. 10 Calcutta, 210), and the case of *Toonya Ram v. the East Indian Railway* (I L R 30 Cal 257)

In the High Court of Judicature at Bombay.

SMALL CAUSE COURT REFERENCE

*Before Sir Basil Scott, Kt, Chief Justice, and Mr.
 Justice Batchelor*

MAGANLAL PURSHOTAM AND ANOTHER, (PLAINTIFFS),

v

THE BOMBAY, BARODA AND CENTRAL INDIA
 RAILWAY COMPANY (DEFENDANTS) *

1909
 Sept 7

Indian Railways Act (IX of 1890)—Risk Note Form B (revised)†—Goods—Loss of complete consignment—Negligence negatived—Onus of proof of loss

The plaintiff delivered two tins of ghee to the Railway Company at Jhotana for carriage to Bombay and in respect of which he signed a Risk Note Form B (revised)† The Railway Company failed to deliver the goods and the plaintiff filed this suit to recover the value of the same

The Lower Court found as a fact that the Railway Company had proved affirmatively that the loss was not due to the neglect of the Railway Company, or its servants and that the Railway Company took all the care of the goods which could reasonably be expected

* Small Cause Court Suit No 15,151 of 1908

† The Risk Note here referred to is one of those sanctioned by the Governor General in Council for adoption on all lines of Railway and is set out in full in Appendix C to this book

H 11—That the Lower Court having found as a fact that the loss was not due to the neglect of the Railway Company, the Railway Company in order to avoid liability was not bound under the circumstances of the case and under the terms of the Risk Note to prove affirmatively that the loss was due to the negligence of a running train or any other unforeseen event in transit within the meaning of the Risk Note Form B.

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CA 11 stated for the opinion of the High Court under Section 69 of the Presidency Small Causes Courts Act XX of 1882 as amended by Act IV of 1906 Section 41A N W KEMP Chief Judge of the Court of Small Causes at Bombay.

“1 In this case the learned Second Judge differs from me on a question of law arising on an application to the Full Court against his judgment in the case and this reference to the High Court is consequently necessitated.

“2 The facts of the case are as follows.—On the 1st the plaintiff consigned two tins of ghee at Jhotana under a Risk Note in Form B under the Indian Railways Act (IX of 1890) for carriage by the defendant Railway from that station to Bombay. The Risk Note the terms of which are very material, is hereto annexed and marked A. It appears that goods consigned from Jhotana to Bombay are transhipped at Mahsana and travel thence via Dongarwa, Pansar and Kalol to Bombay. The defendants have failed to deliver the goods and this suit is for the non-delivery. The particular consignment in this case was loaded in wagon No 554 on the 37 Up train from Abu Road station. The wagon was then closed and sealed. On arrival of the train at Kalol station the door of the wagon was found open and six tins of ghee, of which two are the consignment in this case missing. The evidence adduced on behalf of the Railway shows that the wagon was last examined and the seals found intact at Dongarwa, which is a station at a distance, according to the B B and C I Railway time table, of 10 miles from Kalol. It is clear, therefore, that the tins were lost somewhere between Dongarwa and Kalol.

“3 At the first hearing before the Second Judge on 25th September 1908 the defendants denied liability on the ground of the execution of the Risk Note by the plaintiff whereby

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the goods were consigned at owner's risk, and pleaded that the loss was due to robbery from a running train which, if found, would specially exempt the Railway from liability under the terms of the Risk Note. The Second Judge decided that there was no evidence of robbery and passed a decree for the amount claimed. From that decision the defendants on 10th January 1909 preferred an appeal to the Full Court. The Full Court (consisting of the Second Judge and myself) remitted the suit back for new trial for the Second Judge to determine the liability of the Railway under the Risk Note apart from the question of robbery and including the question of the burden of proof arising out of the terms of the Risk Note. It will be noted that the Railway Administration before the Second Judge specifically pleaded exemption from liability under the terms of the Risk Note. The parties were further given liberty to adduce such further evidence on this point as they might think fit. The Second Judge reheard the case and gave a verdict for the plaintiffs on the ground, *inter alia* that the non delivery of the whole consignment amounted to wilful neglect and that the Railway Administration could only negative this presumption by proving that the loss was due to fire, robbery from a running train or any other unforeseen event or accident. Copy of the learned Second Judge's judgment is hereto annexed and marked B. It will be noted that the learned Second Judge came to no finding on the evidence of the witnesses recorded and the statement in his Judgment on this reference to the effect that one of the grounds of his decision in the first Court was that there was enough evidence of wilful neglect on the record to make the Railway liable is not incorporated in his written judgment B. A perusal of that judgment shows that the learned Judge based his decision on the fact of non delivery and he did not adjudicate on the evidence of the witness called before him. Against that decision the defendants preferred the present application to the Full Court.

"4 Two grounds are urged by the Defendant Railway against the decision—*firstly*, that the Risk Note in Form B exempts the Railway Administration from all liabilities for loss or damages to goods consigned to the Railway for carriage

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except on proof by the plaintiff that the loss is of a complete consignment or of one or more complete packages forming part of a consignment and such loss is due to the wilful neglect of the Railway Administration or to theft by or the wilful neglect of its servants and, *conly* that the Railway Administration has shown from the evidence adduced before the Second Judge that the loss was not due to any neglect—much less wilful neglect—on the part of the Railway Administration or its servants. As to the second argument I am of opinion from a perusal of evidence adduced before the Second Judge that the Railway Administration has proved affirmatively that the loss was not due to the neglect of the Railway Administration or its servants and that the Railway Administration took all the care of these goods which could reasonably be expected. The Second Judge in the Full Court differs from me in this finding of fact but is under S 11 of the Presidency Small Cause Courts' Act the opinion of the Chief Judge prevails and is conclusive on a question of fact arising in the full Court, and although I am as a rule, reluctant to interfere with a finding of fact arrived at by the Judge who tried the case and heard the witnesses, the learned Second Judge did not in this case come to any finding of fact on the evidence in his judgment in the first Court and I consider that in this instance the defendant Railway has adduced all the evidence at its disposal to show the care and custody taken of the goods, and that there is no reason why such evidence should be disbelieved. The Second Judge has not suggested that the demeanour of any of these witnesses in the box was such as to throw doubt on their evidence and I do not agree with his conclusions that it was impossible for a proper survey of the wagons to be held and a proper watch on the train at the different stations *en route* to be kept as deposed to by the different witnesses for the defence. Now negligence is a question of mixed law and fact (*Ryder v Wombell* L R 4 Ex. 32, at p 38), and the question of law to be decided in considering whether there has been negligence or not is whether there is any evidence on which, apart from any distinction between neglect and wilful neglect, a jury would properly find the verdict for the party on whom the onus

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of proof lies, *etc.*, the plaintiff in this case I cannot see any such evidence here. The learned Second Judge does not say *in ulat respect* the negligence lay. He says it is more than likely the wagon doors were open at Dongarwa and the train proceeded with these open doors and the tins were jolted out of the wagon. But there is no affirmative evidence of this. It is mere surmise. The tins might have been stolen (not lost by 'robbery' for there is no evidence of wrongful restraint, *see* S 390, Indian Penal Code). He finds that six tins were missing at Kalol but that it is not clear if plaintiff's two tins were amongst them. I think there is no doubt on the evidence the plaintiff's two tins were amongst the six tins missing. No evidence has been adduced to show the two tins said to belong to the plaintiff belonged to any one else. There is therefore no evidence of a state of facts which in law would amount to negligence and on the facts themselves I hold there was no negligence, and my finding of fact as to whether the defendant Administration was guilty of negligence is conclusive under S 11 of the Presidency Small Cause Courts Act. I find that the oral and documentary evidence shows that the goods were placed in wagon No 5554 in the 37 Up train and that the wagon was properly closed and sealed, and that the loss of the particular tins in the case was discovered with due vigilance and promptitude having regard to the circumstances of carriage of goods by railway and the report of their loss duly notified. To say that each of these different witnesses would naturally depose to having done his duty and that little reliance should therefore be placed on the oral testimony in the case is to place the Railway Administration in the unfortunate position of not being able to prove proper care was taken of the goods. Absolutely nothing in disparagement of their story has been elicited in cross examination. I therefore hold, as a finding of fact to complete the statement of the case for their Lordships' opinion, that the Railway Administration has shown it is no longer in possession of the goods and is not guilty of conversion, and has further shown the circumstances under which it ceased to have possession as detailed in paragraph 2 of this reference, and that it took all reasonable measures for

the proper care of these goods, having regard to the fact that the goods were consigned for carriage by railway. To expect the Railway Administration to place a man in each wagon to keep watch over the goods is to my mind unreasonable.

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"5 The question of law which therefore arises from the learned Second Judge's decision is—Whether the Railway Administration is to be presumed guilty of wilful neglect, unless it shows that the loss was caused by fire, robbery from a running train, or any other unforeseen event or accident." The Second Judge answers this question in the affirmative. I am unable to agree. The answer to the question depends on the construction of the Risk Note in Form B. I read it that the Railway Administration is only liable for total loss of a complete package due to their wilful neglect, or the theft or wilful neglect of their servants, and, further, that certain eventualities, viz., fire, robbery from a running train, or any other unforeseen event or accident are not to be considered 'wilful neglect'. So that if it appears that the loss of the goods was due to an unforeseen event or accident, that at any rate is not to render the Railway Administration liable. In other words, to render the Railway Administration liable loss must be due to some other cause amounting to wilful neglect than an unforeseen event such as fire, robbery from a running train, or any other event *ejusdem generis*. Thus the Railway Administration is only to be liable for loss through wilful neglect arising out of circumstances which the Railway might reasonably have anticipated, e.g. through wilful neglect in improperly loading the goods or improperly fastening the doors of the wagon by which the goods fell out on to the track, these being the results which might have been foreseen. The Second Judge considers that the Railway Administration must show the cause of loss and that it was a loss caused by an unforeseen event or accident, otherwise it is presumed guilty of 'wilful neglect'. In my opinion, the Railway Administration does not need to show either the cause of loss or that the loss was caused by an unforeseen event or accident. *Curran v Midland Great Western Railway*, (1896) 2 J. Rep 183, was a case where the Railway Company adduced no evidence whatever, and it was

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of proof lies, *i.e.*, the plaintiff in this case. I cannot see any such evidence here. The learned Second Judge does not say *in what respect* the negligence lay. He says it is more than likely the wagon doors were open at Dongarwa and the train proceeded with these open doors and the tins were jolted out of the wagon. But there is no affirmative evidence of this. It is mere surmise. The tins might have been stolen (not lost by "robbery" for there is no evidence of wrongful restraint, see S 390, Indian Penal Code). He finds that six tins were missing at Kalol but that it is not clear if plaintiff's two tins were amongst them. I think there is no doubt on the evidence the plaintiff's two tins were amongst the six tins missing. No evidence has been adduced to show the two tins said to belong to the plaintiff belonged to any one else. There is therefore no evidence of a state of facts which in law would amount to negligence and on the facts themselves I hold there was no negligence, and my finding of fact as to whether the defendant Administration was guilty of negligence is conclusive under S 11 of the Presidency Small Cause Courts Act. I find that the oral and documentary evidence shows that the goods were placed in wagon No 5554 in the 37 Up train and that the wagon was properly closed and sealed, and that the loss of the particular tins in the case was discovered with due vigilance and promptitude having regard to the circumstances of carriage of goods by railway and the report of their loss duly notified. To say that each of these different witnesses would naturally depose to having done his duty and that little reliance should therefore be placed on the oral testimony in the case is to place the Railway Administration in the unfortunate position of not being able to prove proper care was taken of the goods. Absolutely nothing in disparagement of their story has been elicited in cross examination. I therefore hold, as a finding of fact to complete the statement of the case for their Lordships' opinion, that the Railway Administration has shown it is no longer in possession of the goods and is not guilty of conversion, and has further shown the circumstances under which it ceased to have possession as detailed in paragraph 2 of this reference, and that it took all reasonable measures for

the proper care of these goods having regard to the fact that the goods were consigned for carriage by railway. To expect the Railway Administration to place a man in each wagon to keep watch over the goods is to my mind unreasonable.

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'5 The question of law which therefore arises from the learned Second Judge's decision is — Whether the Railway Administration is to be presumed guilty of wilful neglect, unless it shows that the loss was caused by fire, robbery from a running train, or any other unforeseen event or accident." The Second Judge answers this question in the affirmative. I am unable to agree. The answer to the question depends on the construction of the Risk Note in Form B. I read it that the Railway Administration is only liable for total loss of a complete package due to their wilful neglect, or the theft or wilful neglect of their servants, and, further, that certain eventualities, viz. fire, robbery from a running train, or any other unforeseen event or accident are not to be considered 'wilful neglect'. So that if it appears that the loss of the goods was due to an unforeseen event or accident, that at any rate is not to render the Railway Administration liable. In other words, to render the Railway Administration liable loss must be due to some other cause amounting to wilful neglect than an unforeseen event such as fire, robbery from a running train, or any other event *ejusdem generis*. Thus the Railway Administration is only to be liable for loss through wilful neglect arising out of circumstances which the Railway might reasonably have anticipated, e.g. through wilful neglect in improperly loading the goods or improperly fastening the doors of the wagon by which the goods fell out on to the track, these being the results which might have been foreseen. The Second Judge considers that the Railway Administration must show the cause of loss and that it was a loss caused by an unforeseen event or accident, otherwise it is presumed guilty of 'wilful neglect'. In my opinion, the Railway Administration does not need to show either the cause of loss or that the loss was caused by an unforeseen event or accident. *Curran v Midland Great Western Railway*, (1896) 2 J. Rep 183, was a case where the Railway Company adduced *no evidence whatever*, and it was

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held the Railway could not rely *solely* on the Risk Note without adducing any evidence as to carriage of the goods. In that case the Lord Chief Baron held that the fact that the Railway Company adduced no evidence whatever was ground for holding the Company had pigs which formed the subject matter of the consignment in its possession at the time of the institution of the suit. Possession once having been given to the Company was presumed to continue till the Company showed it had no longer possession, or until a different presumption arose from the nature of the subject. The Chief Baron then went on to say that he does not express any opinion as to the *extent* of the explanation the Company must give, whether it need only show the pigs ceased to be in its custody or must go further and prove the circumstances under which such change of custody occurred. It was held that the Railway Company's unaccounted for refusal to deliver the pigs in its possession was "wilful neglect or misconduct." Now in the present case the Railway Administration has not only shown the ghee is not in its custody, but also the circumstances under which it ceased to be in its custody. Incidentally it may be noted the Risk Note in *Curran v. Midland Great Western Railway* held the Company liable for wilful misconduct which this Risk Note does not, though possibly the same arguments would apply in this case. In the present case if the Railway Administration was in a position to show how the loss occurred, it is unlikely the loss would ever have occurred, for the Administration would then have taken measures to prevent it. Moreover, it can scarcely be said that the Railway Administration intended to throw upon itself the onus of showing the cause of a loss. It is true S 106 of the Evidence Act throws the burden of proof of a fact especially within the knowledge of a party upon that party, but it cannot be said here that the cause of loss is especially within the knowledge of the Railway Administration. What is especially within their knowledge is the proper custody of the goods and that I have held the Administration has proved. Nor has the cause of loss in my opinion to be proved by the defendant at all. Even assuming any onus lies on the Railway Administration once it has shown the circumstances

under which it ceased to have custody of the goods, that onns would according to *Curran v Midland G W Railway* be discharged. Section 76 of the Railways Act provides that the plaintiff need not show the cause of the loss but, *firstly*, that section does not *presume negligence* on the Railway Company's part and, *secondly*, if it did, the Railway Administration in this case has rebutted that presumption. As a matter of fact, Section 76 is not applicable at all as here the parties have qualified the ordinary contract of carriage by railway by a Risk Note in Form B. I consider, therefore, that even assuming the Railway Administration has to prove it was not guilty of wilful neglect it has proved that in this case and does not need to show how the loss occurred.

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6 "Wilful neglect" is to my mind something more than ordinary neglect and has a different signification. "Neglect" may be due simply to a careless omission to do what one should do, whilst "wilful neglect" implies that one knows that one should do a particular act and deliberately abstains from doing it. Of course, one may be said to presume to will to omit to do what one does not do, but that is an inference of the law for the purpose of affixing responsibility in cases of omission and the law does recognise and give effect to deliberate omissions where it would not to omissions not deliberate. The discussion is therefore not purely metaphysical. The term "wilful neglect" seems to me very similar to the term "wilful default" and the distinction between mere "default" and "wilful default" has been recognized and given effect to in law, especially in cases between vendor and purchaser, e.g., where there is a clause in the agreement of sale that if the conveyance is not executed through the "wilful default" of the vendor no interest shall be chargeable on the purchase money from the date of such wilful default. (See *Bennett v Stone* [1903] 1 Ch 509)

7 "Then, again, it is argued that it is impossible for the consignor to prove wilful neglect of the Railway Administration, but I do not think any such impossibility really arises. It is by no means unusual for the onus of negligence to be

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thrown on a consignor under the special circumstances of a contract, *e.g.*, in the case of goods shipped under a bill of lading it has always been held that negligence must be affirmatively proved by the shipper where it is relied upon to take the case out of the excepted perils in the Bill of Lading, where negligence is not of one of the exemptions in the bill of lading in the shipowner's favour (*The Glendarroch* [1894] p 226)

8 "Now this Form of Risk Note is passed in consideration of a cheaper rate of freight. It is a new form of an older form of Risk Note by which the Railway Administration was exempted from loss arising from any cause whatsoever. For decisions on that form of Risk Note see *Toonya Ram v E I Railway Co*, 1 L R 30 Cal 257

"To adopt the Second Judge's contention in this case and hold that the Railway Administration must prove the cause of loss would be to hold that the Railway Administration is by this Risk Note in a worse position than an ordinary bailee (see *Railways Act*, S 72) and yet the object of this Form of Risk Note is to lessen in some degree, the ordinary liability of a Railway Company

9 "The questions therefore, which I submit for reference to their Lordships are —

"(a) Whether in order to avoid liability the Railway Administration is bound under the circumstances of this case and under the terms of the Risk Note in Form B in the case, in the event of non delivery of a complete consignment to prove affirmatively that the loss was due to fire, robbery from a running train, or any other unforeseen event or accident

"(b) Whether in order to avoid liability the Railway Administration is bound under the circumstances of this case and under the Risk Note referred to in the event of non delivery of a complete consignment to prove that such non-delivery was not due to the wilful neglect of the Railway Administration?

“(c) Whether under the circumstances of this case once the Railway Administration has proved affirmatively the circumstances under which it is no longer in custody of the goods, and unable therefore to give delivery, the burden of proof of wilful neglect is not on the plaintiff

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“(d) Whether the term “wilful neglect” in the Risk Note in Form B in this case is equivalent to “neglect.”

“My answer to questions (a), (b) and (d) is in the negative, and to question (c) in the affirmative. The learned Second Judge answers questions (a), (b) and (d) in the affirmative. As to question (c) the learned 2nd Judge adheres to his finding of fact that the Railway Administration has not shown it is no longer in possession of these goods and so he considers he does not require to answer this question. I have, however, inserted the question as I consider that having regard to my finding as Chief Judge being paramount and adverse to the finding of the 2nd Judge on this point the point of law involved in the question arises.

“Really my finding of fact on the evidence adduced before the Second Judge disposes of the necessity of any reply to questions (b), (c) or (d), but as the Second Judge has come to a different conclusion of fact, I submit the further questions for their Lordships to decide if they so think fit.

“The Second Judge wishes to add the following two questions as drafted by him —

- (e) The defendant Railway having admitted non-delivery and the trying Judge and the Full Court having both held the plea of robbery from a running train not proved is not the defendant Railway liable?
- (f) Is the finding of the trying Judge correct, viz., that the defendant Railway by its servants was guilty of wilful neglect?

“His replies to questions (e) and (f) are in the affirmative.

“As to question (e) it is in my opinion incomplete for the Railway Administration not only admits non-delivery, but I

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have held has shown it is no longer in custody of the goods and the non-actionable circumstances under which it ceased to be in custody of the goods. The question is therefore too general for an answer.

"As to question (f) my finding on a question of fact arising from my finding on the question of law implied in the term 'negligence' is under S. 11 of the Presidency Small Cause Courts Act paramount. I submit, therefore, this is not a question for reference is, however, the reference has to be by the Court under S. 69 of the Presidency Small Cause Courts Act, the questions (e) and (f) drafted by the second Judge are sent herewith."

The plaintiffs were unrepresented.

Strangman (Advocate General) for the defendant Company.

JUDGMENT—The plaintiffs in this case shipped two tins of ghee for carriage by the Bombay, Baroda and Central India Railway Administration under a Risk Note in what is known as Form B, whereby the charge for carriage was at a special reduced rate, instead of the ordinary tariff rate chargeable for consignments, upon the terms that the Railway Administration should be free from all responsibility for the loss of the consignment from any cause whatever except for the loss of the complete consignment due either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit by the said Railway provided that the term "wilful neglect" be not held to include fire, robbery from a running train or any other unforeseen event or accident. The plaintiff's tins were completely lost while being carried on the defendant's Railway. The finding of fact of the Chief Judge of the Small Cause Court by which we are bound is that the Railway Administration have proved affirmatively that the loss was not due to the neglect of the Railway Administration or its servants, and that the Railway Administration took all the care of these goods which could be reasonably expected. This finding would appear to negative the exception to freedom from responsibility specified in the Risk Note. We have, however, been asked by a Bench of two Judges of the Small

Cause Court in the case stated to answer certain questions of law which one or both of the Judges think arise in the case

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The 1st question is whether in order to avoid liability the Railway Administration is bound under the circumstances of this case and under the terms of the Risk Note in Form B in the case in the event of non delivery of a complete consignment to prove affirmatively that the loss was due to fire robbery from a running train, or any other unforeseen event or accident?

We answer that question in the negative Neglect on the part of the Railway Administration or its servants having been negatived it is not necessary to consider the exceptions to wilful neglect which are specified in the proviso of the Risk Note

Upon the findings of fact above stated we do not think any of the other questions arise

Costs will be costs in the cause

Attorneys for the defendant Company—*Messrs Crauford, Brown & Co*

In the High Court of Judicature at Bombay

EXTRAORDINARY JURISDICTION.

Before Sir Basil Scott, Kt., Chief Justice, and
Mr. Justice Batchelor.

THE BOMBAY BARODA & CENTRAL INDIA
RAILWAY COMPANY

(ORIGINAL DEFENDANTS), APPLICANTS,

v.

AMBALAL SEWAKLAL & OTHERS*

(ORIGINAL PLAINTIFFS), OPPONENTS

1900
Nov 11.

Indian Railways Act (IX of 1890) Section 72—Risk Note, Form B
(revised) †—Goods—Loss of portion of complete consignment—Suit for
compensation

100 Cans of 'ghree were delivered to the Railway Company at Nadiad for carriage to Surat under the terms and conditions of a Risk Note Form B (revised) which provided that the sender of the goods agreed to hold the Railway Company harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants transport agents or carriers employed by them before during and after transit over the said Railway, &c. The 100 Cans having arrived at Surat, delivery of the same was offered to the agent of the consignee who took delivery of 95 Cans only and declined to accept the remaining 5 Cans on the ground that the same

* Civil Application No 98 of 1900 under Extraordinary Jurisdiction against the decision of the Judge of the Court of Small Causes, Surat in Suit No 1258 of 1900.

† The Risk Note here referred to is one of those sanctioned by the Governor General in Council for adoption on all lines of Railway, and is set out in full in Appendix C to this book.

had been cut or broken open and the contents were missing. In a suit to recover the value of the 'ghee' alleged to have been short delivered —

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Held (reversing the decree of the Lower Court and dismissing the suit) that there had been no loss of a complete package forming part of the consignment, that all the Cans forming separate packages in the consignment were delivered to the consignee, and that the fact that all the contents of some of the cans were lost did not make the Railway Company liable under the terms of the Risk Note in question.

APPEAL by way of Application for revision under Section 25 of the Provincial Small Causes Courts Act, 1887, against the decision of J. L. THAYER, Esquire, Judge of the Court of Small Causes, at Surat.

The following were the facts as set forth in the petition for revision —

"1. That early in the month of May 1908, one Chhumal Damodar in the name of Bhogilal Haribhai (Opponent No 3) delivered to Your Petitioners' servants and agents at Nadiad 100 Cans of 'ghee' for carriage to Surat, to be there delivered to the firm of Ambalal Sewaklal (Opponents Nos. 1 and 2). The said goods were despatched from Nadiad at a "special reduced" or "owner's risk" rate on the terms contained in a Risk Note duly signed by one Purushottam Jekisandas as agent of the said Bhogilal. By the said Risk Note, which was in Form B approved by the Governor-General in Council under Section 72 (2) (b) of the Indian Railways Act, 1890, the sender of the said goods agreed to hold Your Petitioners harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to, the said consignment, from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said Railway provided the term 'wilful neglect' be not held to include fire, robbery from a running train or any other unforeseen event or accident."

"2. That the said 100 Cans having in due course arrived at Surat, Your Petitioners' servants and agents offered delivery

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of the same to the agent of the said consignees (Opponents Nos 1 and 2) The said agent took delivery of 95 Cans only, and declined to accept the other five alleging that the same had been cut or broken open

"3. That subsequently the said consignees instituted Suit No 1258 of 1908 in the Court of Small Causes at Surat to recover from Your Petitioners the sum of Rs 312 as the value of 'ghee' alleged to have been short delivered to them

"4 Your Petitioners' defence, *inter alia*, was that inasmuch as the whole of the said consignment of 100 Cans had as a fact arrived at Surat, and, moreover delivery of the same was offered to the Consignee's agent, Your Petitioners were exempt from all responsibility in accordance with the terms of the Risk Note aforesaid

"5 The Opponents contended (1), that the said Risk Note which was produced at the hearing and marked Dc 82, was not genuine, and (2), that the said Parushotam had no authority to execute the same On a consideration of the evidence adduced in the case, the said Court held that there was no doubt either as to the genuineness or the binding character of the Risk Note

"6 That on the 27th day of March 1909, however, the said Court passed a decree for Rs 86 and proportionate costs in favour of the said Opponents

"7 That aggrieved by the said decree Your Petitioners beg to apply to Your Lordships under Section 25 of the Provincial Small Causes Courts Act 1887, on the following among other grounds, namely :—

"(a) That the Lower Court has misconstrued and misunderstood the provisions of the said Risk Note Ex 32

"(b) That the Lower Court has misconstrued the expression one or more "complete packages forming part of a consignment" in Risk Note Ex 32

"(d) That the Lower Court's finding that there was a loss of complete five packages forming part of the consignment of 100 Cans due to theft by the defendants (i.e., Your Petitioners') servants, is not based on any legal evidence. The facts that the whole consignment of 100 Cans had arrived at Surat, and delivery of the same had been offered to the consignee agent are undisputed.

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"(e) That the Opponents did not adduce evidence to prove that the five Cans of which they failed to take delivery were entirely empty and Your Petitioners submit that the documentary evidence produced in the case proves that they were not.

"(f) That it is not clear up on what materials the Lower Court has come to the conclusion that the said five Cans weighed 14 seers. The Opponents have not proved it. But even if the said Cans weighed 14 seers, it shews that they could not possibly have been quite empty."

H C Coyajee, Advocate, (with Crawford, Brown & Co) for the Applicants (the Railway Company)

Ratanlal Ranjoddas Pleader, for the Opponents

JUDGMENT.—In this case we think it is quite clear that there has been no loss of a complete package forming part of the consignment. All the tins forming separate packages in the consignment were delivered to the consignee. The fact that all the contents of some of the tins were lost does not make the Railway Company liable under the terms of the Risk Note in Form B.

We therefore reverse the decree of the Lower Court and dismiss the suit with costs throughout.

Decree reversed and suit dismissed

The Bombay High Court Reports, Vol IV. Page 129.

REFERRED CASE

Before Mr. Couch, C. J., and Mr. Westropp, J.

LAKHMIDAS HERA CHAND (PLAINTIFF),

v

THE GREAT INDIAN PENINSULA RAILWAY COMPANY
(DEFENDANTS)

1867
August, 17

Silk dhotee value of silk—Evidence, question of—Act XVIII of 1854 S 10—Act IX of 1850, S 55—Act XXVI of 1864, S 7

Whether or not cotton fabrics bordered with silk, or having a portion of silk otherwise used in their manufacture are 'silks in a manufactured or unmanufactured state wrought up or not wrought up with other materials' within the meaning of Act XVIII of 1854 S 10, is a question of fact to be decided on the evidence—not a question of law, to be reserved for the opinion of the High Court, under Act IX of 1850, S 55, and Act XXVI of 1864, S 7, *Brunt's The Midland Railway Company* (77 L J 1 x 137) followed.

Semle—The proper test for a Judge to apply in such cases is to determine whether or not the value of the silk wrought up with other materials is more than half the value of the fabric. If it be not, the fabric cannot be considered to be silk within the meaning of the Act.

CASE stated for the opinion of the High Court of Judicature, pursuant to the provisions of Section 55 of Act IX of 1850 and Section 7 of Act XXVI of 1864, by JOHN O'LEARY, Acting First Judge of the Bombay Court of Small Causes —

"This suit was instituted to recover from the defendants the sum of Rs 794-14-3, being damages for non-delivery of a bale of piece goods, entrusted to the defendants, to be carried on the defendants' Railway for hire.

"At the trial *Mr Hurrel*, for the defendants, admitted that the Company had received the bale, that they had not delivered it, and that the value of it, at the place where it should have

been delivered, was Rs 77, which was the value of the goods according to the evidence for the plaintiff. The defence was that the goods were silk, or at least were goods which came within the operation of Section 10 of Act XVIII of 1854.

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"On the evidence for the plaintiffs, it appeared that the bale in question consisted entirely of *dhotre* that is, cotton cloths about six yards long by three quarters of a yard wide, with a border of silk at the ends varying from one in some *dhotre* to three inches in others. The plaintiff did not produce the invoice, but stated that the *dhotre* varied in value from Rs 10 to Rs 4, that they were silk bordered and that the value of these *dhotre*, without the silk border, would vary from Rs 7 to Rs. 2 or Rs 2-8 0. Plaintiff himself stated that the silk border of a *dhotre* made a difference of about Rs 2 in the value of the article.

'Under these circumstances, I was of opinion that the Company were, by Section 10 of Act XVIII of 1854, exempted from liability for the loss.

"The plaintiff thereupon required me to give judgment, contingent upon the opinion of the High Court upon the following question—Did the fact that the *dhotre* were, to the extent set forth in the evidence for the plaintiff, composed of silk, exempt the Company from liability for their loss? Subject to the opinion of the High Court on the above question, I give a verdict for the defendants."

9th August—The case came on for hearing this day before COUCH, C J, and WENTWORTH, J.

Dunbar (White with him)—for the plaintiffs, cited *Brunt v The Midland Railway Company*(1), *Bernstein v Baxendale* (2).

Green (Howard with him) for the defendants, commented on the cases cited (*supra*)

Couch, C J—The articles in question are stated by the First Judge of the Small Cause Court to have been sent by the plaintiffs to be carried on the defendants' Railway. No other evidence except that of the plaintiff was given as to the value

(1) 33 Law J., Exch 187, 9 C, 10 Jur N S, 181

(2) 29 Law J., C. P 265 S C, 5 Jur N S, 1036

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and composition of the goods. The border made a difference, taking an average, of about Rs. 2 in the value of each article. In some of them, the value of the silk amounted to Rs. 2 in 7, or Rs. 2-8-0 in 7. In no case was the value of the silk more than one-half of the entire value.

There is no evidence before us as to what quantity were of so small a value as Rs. 4 or Rs. 4-8-0.

The Judge has referred to us the question, whether these articles are, or are not, silks wrought up with other materials. This is not a question of law which, by Act XXVI of 1864, the Judge had power to reserve for the opinion of this Court. In *Brunt v. The Midland Railway Company*,⁽¹⁾ three of the Judges treated it as a question of fact, to be dealt with by the Court sitting as a Jury. So that the Judge is not proceeding under the Act in submitting this question for our opinion, but as it has come before us, I think it right to express our opinion upon it as a question of fact, and as a question of fact I consider that these articles are not silks wrought up with other materials within the meaning of the Act.

I should take a general test in these cases, whether the value of the silk is more than half of that of the whole article. This consideration would appear to have influenced the Judgment of the Court in *Brunt v. The Midland Railway Company*.⁽¹⁾ The evidence in this case, as stated by the Judge, fails to show that the silk here bore so large a proportion to the other materials as to bring the goods within the denomination of silks wrought up with other materials within the meaning of the Act.

WEETON, J. - I concur in holding that the articles in this case do not fall within the meaning of the 10th section of the Act, as silks wrought up with other materials.

Not long ago an appeal was brought by Mr. Hayes, Traffic Manager of the Bombay, Baroda and Central India Railway, against Viswantham Bhikandas, who had sued the Company in the Court below for goods which had been lost by the Railway Company. The value of the goods, as a whole, had been ascertained by the Judge of the Court below, but the value of

(1) 33 Law J., Ex. 147, S. C., 10 Jur. N. S., 181.

the proportion of silk and the other materials had not been ascertained, and the Appellate Court, consisting of myself and Mr JUSTICE TUCKER, reversed the proceedings of the Court below, and directed a new trial upon issues framed for the purpose of ascertaining the value of the silk in the goods and also the value of the gold in the goods⁽¹⁾, some of the goods in that case were similar to those in this case—*dhotre*, with silk borders, and some of them with gold in the borders, and the total value of each material was the chief point remaining to be ascertained.

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G I P By

In the Court of Exchequer, in the case of *Brunt v The Midland Railway Company*⁽²⁾, the question was treated as a question of fact, and in deciding it the Court appears to be guided by a principle, which principle was to ascertain whether the silk was the major part of the value, and they came to the conclusion that it was, inasmuch as it stood in the ratio of 9 to 7 to the other material, and, accordingly, the Court found that the goods came within the section

Here the value of the silk was far below the value of the other material in many of the articles, and in no instance did it exceed one half. I therefore think that the case does not come within the terms of the section

(1) See order of 10th January 1906, made in that case.

(2) 33 Law J Ex, 107, S C, 10 Jur N S, 101

In the Chief Court of the Punjab.

Before Boulnois and Simson, J. J.

JEYTU NAND (PLAINTIFF), APPELLANT,

v.

THE PUNJAB RAILWAY COMPANY (DEFENDANTS),
RESPONDENTS.

1819
October, 23

Liability of Railway Company—Railway Act, XVIII of 1864, S. 10—Declaration and Insurance of articles of special value—Refusal by the sender to insure—Increased charge and Insurance rate.

The plaintiff booked a parcel containing silk for despatch by Railway from Amritsar to Multan. On arrival at the destination, the parcel was found to contain hemp instead of silk. The plaintiff sued the Company for damages for the value of the silk.

Held—That as the plaintiff declined to insure the parcel and elected to book it at owner's risk the Railway Company were not liable for the loss under S. 10 of Act XVIII of 1864.

APPEAL from Additional Commissioner, Amritsar.

Ralligan for appellant

Gouldsbury for respondent.

Suit for Rs. 1256-5-0, value of silk entrusted by plaintiff to defendant for transport from Amritsar to Multan and lost en route.

JUDGMENT

The facts briefly are—That on the 27th of September 1866, the plaintiff sent a parcel of silk, weighing one maund, thirty-nine seers, 13½ chittaks, of the value of Rs. 993-0-3 by Railway from Amritsar to Multan, forwarding the Railway goods receipt for the parcel to one Jowahir Singh at the latter place. On the arrival of the train at Multan, Jowahir Singh went to the station, and producing the receipt claimed delivery.

After some delay a parcel was shown to him as that which his receipt represented, but instead of containing silk this parcel

contained *sun* (hemp), a material of little value and no delivery was made to Jowahir Singh of the parcel of silk

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The plaintiff filed his plaint on the 6th of February 1867, against the Scinde Railway Company, stating the above facts and claiming the value of the silk at Multan prices

The Railway Company amongst other defences, which included the denial that the parcel forwarded by complainant contained silk, relied upon Section 10 of Act XVIII of 1854, alleging that the plaintiff had not paid an enhanced charge for safe conveyance to which they were entitled under that Section in respect of silk, and contending that this non payment precluded the plaintiff from recovering

The following issues were fixed —

First,— Whether the plaintiff according to Section 10 of Act XVIII of 1854, on delivering over the parcel to the Railway Company, declared the nature and value of the contents of the parcel, and whether by reason of the contents being declared as silk an increased charge for safe conveyance of the parcel was accepted by the defendant

Secondly,—If so, whether the parcel was lost by gross negligence on the part of the Railway Company's servants

Thirdly,—Whether the contents of the parcel when delivered to the Railway Company were silk, and of what value

Fourthly—The damages due

The evidence left no doubt that the parcel delivered to the defendants contained silk, and the reasonable presumption arising on the case was that the *sun* was substituted whilst the parcel was in the custody of the Railway Company's servants

The parcel was booked at Amritsar through one Bela Ram, the servant of a person carrying on business in that way at the Amritsar Station, who, together with Rajkour the plaintiff's servant, on the morning of the 27th September caused the parcel to be labelled 'silk' in the presence of Shodiyal, a Railway servant. Bela Ram was then supplied with a blank form of forwarding note, which he filled in outside of the office of the Assistant Station Master, Hurdial. A red ink form was used,

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such as Bela Ram, by his own admission, knew to be in use when goods are sent at owner's risk. Bela Ram then coming into Hurdial's office showed the form, declared the parcel to contain silk, and was told by the latter to "insure." This he declined to do, and on declining so to do wrote on the forwarding note, which is in evidence, the words, "*nuksan zimmah malik, in Gooi mukhee*."

The parcel was sent bearing payment, and the rate charged for the parcel was $4\frac{1}{2}$ annas per maund, the rate for silk charged by the Railway Company according to their advertized classification of goods and rates silk being in a class of goods of which the carriage is charged at higher rate than that of certain other commodities.

Accordingly, there being no doubt as to the declaration of the contents of this parcel, it becomes a question under the first issue, whether the Railway made an extra charge in respect of it. Section 10 of Act XVIII of 1854 declares that the Railway Company shall not be answerable for loss of or injury to any of the articles enumerated in a list which includes silk, (which shall have been delivered to the Railway Company, either to be carried for hire or to accompany a passenger) unless the value and nature of such articles shall have been declared by the person sending or delivering the same, and increased charge for the safe conveyance thereof shall have been accepted by some person specially authorized to enter into such engagements on behalf of the Railway Company. The acceptance of an increased charge, in fact, replaces the Railway Company as the common carrier in their common law position of insurers.

Now the evidence showed that the Railway Company have a system by which an increased charge is taken in respect of silk and the other articles enumerated in Section 10, and that they term it the insurance rate.

At the same time this insurance rate is not identical with the charge according to the class of goods or charge specified in the advertized classification of goods, that charge having reference to the weight, traffic value of merchandise and other consideration. The advertised list of classes expressly states that the

increased charge made for goods in some of the classes does not include what is termed insurance, and in this case Bela Ram showed clearly that he so understood his contract with the Company. Under these circumstances, it is impossible for the Court to adopt the view that an increased charge is contemplated by the Act was accepted by the Railway Company. But it still remains to consider the point that was argued at the hearing that the defendants have precluded themselves from taking any defence under Act XXIII of 1854, by themselves departing from the requirements of the Act, and by their not having affected to proceed in accordance with it when the parcel was booked. It is contended that not having demanded an increased charge, they cannot rely on not having accepted it. Insurance, it is argued, is a separate contract, which may be treated as an independent transaction collateral to the carrier's contract and not affecting his liability which is compounded of the duty undertaken in carrying, and the conditions which he and the owner are called on to fulfil by the Act. The fact that the parcel was sent bearing seems at first to support the view that the Railway Company having accepted the duty of carrying but not having made the increased demand which they might have made, are liable notwithstanding the words of the Act.

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The Act no doubt requires, as a condition on which the immunity of the Railway Company depends that they should have accepted an increased charge, implying on their part a demand for it. But "increased charge" is not increased "payment," and the Act leaves untouched the right of the Railway Company to refuse to take goods unless the hire is first paid and pre payment may be made a term upon which the Railway Company may insist under the power given to them of accepting.

The cases decided upon the English Statute II, George IV, I W IV c 68, which, except in requiring a tariff or notice to be exhibited of the sums which the carrier means to charge for the enumerated articles, does not materially differ as regards the points now under consideration from the Indian Railway Act, show that the making of the demand may be effected in a general way. In *Behrens v The Great Northern Railway Company*,

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30, L J Exch, 153, WILDE B pointed out the usual steps in such cases under the II George IV and I W IV, c 63 "The sender must first declare the value of the parcel, then the carrier must demand the extra rate, which the sender either pays and is insured, or the sender refuses to pay and insure himself, and then the carrier takes the parcel" Now, in this case, as appears from the evidence above stated, there was a substantial compliance with all the required steps. No doubt the increased charge might be made by way of requiring increased payment at the end of the journey. But in this case the facts show that neither party contemplated the charge being made in this way, and the use of the term "insurance" instead of "increased charge prepaid" cannot alter the rights of the parties. The amount of increase required was not stated by Hundyal, but Beha Ram on behalf of the owner dispensed with further particulars as soon as insurance was mentioned. It probably is essential that the premium for the insurance should be either agreed upon or taken contemporaneously with the agreement by the carrier to carry the parcel and that the owner should not be put off to enter into another transaction with third parties. But the insurance was suggested at the time of the booking by the Railway servant, and declined. In the present case the words of the Act appear to the Court to be wide enough to render the Railway Company irresponsible for the loss that has been shown, whatever may be their effect where specific acts of wrong are proved against the Company or their servants.

Another part of the case requires notice although the decision of it is based on the Act above mentioned. The goods receipt contains a printed notice in English on the back of it to the effect that the Railway Company will not be responsible under circumstances precisely the same as those mentioned in the Railway Act, to which however the notice does not refer. The Railway Act does not interfere with special contracts and it may be that in taking the receipt the owner assented to sending the goods on these conditions, although the words *nushan zimma mali* did not signify the sender's knowledge of the above term. It is not necessary however to discuss the effect of this special notice, as the decision of the case rests on other grounds. The

express contract between the parties might alter their position at law, and the liability of Railway Company as declared by the Act on the principle of *modus et conventio vincunt legem*, but it does not affect so to do and the terms of the special contract if they are taken to have been assented to, only reiterate the terms of the Act

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The appeal is dismissed but, in regard to the defence made by the Company, each party to pay his own costs throughout

In the Chief Court of the Punjab.

Before Boulnois, Lindsay, and Melville, J. J.

SINDH, PUNJAB, AND DELHI RAILWAY COMPANY
(DEFENDANTS), APPELLANTS,

v

RUSTOM KHAN (PLAINTIFF), RESPONDENT

Liability of Railway Company for loss—Act XVIII of 1854, S 10—Declaration of the value of a parcel containing shawls

1872,
May, 22

Two parcels containing shawls were booked at Lahore Station by the plaintiff for despatch to Monghyr their contents having been duly declared. On arrival at the destination one of them was found missing. The Railway Company repudiated their liability under S 10 of the Indian Railways Act, XVIII of 1854, and the plaintiff sued them for compensation for the loss of the parcel.

Held—That as the plaintiff failed to declare the value of the contents of the parcel as required by the Act the Company was not liable to the claim of the plaintiff.

APPEAL from Offg Commissioner, Amritsar

Reynolds for appellants

Leighton for respondent.

BOULNOIS, J.—The plaintiff sues the Punjab and Delhi Railway Company, for Rs 2,500, the value of shawls delivered by him to the Company for carriage from Lahore to Monghyr in Behar

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on 3rd December 1870 The plaintiff sent the shawls by the Railway in two parcels of which only one arrived on the 18th of December at its destination. He demanded the above amount of the Company, and not receiving compensation brought this suit.

The defence made by the Company was non-communication of value of the shawls by the plaintiff, leading to the result that they were protected by the words of section 10 of Act XVIII of 1854, shawls being comprised in the list of articles in that section which enacts, "No such Railway Company shall in any case be answerable for loss or injury to (*inter alia*) shawls which shall have been delivered to such Railway Company either to be carried for hire or to accompany the person of any passenger, unless the value and nature of such article shall have been declared by the person or persons sending or delivering the same and an increased charge for the safe conveyance of the same shall have been accepted by some person specially authorized to enter into such engagements on behalf of the Railway Company."

At the trial on the 31st May 1871, it appeared that the plaintiff held the Railway Company's receipt for the two parcels of shawls, of which he had at the time of booking declared the nature, as the articles were described as shawls in the receipt, and for which he had paid the carriage. These shawls were despatched, being charged for at the appropriate rate in the classified rates of carriage as advertized by the Company. The non-delivery was shown and no evidence was given to show that the Company by any authorized person had demanded any increased charge for the safe conveyance of the shawls at the time when it was stated what the parcels contained, or that they had any specially authorized person at hand to receive money in respect of it.

In the Court of first instance—that of the Deputy Commissioner of Amritsar—the suit was dismissed on the following ground, viz, the absence of declaration of the value of the articles delivered. On this point the Deputy Commissioner said—"The Court holds that the partial and incomplete fulfilment of the first step in the transaction exonerates the defendants from liability for their servants' omission to take the second, i.e., to

make a demand. Plaintiff's claim will not lie, inasmuch as he did not comply with the requirements of the Railway Act in regard to the declaration of the value of the goods." The Appellate Court (Commissioner of Amritsar) took a different view and held that there were two questions to be disposed of—first, whether there was not such a sufficient and substantial compliance on the part of the plaintiff with the requirements of Section 10 of the Railway Act as to throw upon the defendants the obligation of making the demand for the increased charge or insurance rate, second, whether the Railway Company would not be liable in case of specific neglect or gross wrong appearing, notwithstanding Section 10. Upon the first of these the Lower Appellate Court considered what steps would properly be taken if the consignor, on the one hand, and the Railway Company's servants on the other, followed the course contemplated by the Act and he expressed his opinion that it was sufficient for the consignor to declare that the parcel delivered to the Railway Company contained one of the enumerated articles in Section 10 to make it obligatory on the part of the servants of the Company specially authorized to accept the increased charge for the safe conveyance of such articles to make the demand for that charge.

In this case there was no doubt, said the Commissioner, that the contents of the parcels were declared to be shawls, and this he held to be a sufficient conformity to the requirements of Section 10 to render it obligatory on the specially authorized servant to demand the enhanced rate, "especially," says the Commissioner, "as shawls come into the class of goods for which a higher rate is charged to require more than this from the natives of this country would be to place them entirely at the mercy of the subordinate officials of the Company." Upon the second question raised the Commissioner gave judgment as follows—"I would remark that the defendants have not attempted to show what became of the two parcels. The plaintiff holds the receipt for them and the defendants say they are lost, which of course means that they were stolen in the defendants' keeping. In this case a poor Kashmiri, owing to the gross negligence, if not worse, on the part of the defendants' servants, has been suddenly deprived of the earnings of years and almost ruined, and it is

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pleaded that the defendants ought not to be called on to pay because at the same time the plaintiff did not declare both the value and the nature of the property delivered to them for conveyance.

The Commissioner also pointed out that in a case formerly decided in the Chief Court in favour of the Railway Company, under this section where there had been a substantial demand for the increased charge there had also been a distinct refusal to pay it, written on the part of the plaintiffs while at the same time in that case no specific act of neglect or wrong had been proved against the Railway Company, or their servants. The Commissioner having reversed the decision of the Lower Court on the grounds stated, remanded the suit for restoration to the file and determination of the question of the value of the property lost and the amount of damages if any.

An appeal is now preferred to this Court on the ground that the Railway Company are not answerable for the loss of the plaintiffs shawls as the value and the nature of the parcels were not declared under Section 10 of Act XVIII of 1854. That section, it is to be observed in determining the liability of the defendants in this case, is followed by one which declares that neither public notice nor private contract on the part of the Company, in respect of articles other than those specially provided for in Section 10, shall affect the liability of the Railway Company, and it is added, 'But such Railway Company shall be answerable for such loss or injury when it shall have been caused by gross negligence or misconduct on the part of their agents or servants.'

The question raised in this case turns entirely upon the true construction of the enactment in Act XVIII of 1854, limiting the liability of Railway Companies in case of loss and the words must receive their plain sense and ordinary meaning. And whether or not the result of construing those words in that way should be in accordance with what might appear to be the equitable disposal of this case if the Act was silent, the Court must adhere to the Act as the Court of first instance points out. But at the same time,

qui h'et in libra loeret in cortice, and the words must receive S P & D Ry
 their full meaning with reference to the context in which they
 are found. The construction of the analogous English statute
 by the English Courts is not altogether a complete guide, and
 parallels of this kind are to be used with great caution. But it
 is to be observed that the Statute II Geo IV and I Will IV
 Cap 68, (The Carriers Act), and 17 and 18, Vic C 31 or in *pari*
materia with the Indian Act and in construing the provisions of
 the above-quoted Section 10, it will be as well to refer to the
 English Law with all proper reservation. The eighth section of
 the English Act provides that notwithstanding anything in the
 Act, the Carrier shall not be exempt from liability for loss or
 damage caused by the felonious or tortious acts of his agents
 and there is no corresponding provision in the Indian Act.

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Yet here there has been a tortious act, for the complete silence
 as to what has become of the goods on the part of the Company's
 servants, the absence of an attempt to shew where and under
 what circumstances the parcels of shawls were lost sight of,
 leaves the only possible inference that negligence, which in
 itself is a tort, at the least, was the occasion of this loss. The
 second section of the English Act permits carriers in anticipa-
 tion of receiving parcels of value, to affix a notice in legible
 characters to some conspicuous part of their booking office,
 stating the increased rate of carriage as compensation for taking
 the increased risk of valuable articles. And by the third sec-
 tion if the notice is not duly affixed, or the carrier refuses to
 give a receipt when required, he is deprived of the protection of
 the Act.

In the Indian Act no notice is required to be affixed, and no
 express provision is made requiring measures to be taken to
 bring the necessity of declaring the value of the articles com-
 prised in the section home to the knowledge of the consignor.
 The picture of hardship drawn by the Commissioner, may then in
 some conceivable cases be the result of the Act. But in using
 the words "loss or damage" the English Act employs language
 with exactly the same meaning as Section 10 and in *Hinton v*
Dibbin this precise question arose whereupon it was determined
 by the Court of Queen's Bench that a carrier protected by the

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statute is not liable for damage caused by his gross negligence (2, Queen's Bench, p 646)

Here, then, by omitting to provide for the liability of the Railway Company, when the loss shall arise by the tortious act of their servants, the Indian Act is less favourable to customers (although the majority of them as persons speaking a different language deserve more consideration) than the English Act, and even gross misconduct on the part of a Railway servant cannot without doing violence to the language of the Indian Act be held to restore the liability of the Company. It cannot be so held without importing a provision similar to the closing one in Section 11 into Section 10 where it is not found. And if the two sections are read together it is apparent that the intention was to apply this provision only where the property was not of the nature specified. The latter kind of property is rendered insurable by payment of the increased rate for safe conveyance against the lower as well as the higher degrees of carelessness. If then the case rested here, the judgment of the Commissioner could not stand. Another point remains.

Although by the Indian Act no notice is required to be affixed, and no express provision is made, requiring measures to be taken to bring to the knowledge of the customer, if he wishes to avoid risk, yet there must be some sort of limit to the irregularities and misconduct of the Railway officials in conducting business at the Booking office.

It cannot be that by the very omission to provide due facilities for the putting customers on their guard, the Railway Company can effect their own subsequent absolution for acts of gross neglect or wilful fraud (to which indeed a door may have been thus opened) on the part of their own servants who must have soon learned the consequences of non payment of the increased charge under Section 10.

Anything in my opinion of the nature of a voluntary or involuntary causing the customer to omit to pay the increased charge, would place the transaction outside the contemplation of the Railway Act altogether. The provisions of Section 10 are wanting in details, for, frame evidently with an eye to the English

Carriers Act, one or two sections put forward the whole gist of S P & D By. that Act which consists of many The burden is all thrown by the Indian Act upon the customer to declare (even when in such a country as this it is unreasonable to suppose that he must know that he ought to declare) both the value and nature, and to tender the increased charge

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This section must be construed to imply the demand of an increased charge, and at a certain stage the burden ought to be shifted on to the Company's servants to conduct the transaction, as the Commissioner pointed out

Accordingly, with regard to this and also with reference to the words of Section 10, which declare that a specially authorized person shall be the receiver of the increased rate, it seems to me that it may rightly be held a necessary part of the defence in a case like this, for the Company to show that they had on the spot a specially authorized agent instructed in this respect and ready and willing to receive the enhanced rate if tendered

On this point no aid is afforded by the decisions upon the English Carriers Act. It is true that in a case under that Act in which it appeared that the carrier's agent had a general impression as to the value of the goods, and did not require any express declaration, Lord Deuman held that the plaintiff was bound to have made it (*Pocell on Carriers*, p 118, 2nd Ed). Yet this decision, although given in reference to similar words, has reference to an Act in which requirements as to notice and other details place the carrier on a footing somewhat different to that on which the Railway Company stands under the Railway Act

The question then is whether in the absence of any allegation as to the want of authority in the Booking Clerk this point can be taken by the Court in favour of the plaintiff I think not On the whole, it seems to me that the declaration of value by the customer is intended to precede the reception of the increased charge by the authorized Railway servant, and that failing any declaration of value of the customer and allegation of absence or reasonable doubt of the presence of the authorized agent in the Booking Clerk, it ought to be presumed that the declaration would have been duly received

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With some doubt then, I conclude that this appeal must be admitted. The case is one of such hardship that I have some doubts whether the decision is according to the law laid down in the Act, but the words of the Act speak for themselves and must not be set aside by this Court. I am of opinion that no costs should be allowed to the Railway Company.

LINDSAY, J.—The main points urged in favour of the plaintiff are, that he substantially complied with the provisions of the law when he declared the nature of the goods, and that he was led to believe in having to pay the higher and special rates for shawls that he was insured against loss by the Company, that in point of fact the goods were stolen, and that Section 10 of the Railway Act does not protect the Company under such circumstances.

The Law is clear. The consignor must declare the value as well as the nature of the goods delivered to the Railway Company if he intends to be insured against loss by the Company. If the allegation that the plaintiff was led to believe that he was protected from loss by the action of the Company's servant charged with the duty of taking delivery of goods be true, I think equity would step in and give the plaintiff relief, but I find no evidence on this point. There is no valid reason for thinking the plaintiff was deceived either intentionally or otherwise. As to the allegation of theft, on this point there is no evidence. We have no valid reason for thinking the shawls have been stolen by the Company's servants. I think the word 'loss' in Section 10 of the Act must be construed in the manner laid down in *Addison on Torts*, p. 453, to the effect that loss means loss of things by the carrier or his servants in the carriage of them either by losing them from their vehicles or mistaking them, so that it was impossible to find them when they ought to have been delivered, and not the loss that may accrue to the owner or consignor by reason of non delivery in due time, or by reason of great delay in delivery of the goods. Also see *Pu ell on Carriers*, p. 103.

If the guard of the Railway Company steal goods entrusted to his charge and appropriate them to his own use, it cannot

reasonably be said the goods are lost in the sense of not knowing S P & D By
 where they are. It was contended for the Company that if ^v
 the guard had misappropriated the shawls to his own use and Rustom
 retained the bales in his own possession, the Company would Khan
 nevertheless not be liable. I am unable to take that view, but if
 it be correct the sooner the law is changed the better.

It is true that in the Carriers Act I Will IV, C 68, the term 'loss' appears to include a felonious taking by the servant of the carrier, but then Section 8 of the Act protects the consignor and makes the carrier answerable for the felonious act of his servant. If the man who drafted Section 10 of the Railway Act contemplated protecting the Company from all responsibility for the felonious act of its servant he did not act, in my opinion, in good faith towards the public, and it must have been by an oversight on the part of the legislature that such a law was passed so opposed to the fair and just provisions of the English Act. I would rather think, and I do think, the framer of the Act used the word loss as used in ordinary parlance and not in the peculiar sense which the English Act appears to give it.

It is my opinion that Section 10 of the Railway Act XVIII of 1854 does not protect the Company from liability to answer for the felonious act of its servant. I agree with Mr Justice Boulnois that the appeal must be decreed and the Judgment of the first Court upheld.

MELVILL, J.—The plaintiff did not comply literally or substantially with the terms of Section 10 of Act XVIII of 1854, and there was nothing done by the officers of the Railway Company to deprive the Company of the protection afforded by this section. I therefore concur in affirming this appeal. I am also of opinion that as the officers of the Company did not inform the plaintiff that he should pay the insurance rate if he desired the shawls to be conveyed at the Company's risk, the Company should not be allowed the costs of this appeal. The law does not, it is true, require the Company to make any such communication to the consignors of articles of the kinds mentioned in Section 10, but it is equitably incumbent on it to do so.

The Indian Law Reports, Vol. II (Madras) Series,
Page 310.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Kernan

ILLOOR KRISTNIAH (PLAINTIFF), APPELLANT

v.

(1) THE G I P RAILWAY COMPANY,

(2) THE MADRAS RAILWAY COMPANY

(DEFENDANTS), RESPONDENTS *

1890
April 15

Liability of Railway Company—Valuable article not declared—Act XVIII of 1854, S 10—Act III of 1865, S 3

A Railway Company is not liable for non delivery of articles specified in S 10 Act XVIII of 1854 the value of which has neither been declared nor insured

The protection conferred by that section extends till such time as the consignee takes delivery and does not terminate on the arrival of the article at its destination

In this case the plaintiff sued the defendant-Companies for damages, being the value of a parcel of silk which was delivered to the Great Indian Peninsula Railway Company at Bombay to be delivered at Adoni on the Madras Railway Company's line in August 1878

The defendants pleaded that the contents of the parcel had not been declared to be silk at Bombay, that silk comes under the schedule of articles referred to in Act III of 1865, S 3, or S 10 of Act XVIII of 1854, and that the parcel ought to have been insured according to the provisions of those Acts and in compliance with the public notice of the G. I P Railway

* S A 71 of 1890 from the decree of J H Nelson, Acting District Judge of Bellary, confirming the decree of the District Munsiff of Adoni dated 22nd October 1879

Company posted up at the Bombay Station where the parcel was delivered by the plaintiff's agent to the servants of the G I P Railway Company

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The Munsif found that the plaintiff's agent had not declared the value of the parcel or insured it and that the parcel had probably been misappropriated by the Railway servants at Adoni

On appeal by plaintiff, these findings were confirmed, except the last, the District Judge remarking that there was no evidence of the fate of the parcel beyond that it had been placed on the platform at the Raichore Station

As to the question—whether the defendants were exempted from liability owing to the plaintiff's failure to declare the value of the parcel and insure it—the Judgment of the Munsif (confirmed by the District Judge) was as follows —

The most important issue in this case is the fourth, viz, whether the defendants are responsible for the parcel owing to the failure of the plaintiff to insure it under the law in force. The important Sections in Act XVIII of 1854 in relation to the liability of Railway Companies for goods delivered to them for conveyance, are Ss 9, 10, 11. Of these, S 9 relieves Companies of liability in respect of loss or injury to passengers' luggage, in any case, unless it shall have been booked and separately paid for, and S 10 relieves Companies of responsibility, in any case, for loss or injury to gold, silver, raw silk and other articles of great value particularly enumerated in the section, unless the value and nature of such goods has been declared by the sender, and an increased charge for their safe conveyance accepted by a specially authorised person on behalf of the Company, S 3, Act III of 1865, confirms the above. These two sections are in favour of the Railway Companies. S 11 of Act XVIII of 1854 has a different aspect. In *Surutram Dhaya v The Great Indian Peninsula Railway Company*(1) recently referred by the Court of Small Causes, it was said that the 11th Section, taken in the aggregate, appears to mean that a Railway

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Company shall be responsible for the loss or injury caused by gross negligence or misconduct of their agents or servants, except in cases otherwise specially provided for by the Act, e.g., such cases as are mentioned in Ss 9 and 10, notwithstanding any public notice given or private contract made by such Companies to the contrary (See *Kuwerjee Tulsidas v. The Great Indian Peninsula Railway Company* (1)). The price of the silk, said to have been purchased by the plaintiff's agent and 11th witness at Bombay, is shown to be Rs 625-0-6. The travelling and telegram expenses are not proved. I accordingly decide the 4th and 5th issues in favour of the defendants. The defendants have, however, failed to produce the delivery book alluded to by the plaintiff's 1st witness, Mr D'Cruz. I therefore dismiss the plaintiff's claim assessing each party to bear his own costs.

The plaintiff appealed to the High Court.

V. Bashyam Ayyangar, for Appellant.

Johnstone, for the first Respondent, *Barclay and Morgan*, for both Respondents.

The Court (INNES and KERNAN, JJ) delivered the following JUDGMENT.—We entirely agree with the decisions of the Court of First Instance and the Lower Appellate Court.

It is contended here that the protection from liability, conferred on the Railway Company by S 10, Act XVIII of 1854, in cases in which the value of such property is not declared and the higher charge paid, ceases on arrival of the parcel at the place of its destination, and that a higher liability attaches between the arrival of the article and its delivery. We think the protection in such a case would extend to the period at which the consignee takes delivery.

We dismiss the appeal with costs.

The Indian Law Reports, Vol. V. (Madras) Series,
Page 208

APPELLATE CIVIL.

*Before Sir Charles A. Turner, Kt, Chief Justice,
and Mr. Justice Kindersley.*

MUTHAYALU VENKATACHALA CHETTI
(PLAINTIFF), APPELLANT

1.

SOUTH INDIAN RAILWAY COMPANY
(THIRD DEFENDANTS), RESPONDENTS.*

*Railway Act, Section 10—Loss by criminal act of Company's Servants—
Sister—Declaration—Nature of—Liability of Company*

1881
October, 11
1882
February, 24

Section 10 of the Railway Act, which provides that no Railway Company shall in any case be answerable for loss or injury in respect of gold, silver, and other excepted articles delivered for carriage, unless the conditions of that section are fulfilled, applies where the loss has been caused by the criminal acts of the Company's servants. *Semble*: if, after declaration made by the sender of an excepted article entitling the Railway Company to receive an increased charge, the goods are carried at the ordinary rates, the sender would be entitled to recover in case of loss.

The conditions of Section 10 are not fulfilled by the sender merely giving an account of the quantity and description of the goods delivered for carriage when required to do so by the booking clerk.

To establish the liability of the Railway Company in the case of excepted articles the declaration required by Section 10 must be made in such a manner as to intimate that the sender invites the Company to undertake the special risk and is willing to pay the special rates.

The facts of this case appear from the judgment.

* S A 177 of 1881 against the decree of F Brandt District Judge of Trichinopoly, reversing the decree of C Suri Ayyar, District Munsiff of Trichinopoly, dated November 13th, 1880.

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Ramacl andrayyan for Appellant

The Advocate General (Hon P O Sullivan) and *Tarrant* for Respondents

The Judgment of the Court (TURNER, C J, and KINDERSLEY, J) was delivered by

TURNER, C J—The appellant delivered to the respondents at the *Trichinopoly* Fort Station for carriage for hire to *Bombay* a box containing seven bars of silver, valued at Rs 429b 10⁹. The box was weighed by the clerk and its weight ascertained to be 128 lbs

The clerk inquired and was informed of the nature of the contents but no increased charge for the safe conveyance of the parcel was demanded or tendered

The parcel arrived in due course at *Bombay* and was again weighed, when its weight was found to be only 78 lbs. A telegram was therefore sent to the station master at *Trichinopoly* apprising him of the circumstance, and he was asked to explain the difference. He replied that the correct weight was 128 lbs. No information respecting the despatch of this telegram nor of the receipt of the reply was given to the Traffic Manager

The consignee was informed of the arrival of the parcel at *Bombay*, and went to the station to obtain it. It was delivered to him without the production of the receipt, which had not then reached him from *Trichinopoly*. A demand was made on him for the payment of extra freight, and, as he had not money with him, a servant of the Company was sent with him to collect the freight. The box was opened in the presence of this servant and was found to contain two bars of silver and a number of stones. It is alleged that five bars of silver had been removed and the space left vacant by their removal filled with these stones. The box had been carefully secured by the consignor and no external indications that it had been tampered with were observed. The consignee has sworn that he obtained no receipt for the extra charge for freight though he frequently demanded one

The appellant instituted this suit to recover damages from the respondents for the injury occasioned to him by the loss of the silver, which he alleged was stolen by a servant of the Company

The respondents pleaded (*inter alia*) that the quantity of silver alleged was not delivered to them, that no portion of the silver delivered to them was lost by the misconduct of their servants, that by the provisions of Act XVIII of 1854 Section 10, the Act in force at the time the parcel was despatched, they are not in any case responsible for the loss of silver carried for hire, unless the value and nature of the parcel is declared, and an increased charge for its safe conveyance has been accepted by some person specially authorized to enter into such an engagement on their behalf, and that no such declaration had been made, and no such extra charge accepted in respect of the parcel in question. The appellant produced his accounts and called witnesses described by the Court of First Instance as respectable merchants, to prove that the parcel on its delivery to the respondents contained the quantity of silver alleged. The Court of First Instance found this issue in the appellant's favour and having regard to the conduct of the servants of the Company at Bombay it came to the conclusion that the parcel had been tampered with by the servants of the Company while in transit.

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It held that the "loss or injury" intended in Section 10 of the *Railway Act* was accidental loss or accidental injury and not loss or injury occasioned by the gross negligence or criminal acts of the Company's servants. It also held that inasmuch as the appellant had informed the clerk of the nature of the contents of the box it was the duty of the clerk to demand the extra charge for insurance, and that consequently the non acceptance of such charge would not protect the Company from liability if the provisions of Section 10 were otherwise applicable. On these grounds it decreed the claim with costs.

On appeal, the District Judge reversed the decree and dismissed the suit.

Reading Section 10 of the *Railway Act* with the section immediately following, the Judge came to the conclusion that the terms "loss or injury" in Section 10 could not receive the limited construction adopted by the Court of First Instance and that in providing that no Railway Company should in any case be answerable for loss or injury the legislature intended to

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Ramachandrayyar for Appellant

The Advocate General (Hon P O Sullivan) and *Tarrant* for Respondents

The Judgment of the Court (TURNER, C J, and KINDERSLEY, J) was delivered by

TURNER, C J —The appellant delivered to the respondents at the *Trichinopoly Fort Station* for carriage for hire to *Bombay* a box containing seven bars of silver, valued at Rs 4,296 10⁰. The box was weighed by the clerk and its weight ascertained to be 128 lbs

The clerk inquired and was informed of the nature of the contents, but no increased charge for the safe conveyance of the parcel was demanded or tendered

The parcel arrived in due course at *Bombay* and was again weighed, when its weight was found to be only 78 lbs. A telegram was therefore sent to the station master at *Trichinopoly* apprising him of the circumstance, and he was asked to explain the difference. He replied that the correct weight was 128 lbs. No information respecting the despatch of this telegram nor of the receipt of the reply was given to the Traffic Manager

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The appellant instituted this suit to recover damages from the respondents for the injury occasioned to him by the loss of the silver, which he alleged was stolen by a servant of the Company

The respondents pleaded (*inter alia*) that the quantity of silver alleged was not delivered to them, that no portion of the silver delivered to them was lost by the misconduct of their servants, that by the provisions of Act XVIII of 1854 Section 10, the Act in force at the time the parcel was despatched, they were not in any case responsible for the loss of silver carried for hire, unless the value and nature of the parcel is declared, and an increased charge for its safe conveyance has been accepted by some person specially authorized to enter into such an engagement on their behalf and that no such declaration had been made, and no such extra charge accepted in respect of the parcel in question. The appellant produced his accounts and called witnesses described by the Court of First Instance as respectable merchants, to prove that the parcel on its delivery to the respondents contained the quantity of silver alleged. The Court of First Instance found this issue in the appellant's favour, and having regard to the conduct of the servants of the Company at Bombay, it came to the conclusion that the parcel had been tampered with by the servants of the Company while in transit.

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It held that the "loss or injury" intended in Section 10 of the *Railway Act* was accidental loss or accidental injury and not loss or injury occasioned by the gross negligence or criminal acts of the Company's servants. It also held that, inasmuch as the appellant had informed the clerk of the nature of the contents of the box it was the duty of the clerk to demand the extra charge for insurance, and that consequently the non-acceptance of such charge would not protect the Company from liability if the provisions of Section 10 were otherwise applicable. On these grounds it decreed the claim with costs.

On appeal, the District Judge reversed the decree and dismissed the suit.

Reading Section 10 of the *Railway Act* with the section immediately following, the Judge came to the conclusion that the terms "loss or injury" in Section 10 could not receive the limited construction adopted by the Court of First Instance, and that in providing that no Railway Company should in any case be answerable for loss or injury, the legislature intended to

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protect Railway Companies in respect of articles excepted from liability for loss or injury however occasioned, unless the conditions of the section were fulfilled. He held that to affect a Railway Company with liability in respect of such articles, not only must notice be given of the nature and value of the contents, but an increased charge must be paid and accepted, and that asuming the notice were proved and it amounted to a formal declaration of the value of the parcel, inasmuch as it was admitted no more than the ordinary charge had been paid, the plaintiff was not entitled to recover.

Exception is taken to the Judge's rulings on the following grounds —

It is contended that there is nothing in the Act to discharge the Company from liability when the loss or injury arises from the criminal acts of their servants—*Bradley v Waterhouse*(1)—that the plaintiff, the appellant in this Court, had done all that was necessary to entitle him to recover when he declared the value and contents of the parcel, and that the omission of the Railway Company to demand an increased charge would not defeat the right of the appellant to recover *Behrens v The Great Northern Railway Company* (2).

The cases cited by the appellant's pleader were decided in reference to the terms of the English *Carriers Act*, 11 Geo IV and 1 Will IV, C 65. The provisions of that Act are, with some variation, reproduced in the Indian *Carriers Act* III of 1865, but it is expressly declared in the Indian *Carriers Act* that nothing therein contained shall affect the provisions of Sections 9, 10, and 11 of the *Railway Act* 1854.

It is apparent the Indian Legislature intended to place Railway Companies in respect of their liability as carriers on a different footing from other common carriers. It would therefore be unsafe to look to the decisions of English Courts on the *Carriers' Act* for assistance in construing the law regulating the liability of Railway Companies on any point on which the language of the enactments is materially different.

(1) 3 C & P, 313

(2) 6 H & N, 366, 8 C on appeal 7 H & N, 950.

A comparison of the Indian *Carriers Act* and the *Railway Act* discloses several important differences between the liability of Railway Companies as carriers and the liability of other common carriers, and possibly some difference between the liability of Railway Companies constructed under the provisions of Act X of 1870 and the liability of other Railway Companies; but inasmuch as the respondents' Railway was not constructed under the Act of 1870, it is unnecessary to decide the point.

The Indian *Carriers Act* presumes the general liability of common carriers for the safe conveyance and due delivery of goods delivered to them to be carried for hire. Its object was to afford the common carriers some protection and at the same time to declare that the protection would not extend to loss or injury resulting from certain causes.

In the case of certain articles of value, which we may term excepted articles, it enacted that no common carrier should be liable for loss or damages to such articles when exceeding in value 100 rupees unless the consignor should have declared the nature and value of the article, and it authorized common carriers after giving public notice to require payment for the risk undertaken.

In the case of articles not excepted, it pronounced common carriers with certain exceptions incompetent to limit their liability by public notice, but it authorized them to do so by special contract, and having thus provided a certain measure of protection for common carriers, it declared in Section 8 that notwithstanding anything thereinbefore contained, every common carrier should be liable to the owner for loss of or damage to any property delivered to such carrier to be carried, where such loss should have arisen from the negligence or criminal act of the carrier or any of his agents or servants.

The *Railway Act* of 1854 enacted that no Railway Company should in any case be liable for loss of, or injury to, excepted articles, unless the value and nature of the article had been declared by the sender, and an increased charge for its safe conveyance should have been accepted by some person specially authorized to enter into such engagements on behalf of the Company, Section 10. In the case of non-excepted articles, it

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prevented any limitation of liability for loss or injury either by private notice or by express contract but declared the Company liable for such loss or injury only when it should have been caused by gross negligence or misconduct on the part of their agents or servants. Contrasting the language of these sections, we consider the Judge was warranted in regarding the term "in any case" in Section 10 as including the cases specially mentioned in Section 11—cases where loss results from gross negligence or criminal acts on the part of the agents or servants of the Company—and that unless a person proves he has fulfilled the conditions imposed on him by Section 10, he cannot recover for the loss of excepted articles although such loss may have been occasioned by a criminal act on the part of the servants or agents of the Company.

Bradley v. Waterhouse was decided in reference to provision of the English *Carriers Act* analogous to that of Section 8, Indian *Carriers Act*, in respect of the criminal acts of carriers' servants, but there is no such provision in the Railway Act to control the operation of the 10th Section of that Act. Unless that it can be shown that the appellant has brought himself within the terms of Section 10 he cannot recover.

Inasmuch as the section requires that to render a Company liable an engagement must be made by an agent specially authorized, it appears to be left to the option of a Railway Company whether it will undertake or decline the risk contemplated by the section. We have no evidence that the respondents had exercised their option and authorized their agents to enter into such engagements. Assuming they have done so is the omission of the Company to make an increased charge a sufficient answer to the suit? The terms of the English *Carriers Act*, Section 1, "unless * * the value and nature of such article * * shall have been declared * * and such increased charge * * be accepted" sufficiently resemble the terms of Section 10 of the Railway Act to justify the appellant's plea in relying on the case of *Belens v. The Great Northern Railway Company*.

In that case the sender of a valuable picture had made the declaration required by the Act. The Company although it had given notice it would charge the extra rate authorized, did not

demand nor did the sender tender more than the ordinary rate; and it was held there was nothing in the Statute which protected a carrier from liability, if, after a declaration had been made entitling him to receive an increased rate, he chose to accept the goods to be carried without making any demand for such increased rate or requiring it to be either paid or promised.

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Seeing that the authority to demand an enhanced payment for risk is an advantage conceded to the Company, which it is at liberty to waive, we apprehend that, if other circumstances were proved entitling the sender to recover, he would not be held to have lost his right by the omission of the Company. If it were shown a Company had by the delegation of authority to its agents intimated its willingness to enter into engagements for the risk attendant on the carriage of excepted articles, and a sender had, with a view to entitle himself to the benefit of such an engagement, made the declaration required by the Act to an agent so authorized, and no extra charge was demanded, we are not prepared to say that the equitable interpretation of the provisions adopted by the Court of Exchequer and of the Exchequer Chamber would not be followed. But to establish the liability of the Company, it must be shown that the sender made the declaration required by the Act. It is not sufficient that a consignor should merely give an account to the servants of the Company of the quantity and description of the goods he delivers for carriage. He is required by the 13th Section of the Act to do this in every case where a demand is made by the servant appointed to receive the goods. If he desires to fix the Company with liability, he must make a declaration in such a manner that it may be understood he invites an engagement on the part of the Railway Company to undertake the special risk, and is willing to pay the increased charge. *Robinson v. The South Western Railway Company* (1)

It is not proved in this case that the appellant intended to invite the Company to enter into such an engagement. He took the box to the station and delivered it for conveyance without intimating the nature or value of its contents. When the booking

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clerk presumably in the exercise of his powers under Section 13 inquired the nature of the contents, the appellant furnished the information required. We cannot hold that this constituted such a declaration as would have entitled the Company to make an extra charge, nor the appellant to hold the Company responsible for the risk of conveyance.

On this ground, we affirm the decree of the Lower Appellate Court and dismiss this appeal with costs.

The Indian Law Reports, Vol. VI. (Madras) Series,
Page 422.

APPELLATE CIVIL

*Before Sir Charles A. Turner, Kt., Chief Justice, and
Mr. Justice Muthuswami Aiyar.*

SAMINADHA MUDALI (PLAINTIFF), PETITIONER,

v.

THE SOUTH INDIAN RAILWAY COMPANY (DEFENDANTS),
RESPONDENTS *

1883
January 29
April 20

Indian Railway Act 1870 S. 11, Schedule II (1) Silks—Insurance

The term silks in a manufactured state and whether wrought up or not wrought up with other materials used in the second schedule of the Indian Railway Act 1870 does not apply to all classes of goods in which silk may be introduced.

A cloth composed of silk and cotton thread one eighth being silk and seven eighths cotton the proportionate value of silk and cotton being one to four and a half does not come within the meaning of the said term.

This was a petition under S. 622 of the *Code of Civil Procedure* praying the High Court to revise the decree of the Subordinate Court at Negapatam in *Small Cause Suit No. 328 of 1882*.

The plaintiff sued to recover Rs. 270-13, the value of a bale of cloths given to the *South Indian Railway Company* for carriage to Madras and not delivered.

* C.R.P. 195 of 1882 against the decree of R. Vasulera Rao, Subordinate Judge of Negapatam, in *Small Cause Suit No. 325 of 1882*.

The defence was that the plaintiff having neither declared the value of the bale which purported to contain silk in a manufactured state and wrought up with other materials, nor paid an increased charge could not recover the value thereof by virtue of S 11 of Act IV of 1879

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The plaintiff's claim was dismissed as to all cloths in which silk appeared

The plaintiff objected to the decree of the Subordinate Judge on the ground that the Judge had not admitted evidence as to the value of the cloth, which was not silk wrought up with other materials but cotton wrought with silk

Gopalacharya, for Petitioner

Shari (with him *Grant*, for Respondent)

The Court (*TURNER, C J* and *MUTHUSAWMI AYAR, J*) made the following

ORDER—It does not appear that the Subordinate Judge took any evidence as to the fact that the cloths despatched and of which he disallowed the price were of the nature described in S 11 of Act IV of 1879. This would have been proved by the defendant.

We direct the Subordinate Judge to retry the issue.

In compliance with the above order, the Subordinate Judge submitted the following

Finding—With reference to the order of the High Court in Civil Miscellaneous Petition No 198 of 1882, I have the honor respectfully to submit a statement containing my findings upon the quantity of silk contained in each of the samples forwarded herewith

'Plaintiff produced the majority of the samples and the defendant produced a few on the next day. I have produced what is procurable in the market to make up the number, but still there are one or two whose samples cannot be procured in the market

'Parties examined each a witness and dispensed with the examination of the rest as they agreed as to the quantity of silk contained in each. Clause (1) of the second schedule attached to Section 11 of Act IV of 1879 refers generally to silks, whether wrought up or not wrought up with other materials. It makes no reference as to the quantity which ought to form part

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of the article intended to be included in the said clause (1), so that I thought and still think that the samples now forwarded contain silk wrought up with cotton thread, and that they therefore fall under the said clause (1). No evidence was taken nor offered by the Vakils, as they knew that as a native I must know how much silk each item of the list ought to contain. Hence I find that the cloths despatched were of the nature described in clause (1), Schedule II of Act IV of 1879."

Upon the return of this finding the Court delivered the following

JUDGMENT.—The decision of this case turns on the construction we are to place on the terms "silks in a manufactured state and whether wrought up or not wrought up with any other materials." We are unable to agree with the Subordinate Judge that these terms were intended to apply to all classes of goods in which silk may be introduced yet it is difficult to arrive at any precise definition of the terms. Mr Shaw has called our attention to the case of *Brunt v The Midland Railway Company* (1) in which a web known in the trade as silk web having a silk face and composed in the proportion of 1 oz of silk to $1\frac{1}{4}$ oz of India-rubber and $\frac{1}{4}$ oz of cotton with relative values of 12d or $13\frac{1}{4}$ d (silk) to $7\frac{1}{4}$ d (India rubber) and $3\frac{1}{4}$ d (cotton) was held to be silk within the meaning of the Act. With the exception of articles 2, 3, 12 (b), and 16 not one of the pieces of goods produced in this case has a silk face. But there are several in which the silk forms the the most expensive part of the material employed. The proportionate costs of cotton to silk appear to be one to four and a half. Where there is a larger value of silk than cotton estimated at these rates, we consider the article may fairly be held to fall within the description "silks" &c in the schedule to the Act. Allowing 19 Rupees the value of goods No. 4 (one-eighth silk, seven eighths cotton thread) in addition to the sum allowed by the Subordinate Judge, we see no reason to interfere further with the decree.

The parties respectively will pay and receive proportionate costs of this application.

The Indian Law Reports, Vol XIX (Calcutta) Series,
Page 538.

APPELLATE CIVIL

Before Sir W Omer Petheram, Knight, Chief Justice,
and Mr Justice Hill

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL. (DEFENDANT)

v.

BUDHU NATH PODDAR AND OTHERS (PLAINTIFFS). *

*Indian Railway Act (IV of 1859) S 11—Railway Company liability of—
Carriage of gold and silver etc—Insurance Increased charge for*

1892
March 17

Plaintiffs delivered a box of coins for carriage to the servants of a Railway and declared the nature of the contents at the time of delivery. No demand was made on the part of the Railway for any increased payment for insurance. The box having miscarried—*Held* on the authority of *The Great Northern Railway Company v Belerens*,⁽¹⁾ that the Railway were liable for the loss.

On the 15th March, 1887, the plaintiffs despatched from Dacca station by the Dacca and Mymensing State Railway, a wooden box, containing specie worth Rs 4,291 14 5, addressed to their agent in Calcutta. From the findings of the Lower Courts it appeared that the plaintiffs' gomastahs went to the Booking Office and delivered the box to the Booking Clerk, asking him to weigh it. They informed him that it contained specie of a certain value, and asked what the fare would be for sending it safely to Calcutta. They were told the fare was Rs 9 1, for which sum the box would be safely consigned. They then paid the fare and obtained a receipt. No demand was made on the

* Appeal from Appellate Decree No 753 of 1891 against the decree of T D Beighton Esq District Judge of Dacca, dated the 16th of February 1891, reversing the decree of Babu Krishna Chunder Chatterji Subordinate Judge of Dacca, dated the 12th of August 1889.

(1) 7 H and N, 950

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part of the Railway for any increased charge for insurance. The box having been mislaid or stolen by the way, the Railway Company failed to give delivery to the Calcutta consignee. The plaintiffs sued to recover the sum of Rs 4,291-14-5.

The defendants pleaded that no declaration under Section 11 of the Railway Act (IV of 1879) as to the nature and value of the property had been made by the sender at the time of delivery to the Booking Clerk, nor any insurance fee paid and accepted for the safe conveyance of the same, and that the goods were sent at the owner's risk under an express written agreement signed by the consignor.

The Court of first instance held that the defendant was not liable, the plaintiffs having made no proposal to insure the specie and no insurance having been accepted by a Railway servant specially authorized in that behalf as provided by Section 11 of Act IV of 1879, and accordingly dismissed the suit on this ground.

The lower Appellate Court decreed the plaintiff's appeal principally upon the ground that the benefit of Section 11 was under the circumstances lost to the Railway Company, they having received the goods after declaration of value without demanding an extra charge for insurance and there being no evidence to show that the insurance charge was brought to the notice of the consignees. In support of this view the learned Judge relied on the case of *Behrens v. Great Northern Railway Company*,⁽¹⁾ a decision upon the Statute 11, Geo IV. and 1 Wm IV, C 68, S 1.

The defendant appealed to the High Court.

The Advocate-General (Sir Charles Paul), Baboo Hem Chunder Banerjee, and Baloo Ram Charan Mitter appeared for the appellant.

Mr. J T. Woodroffe and Baboo Lal Mohun Das appeared for the respondents.

The following authorities were referred to. The Indian Railway Act (IV of 1879), Ss 9, 10, 11, Macpherson on Railways, 1880, pp 232-239, and the case of *Jeytu Nund v Panjaub R. Co.*; Chief Court (Lahore), App Civil 91, 1868, there cited; the

(1) 30 L. J. Exch., 153; on appeal see 7 H. & N. 950.

Carriers Act (III of 1865), 11 Geo IV and 1 Wm IV, C 68, S 1, and 17 and 18 Vict, C 31, S 7, *Cogg's v Bernard* (1) and cases there cited *Behrens v Great Northern Railway Company*, (2) cited in *Venlatchella Chetty v South Indian Railway Company* (3)

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The Judgment of the Court (PETHERAM, C J and HILL, J) was delivered by

PETHERAM, C J—This was an action brought by the plaintiffs against the defendant as the owner of a Railway for the loss of a box of coins delivered to them to be carried and accepted by them for that purpose. The defence is that the defendant is protected from liability by reason of S 11 of the Railway Act (IV of 1879), but the fact is that at the time of the delivery of the box to the Railway people they were informed of what the nature of the contents was, and with that information they made no demand for any increased payment for insurance. That seems to me to be within the authority of the case of *The Great Northern Railway Company v Behrens* (4). The head note of that case is, "Where a carrier receives goods of the description mentioned in the 11 Geo IV and 1 Wm IV, C 68, and the person delivering the same has declared their value and nature, he is not bound to tender, but the carrier must demand, the increased charge mentioned in the notice affixed in the office, ware house, or receiving house, whether the goods are there delivered, or to a servant sent to fetch them, and if no such demand is made, the carrier is liable for the loss of, or injury to, the goods, although the increased charge has not been paid." The words of the English Act (5) and the words in this Act (6) are practically the same so far as this matter is concerned, and we think that the reasoning in that case applies to these cases in this country as well as in England and that this appeal must be dismissed with costs.

Appeal dismissed

(1) 1 Sm L O, 9th Ed p 231

(2) 30 L J Exch 153 on appeal see 7 H & N 950

(3) 1 L R 5 Madras 209 (213)

(4) 7 H and N 950

(5) See 11 Geo IV and 1 Wm IV C 68 S 1 and 17 and 18 Vict C 31 S 7

(6) See Act IV of 1879 S 11

The Indian Law Reports, Vol. XIX. (Bombay) Series,
Page 159.

ORIGINAL CIVIL.

*Before Mr. Justice Bayley (Acting Chief Justice)
and Mr. Justice Farran.*

BALARAM HARICHAND AND OTHERS (PLAINTIFFS)

v.

THE SOUTHERN MAHRATTA RAILWAY COMPANY,
LIMITED (DEFENDANTS) *

1894
September,
14

*Railway Company—Liability for loss of goods—Railways Act, IX of
1890, Sec 75*

(1) The words "loss, destruction or deterioration" in Section 75(1) of the Indian Railways Act IX of 1890, include loss caused by the criminal misappropriation of the parcel by a servant of the Railway Administration in charge thereof

(2) Under Section 75 of that Act it is necessary that both value and contents of a parcel (if over Rs 100 in value) should be declared before the Railway Administration can be held liable in respect thereof.

(3) The payment by a consignor of silver coin of the specie rate required by the general regulations of a Railway Company to be paid for the carriage of such goods is not such a payment as satisfies the requirements of Section 75 of the Indian Railways Act, IX of 1890

CASE stated for the opinion of the High Court under Section 69 of the Presidency Small Cause Courts Act (XV of 1882) by C W. CURRY, Chief Judge —

"1. This was a suit brought by the plaintiffs to recover from the defendant Company a sum of Rs 672-14-6, being the value of a parcel of Rs. 700 in cash, consigned by the plaintiffs from

* Suit No. 4019 of 1894.

(1) Section 75 of the Indian Railways Act IX of 1890 —

' 75 (1) When any articles mentioned in the Second Schedule are contained in any parcel or package delivered to a Railway Administration for carriage by railway, and the value of such articles in the parcel or package exceeds one hundred rupees, the Railway Administration shall not be responsible for the loss,

Sangh to Bombay, which the defendant Company failed to deliver, less a sum of Rs 27-1-6 paid to the plaintiff in respect thereof by the Police Superintendent of the defendant Company

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"2 The facts of the case together with the reasons for my decision are fully set out in my judgment delivered on the 4th July, 1894, of which a copy is hereto annexed, and to which for brevity's sake I crave leave to refer

"3 The questions of law which I beg to submit for their Lordships' consideration are as follows —

"(i) Whether the words 'loss, deterioration or destruction of the parcel' contained in Section 75 of the Indian Railways Act, 1890, include loss caused by the criminal misappropriation of the parcel by a servant of the Railway Administration in charge thereof?

"(ii) Whether under Section 75 it is necessary that both value and contents of a parcel (if over Rs 100 in value) should be declared before the Railway Administration can be held liable in respect thereof?

"(iii) Whether the plaintiffs have satisfied the requirements of Section 75 by paying for the parcel in question the special rate required by clause 50 of the defendant Company's rules (p 47 of Exhibit I) to be paid for the carriage of treasure, &c."

destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway and if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk

(ii) When any parcel or package of which the value has been declared under sub section (1) has been lost or destroyed or has deteriorated the compensation recoverable in respect of such loss destruction or deterioration shall not exceed the value so declared and the burden of proving the value so declared to have been the true value shall notwithstanding anything in the declaration, lie on the person claiming the compensation

(iii) A Railway Administration may make it a condition of carrying a parcel declared to contain any article mentioned in the Second Schedule that a railway servant authorised in this behalf has been satisfied by examination or otherwise that the parcel actually contains the article declared to be therein "

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"(iv) Whether the percentage on the value, mentioned in Section 75 which the consignor is, if required by the administration, to pay or engage to pay by way of compensation for increased risk, is equivalent to insurance as prescribed by the Company's bye laws and rules?"

"4 The suit was dismissed by me subject to the opinion of their Lordships on the above questions. The plaintiff has deposited in Court the professional costs Rs 51 awarded against him, together with Rs 50 to meet the costs of reference."

Clause 50 referred to in the third question was as follows. It was contained in the Company's book of rates, and laid down the following regulation with regard to the carriage of specie —

'50 *Specie* —(a) Treasure including specie bullion, gold and silver coin jewellery trinkets, plate &c, shall be carried at the following rates —

| | Pies per maund per mile |
|--|-------------------------|
| Up to 27 maunds | 4½ |
| Above 27 and up to 81 maunds | 2 |
| 81 270 , | 1½ |
| Over 270 maunds | 1 |

Provided that the charge for any quantity shall not be less than that for a smaller quantity according to the above scale

"Insurance Rates

4 *Goods or Parcels* —(a) The rates for insurance of goods parcels &c shall be as follows —

Gold and silver and other excepted articles—2 annas per 100 miles or fraction of 100 miles

Subject to a maximum of one per cent.

(b) The insurance shall in no case be less than two rupees for the whole distance

The judgment of the Chief Judge of the Small Cause Court dismissing the suit was as follows —

JUDGMENT —This is a suit brought by the plaintiffs to recover from the defendant Company a sum of Rs. 672 11 6 the value of a parcel containing 115 700 consigned from Sangli to Bombay by the last plaintiff Ramchand Dayaram which parcel the defendant Company failed to deliver but on account of which they have paid to the plaintiffs Rs. 27 1 6

This is a case of some importance so far as it deals with the responsibility of a Railway Administration under the Indian Railways Act, 1890

The facts, except as to what took place with regard to the declaration of the parcel, are not in dispute. On the 9th June 1891, the plaintiff Ramechandra Dayaram wished to consign a parcel of Rs 700 from Sangh (where his firm is carried on in the name of Raghunath Ramechandra) to Bombay. He accordingly sent the box containing the rupees by his man Ganu Rendala to one Ramechandra Ganesh at Sangh Station. It appears that Ramechandra Ganesh is a mukadam and does consignment business at Sangh for various merchants. Ramechandra Ganesh tendered the parcel to the assistant station master, who asked him what it contained, to which he replied rupees in cash. Ramechandra Ganesh also stated before me that he had told the station master the amount. This was not till he had been recalled and the question put to him by the Court. On consideration of the whole evidence I am inclined to think that nothing at all was said as to the value of the parcel: that no question was put by the assistant station master as to that, but that he merely enquired the contents and made out the various documents as for a parcel of silver coin weighing 10 seers. The charge made was fifteen annas in accordance with the rates prescribed for treasure which charge was paid by Ramechandra Ganesh. The assistant station master, it is true, states that he asked Ramechandra what was the value of the parcel, and that Ramechandra replied that he did not know. I do not feel disposed to accept this statement as accurate. It is improbable that the assistant station master would recollect exactly what was said more than three years ago. I think it more probable that it never occurred to either the assistant station master or Ramechandra to think of the value, and that the parcel was despatched in what appears to have been the usual way, namely, on payment of the higher rates required for treasure but without insurance. The parcel was duly handed to the guard of the train by name Belcher. On the arrival of the train at Poona no such parcel was delivered by the guard, and of course it never reached its destination at Bombay. Some days later in consequence of its non arrival, enquiries were made and it ultimately appeared that the parcel had been stolen by Belcher. He was subsequently put on his trial in respect of the theft, to which he pleaded guilty and was sentenced to a term of imprisonment which he is still undergoing. The Police Superintendent of the defendant Company has returned to the plaintiffs a sum of Rs 271 6, the proceeds of sale of Belcher's effects. It was admitted by the plaintiffs' pleader that the plaintiff considered that he had no remedy against the defendant Company, but in consequence of the decision of STARLING, J., reported at 1 L R, 17 Bom, 723, he was induced to file this suit.

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The defendant Company raised three defences: (i) that the goods [not having been properly declared, the Company are not liable under Section 75 of the Indian Railways Act, 1890, (ii) that, if the goods were so declared,

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the Company took such care of the same as was required by Sections 151 and 152 of the Indian Contract Act, (in) that the parcel did not contain Rs 700

As to the third defence, the statement of Ramchandra Dayaram, that he saw the Rs. 700 put into the box and sent to the station, stands uncontradicted, and I see no reason for supposing that the parcel did not contain the number of rupees alleged

As to the second defence, I think that there can be no doubt whatever that the defendant Company have not discharged the *onus* which lay upon them of showing that they had fulfilled the duties of a bailee as laid down in Section 151 of the Indian Contract Act. So far from proving that they have by the admissions of their own witness Mr Lindsay, who gave his evidence most fairly and candidly, shown that they acted in this matter as, in my opinion no prudent man could possibly have acted. In the first place they engaged this guard Belcher and put him in a position of trust without making any enquiries as to his character and antecedents. Inquiries were then instituted, and although they almost immediately found therefrom that he had been dismissed from the employ of the Indian Midland Railway Company for criminal breach of trust, for which he had suffered six months' imprisonment, though they found that subsequently he had left his employment under the Bengal Nagpur Railway Company under circumstances which, to say the least, imputed to him serious neglect of duty, they nevertheless kept him on and allowed him to remain in a position where the highest integrity was necessary. The only reason for so doing seems to be that they were much in need of guards, and thought that Belcher might be able to clear his character. As these facts were known to the defendant Company in May, 1891, and the theft occurred in June, I am strongly of opinion that in this case the defendant Company cannot shelter themselves under the provisions of the Indian Contract Act by saying that they have acted in this case as a prudent man would have acted

I now come to the consideration of the first issue. This turns upon the interpretation of Section 75 of the Indian Railways Act, 1890. I may, however, first deal with the argument of the plaintiffs' pleader that that Section cannot absolve the defendant Company where the loss, deterioration or destruction has been caused by the criminal act of one of its own servants. It is certainly noteworthy that the words "in any case" which occurred in the corresponding section of the Act of 1874, and which were the subject of judicial interpretation in *I L R, 5 Mad 208 (Venkatachala v South Indian Railway Company)* do not occur in this section, but then again there seems to be nothing in the Act as it at present stands to except the case of the loss, &c., occurring in consequence of negligence or misconduct of the Company's servants, and to say that in such cases

responsibility shall attach. I think, therefore the section must be taken to cover all cases of losses, destruction, deterioration of parcels under whatever circumstances. Nor, I think, can much importance be attached to the argument of Mr Manchashanker that there was no loss of the parcel in this case. It was lost to the defendant Company and to the plaintiffs, and I do not think it can be said not to be so lost because an employe of the Company made away with it.

Then I come to the final question whether these goods were properly declared. Having regard to the evidence I am unable—and I regret that I am unable—to find that they were so declared. The section distinctly stated that the person delivering the package to the administration must cause the “value and contents” to be declared or declare them. Now, here no value was declared. The declaration of the value has become a far more important incident under this new Act, inasmuch as the consignor must give the administration the opportunity of claiming a percentage on the value declared by way of compensation for increased risk. Unless the value be declared, the percentage cannot be ascertained or asked for. I think, therefore, that the declaration of the value must be regarded as a condition precedent to the attaching of the responsibility of the defendant Company. I do not think it would be obligatory on the defendant Company to enquire what the value was. This must it appears, be declared by the sender. In this respect the wording of the Act has been changed, and it seems to me that this case is so far distinguishable from that decided by *STARRING J*. I do not think that under this section it is enough to declare the contents and pay the higher rates as laid down for treasure. The administration must also have the opportunity of demanding a percentage. It is not for me here to rule on the rights of the defendant Company to fix the rates or make bye-laws, but I may mention that bye law 2^c which purports to be an abstract of the Indian Railways Act, 1890, Section 75 gives anything but a correct view of the provisions of that section and the degree of responsibility or exemption from responsibility attaching to the Company under it.

As I said, I regret to come to this conclusion, as it seems to me to be a case where the defendant Company ought if possible to be made responsible. As both parties wish the case to go to the High Court, I make my judgment contingent on the opinion of their Lordships. That judgment is that the suit be dismissed, and Rs 51 certified as costs of the defendant Company.

Lang (Advocate General) for the plaintiffs.—He referred to Act IX of 1890, Section 72, *Hearn v London and South Western Railway Company* (1), *Shipworth v The Great Western Railway Company* (2), Act XVIII of 1854, Section 10, *Secretary of State*

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for *Inha v Budhu Nath*(1), *Venlatachala v. South Indian Railway Company*(2), *Raisett v G I P. Railway Company*(3)

Inrearity for defendants —He referred to the Indian Carriers Act III of 1865, Russell and Bayley on Railways at p 233, *Robinson v The South-Western Railway Company*(4), *Venlatachala v South Indian Railway Company*(2); *Illoor Kristnah v. The G I P Railway Company* (5)

At the conclusion of the argument the Court found as follows —

In the affirmative on the first and second questions referred by the Small Cause Court. In the negative on the third question No answer was given to the fourth question.

Attorneys for the plaintiffs —*Messrs. Matubar & Jamietram*

Attorneys for the defendants —*Messrs. Crawford, Burder & Co*

The Indian Law Reports, Vol. XIX. (Bombay) Series,
Page 165.

ORIGINAL CIVIL.

*Before Mr Justice Bayley (Acting Chief Justice) and
Mr. Justice Parian.*

GREAT INDIAN PENINSULA RAILWAY COMPANY

(ORIGINAL DEFENDANTS), APPELLANTS

v.

RAISETT CHANDMULL AND ANOTHER

(ORIGINAL PLAINTIFFS), RESPONDENTS *

1894
September,
29

Railway Company—Indian Railway Act (IV of 1879), Sec 11—Loss of goods—Liability of Company—Declaration of value and nature of goods and payment of increased charge—Limitation Act (XV of 1877), Sch II, Art 70

In January, 1890, a box containing rupees was delivered by the plaintiffs to the defendant Company in Bombay to be carried to Sangor. From

(1) 11 R. 1, Cal., 579

(3) 1 L. R., 17 Bom., 723

(2) 1 L. R., 5 Mal., 208

(4) 34 L. J. (C. P.) 234

(5) 1 L. R. 2 Mad., 310

* Suit No 636 of 1892; Appeal No 806

the evidence it appeared that the plaintiffs did not intend to insure the box. The box was taken to the booking office at the station and the Parcel Clerk asked what it contained and was told that it contained corn, and he learnt casually that the amount was Rs 6000. The clerk charged Rs 18 1-0 for the box, which was the treasure rate for carriage. This sum was paid and the box was duly despatched but was lost or stolen in the course of transit. The plaintiffs sued to recover the Rs 6000. The defendants contended that, having regard to the provisions of Section 11 of Act IV of 1879, they were not liable, inasmuch as (1) the contents of the box had not been duly disclosed, nor (2) had an increased charge been paid. The plaintiffs obtained a decree in the lower Court. On appeal,

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Held (reversing the decree) that the defendant Company was not liable—

(1) Because there was no sufficient declaration of the value and contents of the box

(2) Because the sum paid by the plaintiffs for the carriage of the box was the ordinary charge for treasure, and was not the increased charge which under Section 11 of Act IV of 1879 should have been paid in order to make the Company liable

(3) *Per* BAYLEY, J. —That the claim of the plaintiffs was one against the defendants for compensation for losing goods and fell within Article 30 of Schedule II of the Limitation Act (XV of 1877) and that as this suit was not brought until after the expiration of two years from the date of the loss it was barred by limitation

APPEAL by the defendants from a decree passed by STARLING, J (1)

The plaintiffs filed this suit in December, 1892, to recover Rs 6,000 from the defendants, being the value of a box delivered to them at Bombay to be carried by them to Saugor, but which had been lost

The plaintiffs alleged that the box in question contained Rs 6,000, and that on the 3rd January, 1890, they delivered it to the defendants, consigned to Raghunathdas Hamirmull at Saugor. The box weighed over two maunds, and was duly sealed and addressed both in English and Marathi.

Saugor is a station on the Indian Midland Railway, about 654 miles from Bombay and is the terminus of a branch line running from Bina Junction on the main line of the said railway midway between Bhopal and Jhansi.

(1) See I L R, 17 Bom, 723.

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The question raised in this appeal was whether, having regard to the provisions of Section 11 of Act IV of 1879,⁽¹⁾ the defendants were liable for the loss of the box. The defendants contended that they were not liable, inasmuch as (1) the contents of the box had not been duly declared, nor (2) had an increased charge been paid.

A book setting forth the rates charged for different classes of goods was put in evidence. These rates were stated under different headings. The following passages from this book were referred to in argument —

'18 *Parcels*—The rates for parcels are —" (Then followed a table setting forth the rates)

"Fish, fruit, vegetables, bazar baskets, meat in small quantities (not more than 20 seers) are charged at half parcels rates at owner's risk subject to a minimum of two annas, &c. &c

"21. *Carriages*" (rates set forth)

"23 *Dogs*' (rates set forth)

"34 *Eggs*—Baskets of eggs are charged at ordinary parcels rate on actual weight.

"35. *Butter*—In baskets booked to Byculla by passenger train from all stations are charged at 3rd class goods rate at owner's risk.

"*Opium*—(a) When more than one ton is sent as one consignment, the whole consignment should be charged for at the parcels rates upon the total aggregate weight and upon each package. These charges are at the owner's risk in each case. For the insurance charges, see clause (c) of this paragraph

| | | | | |
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| * | * | * | * | * |
| "(c) Upon opium | which is carried at the Company's risk at | | | |
| parcels rate by passenger or mixed train the following charge is to be | | | | |
| made for insurance in addition to the charge for conveyance, namely—" | | | | |
| (then follow the charges). | | | | |

(1) Indian Railways Act IV of 1879, Sections 10 and 11 :—

10 Every agreement purporting to limit the obligation or responsibility imposed on a carrier by railway by the Indian Contract Act, 1872, Sections 151 and 161, in the case of loss, destruction or deterioration of, or damage to, property shall, in so far as it purports to limit such obligation or responsibility, be void unless—

(a) it is in writing signed by, or on behalf of, the person sending or delivering such property, and

(b) is otherwise in a form approved by the Governor General in Council

11 When any property mentioned in the second schedule hereto annexed is contained in any parcel or package delivered to a carrier by railway, the carrier

"39 *Treasure, plate, &c*—The charges and arrangements for the conveyance, over the G. I. P. Railway, of treasure, that is, specie, bullion, gold and silver, whether coined or uncoined, and copper coins (whether belonging to the public or to Government), and of plate, jewellery, trinkets, &c, are the following, namely —

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"2 First—For all treasure (except copper coin) the charges, per maund, per mile are at the following scale, namely —

| | |
|-------------------------|----------|
| Up to 27 maunds at | 2½ pies. |
| Above 27 " and up to 51 | 3 " |
| Above 51 " " 270 | 1½ " |
| Over 270 " | 1 pie |

* * * * *

"(5) Treasure which is not insured, whether it is in owner's charge or not, is always carried at owner's risk, and the Company are relieved by Section 11, chapter 3, of the Indian Railways Act, 1879, from all responsibility or risk in regard to such treasure

'40 *Insurance charges*—The following are the rates and rules for the insurance of goods, live-stock, parcels, treasure, &c

'(2) Insurance charges are made in addition to the ordinary charges for the conveyance of treasure parcels, goods, horses, &c, and must always be prepaid. The contents of packages which are insured must always be examined

"(3) The Railway Company is not responsible whether they are insured or not, for damage to horses arising from fright or restiveness, nor for damage to horses or other articles of any kind which may be caused by delays to trains

(4) Station masters are authorized to insure both locally, and through with other railways, articles and animals of any kind (opium and horses only excepted) up to the value of five hundred rupees. Applications for the insurance of articles and animals (except opium and horses) valued at more than five hundred rupees, should be referred to the District Traffic Superintendents at Bombay, Sholapur, Bhussawal, Jabalpur and Nagpur

shall not be liable for loss, destruction or deterioration of, or damage to, such property, unless at the time of delivery the value and nature thereof have been declared by the person sending or delivering the same, and an increased charge for the safe conveyance of the same or an engagement to pay such charge has been accepted by some railway servant specially authorized in this behalf

When any property, of which the value and nature have been declared under this section has been lost, destroyed or damaged or has deteriorated, the compensation recoverable for such loss, destruction, damage or deterioration shall not exceed the value so declared

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and Assistant District Traffic Superintendent, Manmar, the Goods Traffic Inspector, Wari Bandar, the Goods Superintendent, the Passenger Superintendent or to the General Traffic Manager, Victoria Terminus

* * * * *

"Subject to the condition that when the insurance charge for an article valued at more than five thousand rupees comes to less than the charge for five thousand rupees (that is 50 Rs), the latter charge is made. For instance for an article valued at six thousand rupees the charge for insurance will be fifty not thirty rupees."

The evidence given at the hearing as to the despatch of the plaintiff's box of specie from the Byculla Station at Bombay was as follows.—The manager (Motilal Panalal) of the plaintiff's firm said:—

"Another man Buria came and packed them in a box in my presence. The bags were each tied up with string when I received them from the currency office and were not opened on the road to the shop. Each of the bags was weighed before I received them. The bags were not opened before they were packed. When they were packed the lid of the box was nailed down and the box was covered with gunny cloth sewn up, and seals were placed along the seams, and the box addressed to the consignee at Saugor. Then it was taken in a carriage by me and Buria to Byculla Station. On the road to the station the box was not interfered with in any way. We arrived at Byculla Station about 7 P.M., and the box was taken to the booking office, and Buria told the parcel clerk that the box contained three bags containing Rs 2000 each. It was weighed and showed 2 maunds and 5 seers. Then I asked the clerk to take the money for carriage and give me a bill. I paid him what he asked and he gave me a receipt. This is it.

"I paid Rs 18 1 0 which was the amount he asked for. That was all that took place. The box was addressed to Raghunathdas Hamirmul, Saugor. It was written on the gunny with ink.

Buria, who was also examined, said:—

"I and Motilal took the box in a carriage to the Byculla Station where I placed it on the scale in the parcels office. The box and its contents were then in the same condition as when it left the shop. I told the clerk the box contained three bags each containing Rs 2000. This is the man (Fonseca). I told him the box was to go to Saugor and that he should charge what he pleased. The clerk then asked me to shake the box, which I did and the rupees jingled. Afterwards Motilal paid the money and we got a receipt and then returned home. When we arrived at the station, the clerk asked what was in the box. I did not say the box

contained silver (*cloub*). The clerk did not ask if we wished to insure. We had Rs. 20 or 25 with us to pay for the carriage of the box. I do not remember whether it was more than Rs. 25, as Motilal had the money.

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For the defendants the assistant parcel clerk (C. M. Fonseca) at the Byculla Station was examined. He said —

"I recollect the parcel being brought. There were three persons who brought it, Motilal and Baria being two of them. When they brought it, I asked them what it contained and they said '*Cloub rokhia*'. They then said they wanted it despatched to Sangor. I then wrote the receipt, charging the carriage at treasure rate. They gave me some money. I gave them the change and they went away. The parcel was put into the brake by the mukadam with the label on it. It went by the mail train. We do not get a receipt from the mukadam. This is the counterfoil. I had often specie before from these very persons. They never had insured their specie."

The defendants' Traffic Manager (H. Conder) gave evidence as follows —

"There is an ordinary rate for parcels and an ordinary rate for carrying treasure apart from insurance. The insurance is extra."

"We have a working agreement with the Indian Midland Railway Company and we had it in January 1890. The conversation I had with these people was in English. One could speak English, and the other I think could not. My impression is that we spoke of silver all the time, not specie. A larger rate is charged for carriage of treasure at owner's risk than for ordinary parcels at Company's risk. We charge it because it is more valuable and there are many other articles of a valuable nature for which we charge higher than ordinary rates, some being carried at Company's risk and some at owner's. Everything that goes by a passenger train is given into charge of the guard."

"We do not accept treasure at all at any rate lower than the rate charged in this case."

The Traffic Inspector (C. Bedford) stated as follows —

"I have checked the charge of Rs. 18 1 0 in all on this parcel with the weight as described on the counterfoil of the waybill. It is $2\frac{1}{2}$ pies per maund per mile multiplied by 651 miles, the distance from Byculla to Sangor, and multiplied by $2\frac{1}{4}$ maunds, the weight of the parcel. That calculation is in accordance with Rule 39 at p. 66 of No. 10 (coaching tariff book). The insurance which would have been payable, assuming the box to contain Rs. 6,000, would amount to Rs. 52 8 0 according to the rule on p. 68. The ordinary parcel rate for such a box if it did not contain treasure would have been Rs. 9. If the clerk had been told that the box

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contained Rs 6000 he would not have been at liberty to insure it but would have had to apply to the station master and he would have had to apply to the District Traffic Superintendent as provided by Rule 4 at p 68. Uninsured treasure is at owner's risk—rule 3, p 67.

The extra rate is not charged that extra care may be taken. The Railway Company do nothing for it but carry.

STAILING, J., held that the Company were liable, and gave judgment for the plaintiffs (see I L R 17 Bom, 723).

The defendants appealed.

Lang (Advocate General) and Kirkpatrick for the appellants (defendants) — The Company have power within certain limits to prescribe the rates at which they will carry goods on the railway (See *Government v. the* 30th April, 1868). They have accordingly within those limits fixed certain ordinary rates which vary for different kinds of goods, e.g. there is an ordinary charge for parcels generally, an ordinary charge for opium, and an ordinary charge for treasure &c. But where only this ordinary charge is paid for treasure, &c., the Company is expressly exempted from liability by Section 11 of Act IV of 1879. That section fixes the Company with liability only where an "increased charge" is paid. The question here, therefore, is whether the payment made for the plaintiffs' box was the "ordinary charge" or the "increased charge." We contend that it was the former and not the latter, and that therefore, the Company is not liable. Section 11 empowers the Company to make an "increased charge," and the Company by its rules has declared that the increased charge shall be the "insurance charge." There is nothing in the Act to prevent the Company from doing this so long as the charge is within the prescribed limits. The "increased charge" means not an increase upon the ordinary charge for parcels generally, but an increase upon the ordinary charge for treasure. The fact that this latter charge for treasure is higher than the charge for parcels, does not make it an "increased charge." The parcels rate is not the standard by which all other charges are measured. The ordinary "treasure charge" has no relation to the charge for "parcels," and the "increases" spoken of in the section means an increase upon the ordinary treasure charge,

and not (as contended by the plaintiffs) a higher rate than the charge for parcels. The Court below has erred in assuming that the rate prescribed for "parcels" is the standard by which all the other rates are to be measured. The plaintiffs' goods were not insured. There was no application to the officer authorized to insure, and no proper declaration. The suit, moreover, is barred by limitation. The following authorities were cited — Act IV of 1879, Act XVIII of 1854, Section 10, Indian Contract Act IV of 1872, Section 151, Stat 11 Geo IV and 1 Will IV, C 68, *Secretary of State for India v Budlu Nath*(1), *Behrens v Great Northern Railway Company*(2), *Venkatachala v South Indian Railway Company*(3), *Robinson v The South-Western Railway Company*(4), *Great Western Railway Company v McCarthy*(5), *Irranady Flotilla Company v Buganadas*(6), As to limitation, the Limitation Act (XV of 1877), Schedule II, Art 30 and 115, *Mohansing v. Henry Conder*(7), *British India Steam Navigation Company v Hajee Mahomed Esack and Company*(8), *Danmull v British India Steam Navigation Company*(9).

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Interarity and Scott for the respondents (plaintiffs) — The Court below was right in holding the defendants liable as bailees. We adopt the argument in the judgment, which was this — Act IV of 1879, Section 10, imposes upon a Railway Company the liability of a bailee upon all articles carried. But by Section 11 in the case of silver, &c, that liability does not attach unless an "increased charge" is paid. Upon such payment being made, that liability, (*i.e.*, of a bailee) attaches. That increased charge is plainly not an insurance charge, but merely the further charge necessary to impose the ordinary liability of a bailee upon the Company for excepted articles which would rest upon it for other goods without any such increased charge. The Company cannot decline all responsibility for treasure &c, unless it is insured. But it is contended that they have done this by their rules

(1) I L R 19 Calc 538

(2) G H and N 366 7 H and N 950

(3) I L R 5 Mad, 208

(4) 34 L J (C P) 234

(5) 12 Ap Ca, 218

(6) L R, 18 Ind Ap, 121

(7) I L R 7 Bon 478

(8) I L R, 3 Mad 107

(9) I L R 12 Calc, 477

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They contend that in order to make them liable for treasure it must be insured, that is to say, that they have power to require two increased charges, viz, first an higher charge for carriage only, the payment of which however, imposes no liability at all upon them, and, secondly, a further higher charge which imposes upon them the liability of insurers. The Act does not sanction this. It contemplates that without insuring they must carry treasure and other excepted articles as bailees with the liability of bailees just as they carry ordinary goods, but for the excepted articles they may under Section 11 make a further or "increased" charge. We rely on *Chogemul v Commissioners, &c, of the Port of Calcutta* (1), As to limitation, this suit is not barred. All the authorities will be found in *Kalu Ram v The Madras Railway Company* (2) and *Hassaji v The East Indian Railway Company* (3), As to the declaration of these goods, we rely on *Bradbury v Sutton* (4).

BAYLEY C J (ACTING).—The plaintiffs, who carry on business in Bombay as shroffs and commission agents state in their plaint that on or about the 3rd January, 1890, they delivered to the defendants at their station at Byculla a box containing Rs 6,000 to be carried to Saugor a station on the Indian Midland Railway. The box was consigned to one Raghunathdas Haimirnull at Saugor and weighed 2 maunds and 5 seers and was sealed with the plaintiffs seal and addressed to the consignee in the English and Marwadi languages and that on the delivery of the box the plaintiffs were handed the railway receipt dated 3rd January, 1890.

The plaint then states that at the time of the delivery of the box to defendants' servant at Byculla the nature and value thereof were duly declared and an increased charge over and above the charges for ordinary parcels was paid to the defendants for the carriage thereof, and the defendants agreed to carry the same to Saugor. The plaintiffs say that the defendants were bound to take such care of the box and its contents as a prudent man would have taken of his own goods of similar nature and

(1) I L R 18 Cal 427

(2) I L R, 3 Mad, 240

(3) I L R, 5 Mad, 388

(4) 19 W R 800, SC 21 W R 128

value, that the box was not delivered to the consignee at Sangor, but a box weighing 33 to 36 seers only was tendered to him there, the box being in a broken and damaged condition, and the consignee refused to accept the same. And the plaintiffs say that the non delivery of the box was a breach of their contract on the part of the defendants, that correspondence thereupon ensued, and on the 8th May 1890, the defendants' Traffic Manager wrote to the plaintiffs (Exhibit 9) stating that no trace could be discovered of the box containing Rs 6,000 either on the defendants' or on the Indian Midland Railway.

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With regard to the contentions raised by the defendants manager in his letters viz that the defendants are not liable as the box and its contents were not insured, the plaintiffs say that an increased charge for the carriage of the box and its contents on and above the charges for the carriage of ordinary parcels was paid to them, that no intimation was given to them that such increased charge was not for the insurance of the box and its contents that they were always ready and willing and would have paid any further sum had they been informed that such further sum was required for the insurance of the box and its contents and that the contention so raised by the defendants' manager is unsustainable.

The plaint then alleges that all conditions have been fulfilled and all things been done to entitle the plaintiffs to recover the value of the box and its contents from the defendants and interest on the said sum of Rs 6,000, and the plaintiffs pray that the defendants may be ordered to pay as compensation for the said breach of contract Rs 6010 being Rs 6000 the contents of the box delivered by the plaintiffs to defendants to be carried to Sangor and Rs 10 the value of the box, but which have been wholly lost to the plaintiffs, and which were not carried and delivered by the defendants in accordance with their contract with the plaintiffs. There is a prayer also for interest on Rs 6000 at 6 per cent from the 3rd January 1890 to judgment together with the costs of the suit and interest on the judgment at 6 per cent, and for such further and other relief as the nature of the case may require.

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The defendants in their written statement admit that a parcel which was stated by the consignor to contain specie was delivered to the defendants on the 3rd January, 1890, at their Byculla Station to be carried to Sangor. They deny that at the time of the delivery of the parcel the value thereof was declared, or that an increased charge was paid for the carriage thereof, and allege that only the ordinary rate for carriage of treasure at owner's risk calculated on the weight of the parcel was charged, and an increased charge for safe conveyance of the parcel was not charged or paid, nor was any engagement to pay such increased charge entered into with the defendants and they submit that under the provisions of Section 11 of Act IV of 1879, they are not liable to the plaintiffs in respect of the loss of the contents of the parcel.

The defendants then say that if the parcel when delivered to them in fact contained specie, the parcel was lost or stolen while in course of transit to Sangor or at the Sangor Station, or its contents were stolen in such transit or at the Sangor Station, and, earth and iron sledge hammer heads were placed in it instead of the specie, that a parcel afterwards found to contain earth and iron sledge hammer heads, addressed to Raghunath das Hamirmull arrived at Sangor on or about the 5th January, 1890 but the consignee refused to accept it. Diligent search was made for the said specie, but no portion thereof had been found, nor had any parcel, except that containing earth and hammer heads, been found. The defendants submit that they are in no way liable to the plaintiffs for the loss of the said specie and they further submit that the plaintiffs' claim is barred by limitation, and that the suit should be dismissed with costs.

The following issues were framed at the hearing —

1 Whether the parcel delivered to the defendants contained specie to the extent alleged in the plaint?

2 Whether at the time of the delivery to the defendants of the parcel referred to in paragraph 1 of the plaint the value thereof was declared?

3 Whether the charge paid to the defendants for the carriage of the said parcel was not the ordinary rate for the carriage of uninsured treasure?

4 Whether the said parcel was not carried by the defendants at the owner's risk ? C I P Ky

5 Whether the said parcel was not lost or stolen in the course of transit as alleged in paragraph 4 of the written statement ? v
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6 Whether this suit is barred by limitation

7 Whether the plaintiffs are entitled to recover from the defendants the amount claimed or any and what part thereof

The learned Judge in the Court below held that the suit was not barred by limitation, and that the defendants were liable to the plaintiffs and he passed a decree for the plaintiffs for Rs 6000 and by way of damages for the non delivery of the parcel and awarded the plaintiffs interest at 6 per cent on such amount from the 6th January 1890, until judgment (7th August 1893) together with the costs of suit and interest on the judgment at 6 per cent. The defendants appealed against such decree, and the appeal was argued before us on the 20th 21st and 28th September last, when the Court reserved its judgment.

The principal questions argued before us were whether the requirements imposed by Section 11 of Act IV of 1879 upon consignors of treasure and other valuable articles had been complied with by the plaintiffs whether the defendants upon the facts disclosed by the evidence were exempted from all liability in regard to the Rs 6000 which were proved to have been in the parcel when it was delivered to their servants at the Byculia Station, and whether the suit was barred by limitation.

I will first consider whether the value and nature of the property contained in the parcel were duly declared at the Byculia Station as required by Section 11 of "The Indian Railway Act of 1879 (Act IV of 1879), which was the Act in force in January, 1890

Section 11 of that Act enacts that "when any property mentioned in the second schedule hereto annexed is contained in any parcel or package delivered to a carrier by railway, the carrier shall not be liable for loss, destruction or deterioration of or damage to such property unless at the time of delivery the value and nature thereof have been declared by the person sending or

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delivering the same, and an increased charge for the safe conveyance of the same, or an engagement to pay such charge has been accepted by some railway servant specially authorized in this behalf

"When any property, of which the value and nature have been declared under this section, has been lost, destroyed or damaged or has deteriorated, the compensation recoverable for such loss, destruction, damage or deterioration shall not exceed the value so declared" That section is based upon and in part copied from Section 10 of the Indian Railway Act XVIII of 1854

The English Carriers' Act 11 Geo IV and 1 Will IV C. 68, S 1, provided that mail-contractors, stage-coach proprietors or other common carriers by land for hire should not be liable for the loss of certain specified goods above the value of £10, unless at the time of the delivery thereof the value and nature of such article or property shall have been declared by the person sending or delivering the same, and such increased charge as thereafter (i.e., in Section 2) mentioned or an engagement to pay the same be accepted by the person receiving such parcel or package, and in Section 2, such increased charge is stated to be "required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles" Section 3 of the Act states that carriers are, if thereto required, to give receipts acknowledging that the increased rate of charge has been paid, and "sign a receipt for the package or parcel acknowledging the same to have been insured," and if such receipt be not given when required, the carrier "shall not have or be entitled to any benefit or advantage under this Act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge"

In *Bazendale v. Hart*,⁽¹⁾ which was a decision of the Court of Exchequer Chamber upon Section 1 of the English Carriers' Act just cited, it was held that the person who sends or delivers the parcel containing any of the valuable articles mentioned in that

section must take the first step by giving that information as to its contents to the carrier which he alone can give, and if he does not take that first step he could not maintain an action, as Section 1 of that Act said that the carrier shall not be liable unless the declaration is made

The words 'increased charge for the safe conveyance of the same which occur in Section 10 of Act XVIII of 1854 and in Section 11 of Act IV of 1879 were apparently adopted from the passage I have quoted from Section 2 of the English Carriers' Act 11 Geo IV and 1 Will IV, C 68, the words in that section (2 of 11 Geo IV and 1 Will IV, C 68) "as a compensation for the greater risk and care to be taken" being omitted I presume because the framers of the two Indian Railway Acts XVIII of 1854 and IV of 1879, considered that they were unnecessary and that the words they used were sufficiently explicit without them. In my opinion, the three sections are substantially the same, and must be regarded as having the same meaning. It will be noticed that in Section 3 of 11 Geo IV and 1 Will IV C 68, the receipt to be given for the increased rate of charge for the specified articles is to acknowledge the same to have been insured—the increased rate being in fact for the insurance

Was there, then, a sufficient declaration of the value and nature of the contents of the parcel in the present case?

Motilal, the Bombay manager of the plaintiffs' firm, said that he arrived at the Byculla Station about 7 P.M., and the box was taken to the booking office, and Burna, who was with him, told the parcel clerk that the box contained three bags containing Rs 2,000 each, that it was then weighed and showed 2 maunds and 5 seers. Then he said he asked the clerk to take the money for carriage and give him a bill. He paid him what he asked for, Rs 18-1-0, and the clerk gave a receipt.

The receipt was printed so as to show three kinds of charges, viz, "Charges for carriage," "Insurance charge," "Delivery charges."

The Rs 18-1-0 were entered as paid for charges for carriage. Nothing was entered as paid for insurance charge or delivery charges."

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Burra in his evidence said that he told the clerk the box contained three bags each containing Rs. 2,000, that the box was to go to Saugor, and that he should charge what he pleased. The clerk then asked him to shake the box, which he did, and the rupees jingled. Afterwards Motilal paid the money, and having got a receipt they returned home.

In cross examination he stated that he did not say the box contained silver (*chandi*), and that the clerk did not ask if they wished to insure. They had Rs. 20 or Rs. 25 with them.

That neither Motilal nor Burra intended or asked that the box should be insured, is clear. Motilal said that before 1890 the plaintiffs' firm were sending specie up country two or four times a month. He did not insure the box, but simply asked the clerk (Fonseca) to charge what was right, and whatever he asked for he paid. He did not know what insurance of goods by the Railway Company was. That he did not then (on the 3rd January, 1890) know that insurance meant the payment of an extra charge. He had since come to know what insurance was, and when he afterwards asked a European police officer what it was, and on being told by him, he said the box was not insured.

Fonseca, who in January, 1890, was assistant booking clerk at the Byculla Station, said he recollected the parcel being brought by three persons, Motilal and Burra being two of them. When they brought it he asked them what it contained, and they said "*chandi rokra*," and that they wanted it despatched to Saugor. He then wrote the receipt charging the carriage at treasure rate. They gave him some money, he gave them the change, and they went away. He had had often before specie from these very persons and that they had never insured it. He knew that *chandi rola* meant rupees. This was a heavy parcel, and he knew it contained a large quantity of rupees. Nobody told him. He did not ask how much there was in it. He heard them talking about Rs. 6,000 in the box. They did not say anything to him, and they never told him there were Rs. 6,000 in the box. One of them asked him to take from him whatever money he required for the box.

There is thus a conflict of evidence between Motilal and Burra on the one hand and Fonseca on the other as to what was said by

the former at the time the box was delivered to Fonseca, and having regard to the previous practice of the plaintiffs of not insuring when conveying specie to be carried by the defendants and to the probabilities of the case, I think that Fonseca's account of what passed is most likely to be the correct one

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Mr Conder, Traffic Manager of the G I P Railway, said that there was an ordinary rate for parcels and an ordinary rate for carrying treasure apart from insurance, the insurance being extra, a larger rate being charged for carriage of treasure at owner's risk than of ordinary parcels at the Company's risk. They charge it because it is more valuable, and that the Company do not in consideration of the larger payment engage to look more carefully after a parcel for which it is paid than for any other, unless it is insured. The Company do not accept treasure at all at any rate lower than the rate charged in this case

In the notification published in the *Bombay Government Gazette* of 30th April 1868 (Exhibit No 8) certain maximum rates for goods for the Bombay railways sanctioned by Government were published for general information. Among them the maximum rate for parcels for every 50 miles beyond the first 50 is stated to be 3 pies per cewer, and for insurance rates the maximum rate for most precious articles is to be 3 per cent

Mr Bedford, Traffic Inspector of the Great Indian Peninsula Railway Company, stated that he had checked the charge of Rs 18-1 0 on the parcel in question with the weight as described in the counterfoil of the waybill, and it came to $2\frac{1}{2}$ pies per maund per mile, multiplied by 651 miles, the distance from Byculla to Saugor, and multiplied by $2\frac{1}{2}$ maunds, the weight of the parcel that such calculation was in accordance with Rule 39 at page 66 of Exhibit No 10, being the Great Indian Peninsula Railway Time and Fare Tables and Coaching Tariff. He said that the ordinary parcel rate for such a box if it did not contain treasure would have been Rs 9, and that the insurance which would have been payable, assuming the box to contain Rs 6,000 would amount to Rs 52 8 0 according to the rule on page 68 of Exhibit No 10. He further stated that if the clerk had been told that the box contained Rs 6,000 he would not have been at

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liberty to insure it, but would have had to apply to the station master, and he would have had to apply to the District Traffic Superintendent as provided by Rule 4 at page 68 of Exhibit No 10, and that uninsured treasure was carried at owner's risk—Rule 5, p 67, which rule states that "treasure which is not insured whether it is in owner's charge or not is always carried at owner's risk, and the Company are relieved by Section 11, Chapter III of the Indian Railway Act, 1879, from all responsibility or risk in regard to such treasure"

Two cases relied upon by the learned Advocate General on behalf of the defendants may here be referred to. In *Robinson v The South Western Railway Company*(1) decided in 1865, upon Section 7 of the Railway and Canal Traffic Act, 1854, (17 and 18 Vict, C 31), ERLE, C J, said "A declaration would be within the statute if so made as to create a liability on the part of the Company to pay the higher value, as well as a liability on the part of the sender to pay the insurance thereon, but here the sender says he does not intend to insure, but he mentions the value of the horse, and he calls upon the Company to take the animal. I cannot find in that a declaration within the statute" (page 238)

BYLES, J, said "The declaration must come from the sender, and must be so expressed as to be understood by the carrier as such, and, as I think, understood also as the foundation of a contract." SMITH, J, said "I agree with the rest of the Court that the declaration to be within the statute must be made with the intention that it should so operate as to entitle the Company to charge the higher rate"

In *Venkatachala v South Indian Railway Company*(2) it was held by TURNER, C J, and KIRKPATRICK, J, that the conditions of Section 10 of the Indian Railway Act XVIII of 1854 are not fulfilled by the sender merely giving an account of the quantity and description of the goods delivered for carriage when required to do so by the booking clerk. In that case a box containing seven bars of silver valued at Rs 4296 10 9 had been delivered to the Railway Company at Trichinopoly Station for carriage to

(1) 34 L J., (C P) 231

(2) I L R 5 Mad 203

Bombay And it was held that to establish the liability of the Railway Company in the case of excepted articles the declaration required by Section 10 must be made in such a manner as to intimate that the sender invites the Railway Company to undertake the special risk and is willing to pay the increased charge

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In the present case the plaintiffs' man Bura says that he told Fonseca that the box contained three bags each containing Rs 2,000 (a statement which Fonseca positively denies) that the box was to go to Saugor, and that he should charge what he pleased Motilal, too, says that he simply asked the clerk to charge what was right, and that Fonseca did not ask him whether he wished to insure, that he (Motilal) did not insure the box in question, and in fact did not then know what insurance of goods by the Railway Company was I am, therefore, of opinion that there was no sufficient declaration of the value and nature of the contents of the parcel belonging to the plaintiffs, and that the defendants are consequently protected by the provisions of Section 11 of the Indian Railway Act No IV of 1879

It was contended before us that the "increased charge for the safe conveyance" mentioned in that section had been paid, and, moreover, that the Railway Company were liable either as common carriers or as bailees under the Indian Contract Act (No IX of 1872) I think, however, that the additional rate charged and paid for the plaintiffs box, viz Rs 18 10 and not the ordinary parcel rate of Rs 9 was not 'an increased charge for the safe conveyance of the same' within the meaning of Section 11 of Act IV of 1879, but only the ordinary charge for treasure As already pointed out, the sum charged was within the maximum rate for parcels sanctioned by Government, and Mr Conder stated the Railway Company do not accept treasure at all at any rate lower than the rate charged in this case

It may be useful having regard to the conflicting decisions of the High Courts of Calcutta and Bombay as to the responsibility of carriers by railways in India reported in I L R, 3 Bom, 109 (*Kuerji v G I P Railway Company*) and I L R, 10 Cal, 166 (*Moothora Kant v The India General Steam Navigation Co*) and to the question raised by the 6th issue in the Court below, as to

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whether the suit is barred by the law of limitation, to make a few remarks here upon the nature of the obligation of common carriers to carry goods with safety

In *Riley v Horne*(1), Best, C J, in delivering the judgment of the Court elaborately examined the policy and foundation of the rule, and said "To give due security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer the carrier is only relieved by two things viz, the act of God and the king's enemies"

Fifty years after that decision, viz, in 1878, the case of *Berghem v The Great Eastern Railway Company*(2) was decided by the Court of Appeal (Bramwell, Brett and Cotton L, JJ) and the Court expressed itself thus — "He' (the common carrier) "is considered as having contracted to insure the safe delivery of, that is to say, as having contracted to carry and deliver safely and securely (the act of God and of the Queen's enemies alone excepted) the goods of which he as common carrier is bailee. The reason why the law implied that this is his contract, was that the carrier had by himself or his servants during the bailment at times and in places where he could not even be supervised, the exclusive control and care of the goods intrusted to him by the owner, and consequently, to prevent fraud, the law imposed on those who contracted to carry goods as common carriers the obligation also to undertake to insure their safety. The Court then quote a passage from Lord Chief Justice Holt's judgment in *Coggan v Bernard*(3) in which it is said 'And this is a politic establishment contrived by the policy of the law for the safety of all persons the necessity of whose affairs obliges them to trust these sorts of persons that they may be safe in their ways of dealing. Later on the Court calls it "a contract of insurance, which the law had originally implied, because the carrier had the exclusive or, at least, absolute control and care of the goods"

(1) 5 Bngl 217

(2) 3 CPD 221

(3) Lord Raynoud 918 and 1 Sm th s L C, 8th Ed 1 199

The same view was taken by the High Court in Calcutta in a case which came before a Full Bench of five Judges in 1883 (*Moothora Kant v The India General Steam Navigation Co* (1)) when the Bombay decision *Auery v G I P Railway Co* (2) was carefully considered and dissented from GARTH, C J, whilst discussing the duties and responsibilities of common carriers by the law of England said (p 182) "And it is important to note that this duty was imposed upon him irrespective of any contract. It was imposed upon him by the custom of the realm, for the benefit of the public, by reason of the important trust which he undertook. (See the observations of Lord HOLT in *Coggs v. Bernard*, 1 Smith's L C., 199, 8th edition.)"

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Mr Scott in the course of his argument before us on behalf of the plaintiffs cited a passage from Bullen and Leake's work on Pleading with the object of showing that actions against common carriers were founded on contract, or, as they were formerly called, actions *ex contractu*, and were not actions founded on tort. But Sir RICHARD GARTH, C. J., in his judgment already cited says (p 186) —

"It must be borne in mind that the law and liabilities of common carriers are, as I said before, founded on custom, irrespective of contract. A common carrier is and always has been liable to be sued for any breach of this common law duty in an action of tort. The Bombay High Court, while fully admitting that the English law on this subject prevails in the Indian Mofussil, seems to have lost sight of the fact that this law is founded upon a common law duty apart from contract. It is true that when the employment of a common carrier has commenced, the law implies a contract on his part to perform the duty imposed upon him, and consequently he is liable to be sued in an action either of tort or contract, according to the convenience or advantage of the plaintiff in each suit. (See Bullen and Leake on Pleading, pp 101 and 243) "

In the well-known treatise by the late Mr. Selwyn on the "Law of Nisi Prius," first published in the years 1806, 1807, and 1808, (I cite from the 13th edition, 1869), under the title

(1) 1 L R 10 Calc, 166

(2) 1 L R, 3 Rom, 109

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"Carriers," it is stated that "Formerly the declaration in actions against common carriers stated their employment as common carriers, their liability by the custom of the realm and delivery to and acceptance by the defendants of the goods to be carried, for a reasonable hire or reward, concluding with the loss or damage to the goods, but it afterwards became usual to declare in *assumpsit*, and not to state either the employment of the defendants as common carriers, or the custom of the realm as to their liability. This form of declaration has prevailed since the decision of *Dale v Hall*, Michaelmas Term, 1750, in which it was settled, that it did not make any difference whether the plaintiff declared on the custom, or more generally in *assumpsit* for by stating that the defendant carried for hire it would appear that the defendant was a common carrier, and then the law would raise the promise from the nature of the contract"—Selwyn's *Nisi Prius* (13th Ed.), Vol I, pp 362 363

I may here remark that in the case I have first cited on this point *Riley v Horne*,⁽¹⁾ the action was an action on the case against the defendants as common carriers for negligence in losing goods entrusted to them to be safely carried by them, an action *in delicto*

In 1891, in the case of the *Irranady Flotilla Company v Bugwandass*,⁽²⁾ where the Judicial Committee of the Privy Council decided in favour of the view of the High Court of Calcutta, viz., that the liability of common carriers in India was not affected by the Indian Contract Act, 1872 (I L R, 10 Calc, 166) and against that of the High Court of Bombay (I L R, 3 Bom, 109) their Lordships stated the nature of the obligation in the same way that GARTH, C J, had done, and said "The written law is untouched by the Act of 1872" (The Indian Contract Act, 1872) "The unwritten law was hardly within the scope of an Act intended to define and amend the law relating to contracts. The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward" "A breach of this duty," says DALLAS, C J, in

(1) 5 Bingham, 217

(2) L R, 181 A 121

Britherlon v Hood,⁽¹⁾ "is a breach of the law, and for this breach an action lies founded on the common law, which action wants not the aid of a contract to support it"

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At the end of their judgment, then Lordships say that they are led to the conclusion that the Indian Contract Act of 1872 was not intended to deal with the law relating to common carriers, and that notwithstanding the generality of some expressions in the chapter on bailments they think that common carriers are not within the Act (p 101)

I think that the plaintiffs' contentions above referred to are unfounded, as I consider that the liability of the Railway Company as common carriers was taken away by the provisions of Section 11 of the Railway Act IV of 1879, the plaintiffs at the time of delivery of the very valuable property to the defendants' booking clerk not having declared the value and nature thereof as required by that section, and that the Railway Company cannot be held to be liable as bailees under the Indian Contract Act—the Judicial Committee of the Privy Council in the *Irrawaddy Flotilla Company v Bugwandari* (2) having held, as had (as I have pointed out) previously been decided in several cases in England that the obligation imposed by law on common carriers has nothing to do with contract in its origin, it being a duty cast upon them by reason of their exercising a public employment for reward, and consequently, that the liability of Indian Railway Companies as common carriers was not affected by the Indian Contract Act, 1872 As their Lordships say (p 129) "There are several considerations, not all of equal weight, but all pointing in the same direction, which lead irresistibly to the conclusion that the Act of 1872" (the Indian Contract Act) "was not intended to alter the law applicable to common carriers"

Lastly, as to the question of limitation The learned Judge in the Division Court said that there are a number of cases cited at page 132 of *Starling's Limitation Act, 1877*, which show that Article 30 in the 2nd Schedule of that Act does not apply to a case like the present, and that this suit having been brought

(1) 3 B and B 6.

(2) L R 18 I A 121

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"Carriers," it is stated that "Formerly the declaration in actions against common carriers stated their employment as common carriers, their liability by the custom of the realm and delivery to and acceptance by the defendants of the goods to be carried, for a reasonable hire or reward, concluding with the loss or damage to the goods, but it afterwards became usual to declare in *assumpsit*, and not to state either the employment of the defendants as common carriers, or the custom of the realm as to their liability. This form of declaration has prevailed since the decision of *Dale v Hall*, Michaelmas Term, 1750, in which it was settled, that it did not make any difference whether the plaintiff declared on the custom, or more generally in *assumpsit*, for by stating that the defendant carried for hire it would appear that the defendant was a common carrier, and then the law would raise the promise from the nature of the contract"—Selwyn's *Nisi Prius* (13th Ed.), Vol I, pp 362 363

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(1) 5 Bingham, 217

(2) L R 18 I A 121

Britherton v Hood, (1) "is a breach of the law, and for this breach an action lies founded on the common law, which action wants not the aid of a contract to support it"

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At the end of their judgment, their Lordships say that they are led to the conclusion that the Indian Contract Act of 1872 was not intended to deal with the law relating to common carriers, and that notwithstanding the generality of some expressions in the chapter on bailments they think that common carriers are not within the Act (p 131)

I think that the plaintiffs' contentions above referred to are unfounded, as I consider that the liability of the Railway Company as common carriers was taken away by the provisions of Section 11 of the Railway Act IV of 1879, the plaintiffs at the time of delivery of the very valuable property to the defendants' booking clerk not having declared the value and nature thereof as required by that section, and that the Railway Company cannot be held to be liable as bailees under the Indian Contract Act—the Judicial Committee of the Privy Council in the *Irrawaddy Flotilla Company v Bugwandass* (2) having held, as had (as I have pointed out) previously been decided in several cases in England that the obligation imposed by law on common carriers has nothing to do with contract in its origin, it being a duty cast upon them by reason of their exercising a public employment for reward, and consequently, that the liability of Indian Railway Companies as common carriers was not affected by the Indian Contract Act, 1872 As their Lordships say (p 129) "There are several considerations, not all of equal weight, but all pointing in the same direction, which lead irresistibly to the conclusion that the Act of 1872 ' (the Indian Contract Act) ' was not intended to alter the law applicable to common carriers"

Lastly, as to the question of limitation The learned Judge in the Division Court said that there are a number of cases cited at page 132 of Stirling's Limitation Act, 1877, which show that Article 30 in the 2nd Schedule of that Act does not apply to a case like the present, and that this suit having been brought

(1) 3 B and B 6.

(2) L R 18 I A 121

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 "Against a carrier for compensation for losing or injuring goods,
 two years from the date when the loss or injury occurs"
 Article 115, which gives a limit of three years, applies to suits
 "for compensation for the breach of any contract, express or
 implied, not in writing registered, and not herein specially
 provided for"

The only Bombay decision referred to at page 132 of the work just cited is *Mohansing v Henry Conder*,⁽¹⁾ as to which the learned author says that, if the defendant wishes to avail himself of the benefit of Article 30 on the ground that goods have been lost, it is incumbent on him to prove the loss. In that case the G I P. Railway Company did not, so far as the evidence showed, announce their inability to deliver the missing bags of wheat on account of having lost them either in transit or by misdelivery to some one not entitled. On the other hand, they took from plaintiff's agent receipts for the full number of bags as arrived at their destination and gave gate passes for delivery at Sholapur, the place to which they were to be carried.

In the present case the defendants' Traffic Manager by his letter of 8th May, 1890, to plaintiffs' solicitors (Exhibit G) intimates the loss of the parcel, and that although diligent inquiries have been made by the defendant's officers and by the police, no trace of the parcel can be found, and that a like result has followed the inquiries made on the Indian Midland Railway. That decision does not appear to me to be any authority for holding that Article 30 is not applicable to the present case.

The other cases cited at page 132 in *Starling on Limitation* to the effect that where there is a contract between the plaintiff and the carrier, Article 30 does not apply, were decided in Calcutta and Madras, and, therefore, have no binding effect in this Court. They are doubtless entitled to respectful consideration, but no further. Each of the four High Courts in India frequently dissents from the views taken by one or more of the other High Courts as they are perfectly justified in doing.

One of the Madras cases cited at page 132 of the work on Limitation, *Kalu Ram v The Madras Railway Co* (1) seems rather to favour the view that Article 30 applies in a case like the present. There Mr Justice KINNELISLEY who tried the case said "As it has not been shown that there was any contract between the plaintiff and defendants I must hold, following the decision in this Court in *Haji Malomed Isocel v British India Steam Navigation Company*, (2) that the suit, so far as it is founded not on contract but upon the alleged negligence or want of proper care on the part of the defendants, is barred by the Limitation Act, Article 30 of Schedule II"

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There being, in my opinion, no decision of the Bombay High Court applicable to the present case and having regard to the real nature of the suit, and the evidence given in the Court below, I am of opinion that the claim of the plaintiffs is one against the defendants as carriers for compensation for losing goods, and falls within Article 30, and consequently that as the present suit was not brought until December, 1892, two years and eleven months after the loss, it is barred by limitation.

For these reasons I am of opinion that the appeal must be allowed, and the decree reversed. The plaintiffs (respondents) to pay the defendants (appellants) their costs of suit throughout and also pay the appellants their costs of the appeal.

FAIRMAN, J. —The learned Judge of the Division Court has held that the suit is not barred by limitation, applying to the plaintiffs' claim the limitation prescribed by Article 115, and not that prescribed by Article 30 of the Limitation Act. Had the question been *res integra* I should have felt much difficulty in concurring in that view. The authorities cited by the Chief Justice show that a common carrier, who failed to deliver a parcel committed to him for carriage, could be sued either in tort for negligence in carrying out his common law duty, or in contract for breach of his contract, express or implied, to deliver in accordance with his instructions. I refer particularly to *Bretherton v Wood*, (3) cited in *Irrawaddy Flotilla Company v*

(1) I L R, 3 Mad 240

(2) I L R 3 Mad 107

(3) 3 B and B 62

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Bugandas (1) The Legislature must be credited with this knowledge when framing the Limitation Act, and must, I incline to think, have intended when in general terms limiting the responsibility of carriers to make compensation for loss of goods to two years after the loss to make that time the outside period within which they could be sued, whether the claim was laid in tort or is arising out of contract. Otherwise they would have used less broad and comprehensive words to express their meaning and would hardly have employed language which indisputably is wide enough to cover a claim for compensation for loss of goods based on the breach of an express or implied contract of the carrier to carry safely.

I incline to think that the Courts would have better fulfilled the intention of the Legislature by treating all claims against a carrier which could fairly be deemed to arise out of the loss of or injury to, goods (and, liberally interpreted, almost all claims against a carrier, unless he were actually in possession of the goods uninjured would be embraced within one or other of these two categories) as coming within the purview of Articles 30 and 31 than by confining the general words of the former Article to a claim for compensation for loss of goods arising otherwise than out of contract. The position of the article in the schedule is to my mind a most fallacious guide. In Part IV of the schedule claims arising out of contract and claims arising out of tort are mixed together, and certainly a claim under Article 31 is much more naturally based upon contract than upon tort.

Having regard, however, to the current of decisions in the other High Courts I feel constrained to say the learned Judge below could not have decided differently upon this branch of the case, and I think that now it is rather the part of the Legislature to make its meaning more clear if it has been misinterpreted, than for us to run counter to the authorities in the other High Courts, upon the strength of which parties may have forborne to sue within the two years limit, even though we may not be convinced of the reasoning upon which these authorities are

based. However, it is not necessary for me to express a final opinion upon this point, as I agree with the Chief Justice on the other branch of the case.

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Turning to the merits I proceed to consider whether the Division Court is correct in holding that the plaintiffs have paid an "increased charge" for the safe conveyance of their box of specie within the meaning of Section 11 of the Indian Railway Act of 1879. In my opinion they have not.

In the Small Cause Court reference in *Balaram v S M Railway Company*(1) we have already held that a consignee, who pays the treasure rate charged by the Railway Administration for the conveyance of treasure, does not in doing so pay "a percentage on the value" within the meaning of the Indian Railways Act, 1890, Section 70, "by way of compensation for increased risk." The wording of that section is different from that of Section 11 of the Act which we are now considering and that ruling does not, therefore, decide the present case. Now the Act, beyond providing that a copy of the tariff of charges shall be exhibited at each station (Section 9), does not deal with the charges which the defendant Company may levy. That subject is otherwise provided for. The agreement of the 17th August, 1842, between the defendant Company and the East India Company provides that the defendants shall (*inter alia*) be common carriers of goods and shall charge such fares for the carriage of goods as shall be approved by the East India Company (Exhibit 4). The power to give the requisite approval is now vested in the Government of Bombay (Exhibit 6). Government regulate the charge by fixing a maximum rate for the carriage of parcels (*inter alia*) and a maximum insurance rate. So long as the Company keep within these maxima they are at liberty to fix the rate for carriage and insurance. The Company acting on the liberty thus afforded to them have not fixed one uniform rate for all parcels, but have adopted a classification of parcels under which they are charged for according to their contents. Thus there is a charge for bread, ice, leaves, opium, treasure, and various other articles specially laid down, and

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in addition there is a comprehensive charge which includes all articles not specifically provided for. Some of these special charges are above and some below the comprehensive charge for ordinary parcels, but all are within the maximum charge allowed by Government, and are, therefore, charges which the Company may legitimately levy for the mere carriage of parcels. In determining these classified charges the Company no doubt take various circumstances into consideration, fixing the rate low in some instances in order to foster the traffic, and high in other instances where they are sure of the traffic and where they feel the traffic is able to bear such high rate without diminishing its volume. In this way the Company has fixed a low rate for leaves and a high rate for treasure, but each rate alike is the ordinary rate for the carriage of goods of that particular class. This is certainly, as I have shown, within their powers. I fail, therefore entirely to see how in paying this ordinary rate for treasure the consignee pays "an increased charge for the safe conveyance of the same." He pays the ordinary charge for the carriage, and no more and no less.

In addition to this ordinary rate the Company make an extra charge for what they call "insurance" in the case of the valuable articles specified in the schedule to Section 11 of the Act. About this there can be no mistake. In their tariff of charges they say in so many words (page 67 of the Company's book of rates) referring to Section 11 of the Act that they are not responsible for loss * * * of gold, silver, &c, "unless an increased charge for the safe conveyance of the same is paid." This can mean nothing else than an increased charge over the ordinary charge for the carriage of the particular article specified in the tariff. Article 40, clause 2 at page 68 of the Company's book of rates is still more clear. "Insurance charges are in all cases made in addition to the ordinary charges for the conveyance of treasure * * * and must always be prepaid. The contents of packages which are insured must always be examined."

Now this 'increased charge' is not levied on the weight of the article carried, but on its value. In this case also the Government have given the Company a free hand below a certain

maximum The maximum allowed by Government is 3 per cent The Company charge a percentage varying from $\frac{1}{2}$ to 1 per cent The confusion in the present case has probably arisen from the use of the word "insurance" in the tariff of charges The use of the word has arisen in this way A common carrier in England is often spoken of as an "insurer, not because he "insures" in the ordinary acceptation of the word, but because he warrants or contracts that he will (with specified exceptions) carry and deliver the goods entrusted to him safely—*Berghien v The Great Eastern Railway Company* (1) In the case of articles of small bulk and great value (being above the value of £10) the Carriers' Act (11 Geo IV and 1 Will IV, C 68) enacted that a carrier should not be liable for their loss (not arising from the felonious act of his servant) unless an increased rate of charge was paid over and above the ordinary rate and the third section of the Act referred to parcels upon which increased rate was paid as "insured" Hence Judges in England have referred to the payment of such increased charge as an "insurance" see for example, the language of Channell and Wilde, B B, in *Behrens v Great Northern Railway Co*, (2) and the word thus became the usual term to denote goods upon which the increased rate was paid In the present case the increased rate was not paid, "and in my opinion the plaintiffs have not, therefore paid 'an increased charge' for the safe conveyance of their specie within the meaning of Section 11 of the Act

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The more difficult question hence arises, whether, inasmuch as the Company did not call upon the plaintiffs to pay such increased charge (which I shall now refer to as 'insurance'), they are liable as if the same had been paid In order to decide that question it is in the first case necessary to determine what actually took place before and at the time when the box in question was received by the Company for carriage from Byculia to Saugor It appears from the plaintiffs' letter of the 27th May, 1890 that their practice (as well as that of other native merchants) was to send specie by railway uninsured The plaintiff writes that the railway fare at the rate chargeable for

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silver was paid for the parcel, and adds "Relying on the strict supervision and just dealings of the railway authorities valuable parcels without being insured are generally transmitted by railways but hardly such a case as mine happens" A person who described himself as coming on behalf of the plaintiff replied to Mr Conder, in answer to the question why the plaintiffs had not insured "It was not worth while They are constantly sending parcels of large value all over the country and they never lost anything" C M Fonseca, the assistant parcel clerk who booked the box in question said that he had often specie from the servants of the plaintiffs who handed him the box and that they never insured Motilal Panalal says that Buria, who went with him with the box to the station, told the parcel clerk that it contained three bags of Rs 2,000 each It was weighed at 2 muns (maunds) and 5 seers, and he (Motilal) asked the clerk to take the money and give him the bill He paid what he was asked (Rs 18 1 0) and received a receipt The insurance would have been Rs 50 extra The man brought with him Rs 20 or 30 only to pay the fare He did not, he says, insure the box nor did Fonseca ask him whether he wished to insure Buria says pretty much the same adding that he shook the box and rupees jingled Fonseca says that he was told the box contained '*Chandi rohra*' and did not ask and was not told its value, but admits that he heard the men say that there were Rs 6 000 in the box

From this evidence the only legitimate inference which can be drawn is, I think, that the men took the box to the station without the slightest intention of insuring it, and that if the number of rupees which it contained was mentioned in the booking office it was not so mentioned that the clerk might have the opportunity of charging insurance if he pleased, but only in the course of casual conversation

Now the law in England under the Carriers Act has been, since the decision in *Behren v Great Northern Railway Company*(1) well ascertained It is this —If the sender declares the nature and value of the articles and the carrier has the proper

notice affixed in his office, he may demand an extra charge according to such notice. If he neglects to demand it, the sender is not bound to tender it, and the carrier receiving the goods is liable for their safe conveyance. The provisions of the Carriers' Act are wrapped up in many words and are very involved. The Exchequer Chamber in *Behrens v Great Northern Railway Company*⁽¹⁾ had doubts as to their meaning, but by reading the first and the second sections together arrived at the true interpretation of the statute. [See the judgment of all the Judges in the Court of Exchequer (*supra*)].

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The general law being thus settled, the question as to what is a sufficient declaration of the contents and value came to be considered, and it was decided that it need not be an express and formal declaration, and such statements as the following were held sufficient—"Take care. These are pictures of the value of £ 100"—*Behrens v Great Northern Railway Company (supra)*. "There are about £ 100 worth of goods in the parcel" which were described as 'silks'—*Bradbury v Suttan*⁽²⁾. In fact, any declaration of the sender made at the time of delivery calculated to inform the carrier of the nature and value of the articles, so as to enable him to demand the increased charge, was held sufficient. Now it is the second section of the Carriers' Act which enables the carrier to demand the increased rate of charge. Section 1 relates to the duty of the sender of the goods. Sections 2 and 3 relate to the duty of the carrier and his power to make an increased charge. In the Railway Act of 1879, as was the case with the Railway Act of 1854, Sections 2 and 3 of the Carriers' Act are not embodied. Section 1 of the Carriers' Act is enacted as Section 10 of the Act of 1854 and as Section 11 of the Act of 1879. These are in substance the same and differ from Section 1 of the Carriers' Act principally in this that whereas the declaration of value could be made to any person receiving the parcel under the Carriers' Act and an engagement might be accepted by him, the Indian Acts provide that the increased charge shall be accepted by some railway servants specially authorized in this behalf. It does not seem to be necessary that the

(1) 6 H and N 366

(2) 19 W R, 800 21 B, 123

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declaration should be made to the latter. Section 11 after providing for the general non liability of the Company for articles of value runs thus — ‘ Unless at the time of delivery the value and nature thereof have been declared by the person sending or delivering the same, and an increased charge for the safe conveyance of the same or an engagement to pay such charge has been accepted by some railway servant specially authorized in this behalf. It appears to me that reading that section alone and without the addition of a section similar to Section 2 of the Carriers Act, which the Courts in England had to read in combination with the first section, it implies that the sender of the goods must make the declaration in such a form as to invite the Company to make the insurance charge, and that otherwise the Company are not entitled to demand it. This was the view taken by the High Court of Madras in *Tenkatachala v South Indian Railway Company* (1). That case, I think, in substance governs the case before us. It may be that (as was there suggested) the Company may if they please waive the increased charge, but if it is waived it must be on the declaration of value and the invitation to insure being brought to the notice of some duly authorized servant of the company who alone is entitled to bind the Company in such matters.

The station masters are under Article 40 of the Tariff Charges, as a general rule, authorized to insure but in case of insurance above Rs 5,000 applications for insurance are to be referred to various specified officers. I do not say that if an offer to insure were made to the parcels clerk and he received the insurance money for the Company without referring the matter to the station master, or if, in the case of large insurance the latter neglected to refer the matter to the higher authorities and received the insurance, the Company would not be bound, but I am clearly of opinion that a mere casual conversation as to the contents of the parcel taking place before the parcel clerk, through which he becomes acquainted with its value, does not bind the Company to make good its contents or operate as an increased charge for the safe conveyance of the same or in engagement

to pay such charge accepted by a railway servant specially authorized in this behalf. To hold otherwise would be in effect to deprive Section 11 of the Railway Act of all force. The circumstances here are similar to those in *Robinson v The South-Western Railway Company*(1), a case decided under 17 and 18 Vict., C. 31, S. 7, which is in the same line as the Carriers Act. The present is, therefore, in a *fortiori* case to that.

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I have given my reasons at length in this case, as the conclusion I have arrived at differs from that of the Calcutta High Court Bench in the case of *Secretary of State for India v Budhu Nath*(2), composed of Judges for whose opinion I entertain sincere respect, unless indeed it be considered that that case was decided upon the special facts stated in the case which the judgment does not refer to. I do not consider that it makes any difference in the construction of Section 11 whether we regard the decision in *Kutery v G I P Railway Company*(3) as overruled by the *Irracady Fl Millia Company v Bugundas*(4) and *Clogmull v The Commissioners of Calcutta*(5) or as still in force in this Court.

I am, therefore, of opinion that the Company are protected in this case by the provisions of Section 11 of the Railways Act, 1879, and that the appeal ought to be allowed, and the plaintiffs' suit dismissed with costs throughout.

Appeal allowed

March 1, 1895. The respondents applied under clause (c), Section 595, of the Civil Procedure Code for leave to appeal to the Privy Council, but the application was refused.

Attorneys for appellants — *Messrs Little, Smith, Nicholson and Bowen*

Attorneys for respondents — *Messrs Crawford, Butler and Co*

(1) 34 L J (C P) 234 (3) I L R 3 Bom 109 (5) I L R 18 Calc., 427

(2) I L R 19 Calc 548 (4) L R 18 In Ap 121

In the Sadar Court of the Province of Sind.

Before Mr. Geo. M. Macpherson, Judicial Commissioner.

THE SECRETARY OF STATE FOR INDIA IN
COUNCIL (DEFENDANT), APPELLANT

v.

LOVIDA RAM AND SIX OTHERS
(PLAINTIFFS), RESPONDENTS.

1894
November, 31
North-Western Railway—Parcels—Non-delivery of—Declaration of Value
considered necessary—Contract Act, Section 23 (3)—Civil Procedure
Code, Section 575—Indian Railways Act, IX of 1890, Section 75.

The plaintiffs sued the Government to recover Rs. 110, being the value of one of the two parcels not delivered at the destination. The defendant denied liability on the ground that the value of its contents was not declared at the time of the delivery of the parcel to the Railway for carriage. The claim was therefore dismissed and it was held that "the value" referred to in Section 75 of the Indian Railways Act means the value at the destination and not at the place of despatch.

For Appellant.—F. P. Henderson, Esq., I.C.S., Barrister-at-Law, Government Advocate, Punjab.

For Respondent.—Mr. Asanmal, Pleader.

PLAINTIFFS: Lovida Ram and Kimsat Rai, sons of Lekh Raj, sued to recover Rs. 110 from Government, alleging that their Agent Govind Rai forwarded from Amritsar two parcels by the North-Western Railway addressed to the plaintiffs' father for his firm, one of which parcels was not delivered, causing loss of Rs. 97-15-9 to which was to be added Rs. 4 as interest and Rs. 8 spent in correspondence, etc.

For Government it was urged that the Railway Administration had no contract with any person or with plaintiffs, and that the loss was suffered by Lekh Raj, and that the plaintiffs were not entitled to recover the loss. It was also urged that the plaintiffs were not entitled to recover the loss as they were not the owners of the goods at the time of the loss.

the value being undeclared exceeded Rs 100, the Railway administration was not liable for the value, and the other items could not be legally claimed

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v
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The District Judge of Shikarpur framed issues after new parties were added and the plaint had been amended

No 1—Can plaintiffs, as sons and legal representatives of deceased Lekh Raj, the consignee, sue for non delivery of the parcel?

No 2—Did the true value of the contents being silk exceed Rs 100

No 3—Is the price of silk at the place of despatch or at the place of delivery to be taken as the basis of calculation of the value of the contents?

No 4—Was the sender required to pay and did he refuse to pay at Amritsar, a percentage on the value as compensation for increased risk?

No 5—If so, or if the value of the contents exceeding Rs 100, a true declaration of the value was not made is the Railway Company exempted from liability for non delivery of the parcel?

No 6—Are plaintiffs entitled to claim compensation for postage and other expenses? and,

No 7—Assuming that the sender declared the value to be under Rs 100 and therefore was not called on to pay percentage on the value as exceeding Rs 100 and admitting that the value before deducting discount was at Amritsar Rs 107 6 0, but was reduced below Rs 100 by deducting discount, could the sender by so deducting discount reduce the value to less than Rs 100?

The suit was instituted as abovesaid by plaintiffs who did not specify the capacity in which they did so, as deceased's heirs or as Managers of the firm of deceased Lekh Raj, but by consent the plaint was amended so as to show them clearly suing as personal legal representatives of Lekh Raj, and their brothers were joined as plaintiffs, being equally interested as deceased's heirs. The District Judge held that plaintiffs could sue and that, assuming the facts as set out in the invoice, the value of the silk

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v
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was to be taken as Rs 97 15 9 after deduction of discount, that the value was to be calculated on the price at Amritsar, the place of despatch, and as it did not exceed Rs 100, the Railway was responsible for the value but not for other expenses claimed, and awarded Rs 97 15 9 and Rs 4 as interest and costs in proportion and interest from date of suit to date of payment.

Government appeals, and urges that the plaintiffs were not entitled to sue, and that the value was the value at the place of destination and before deducting discount, and therefore exceeded Rs 100. The appellant has included the sum claimed for incidental expenses, the claim to which was rejected.

The value of the appeal is, therefore, too high, and should be Rs 101 15-9 *plus* interest subsequent to suit.

I retain the issues of the District Court except as to such expenses which are not before me.

The disputed points are —Whether plaintiffs can sue and whether the value is the value at Amritsar or at Shikarpur, and whether a sum allowed as discount is to be included, and if it is to be included the effect of this on the liability of the Railway Administration.

The circumstances of this case are peculiar because of errors which have crept into it. Some clear and undoubted facts may first be stated. Govind Ram consigned two parcels containing silks by Railway from Amritsar to Lakh Raj at Shikarpur, one of which was lost. The contents were valued in the invoice at Rs 107 6 0 *minus* Rs 11 5 0 as discount, to which value had to be added Rs 1-3 6 as expense of packing, etc., making a total of Rs 97 3 9 as the Amritsar value of the silk claimed by plaintiffs who in the plaint, as amended, sue as heirs and representatives of deceased Lakh Raj who was dead before the goods were despatched. The nature of the goods was declared at Amritsar but not the value. For appellant, I was referred to a well known ruling of the Privy Council given in Volume XI of Moore's Indian Appeals, according to which the decision must be founded upon a case to "be found in the pleadings or involved in or consistent with the case thereby made." But one difficulty is that the pleadings contain omissions and inconsistencies. Mr HENDERSON

made various admissions in the District Court, and acted generously towards plaintiffs, so as not to put technical difficulties in their way. This is admitted by the District Judge, Mr JACOB. Mr. HENDERSON stated in argument that the Railway Administration of Government desires clear decisions as to certain matters, and therefore did not insist on all the points they might have taken up, but it is difficult to give a clear decision in a case which is not clear and which has been rendered confused by the mistakes or carelessness of people concerned in it. The plaint states that the silks were sent to Lekh Raj for the firm, and as amended it is by the heirs of deceased Lekh Raj, the consignee in the agreement with the Railway. In evidence Kumat Rai says that Govind Ram was one of his agents at Amritsar and sent the goods at his request. If Govind Ram, being the firm's agent, consigned the goods to Lekh Raj at the request of the firm or a partner in the firm acting as such, the principal would be the firm, who would be entitled to sue as such. But the plaint is not by the firm or by people as members of the firm, it is by the heirs of the deceased consignee. Mr HENDERSON, on the other hand, argued that, as the agreement was between the Railway and Lekh Raj's agent Govind Ram, and as Lekh Raj, the principal, is dead, the person entitled to sue is Govind Ram, the agent, "whose principal" being deceased "cannot be sued"—Section 23 (3) of the Contract Act. When I asked if no one was entitled to sue for damages, the sons of Lekh Raj or the members of the firm, he replied that, under the provisions of that clause, Govind Ram, the agent of the deceased principal, could sue. But this is wrong, as admittedly Lekh Raj was dead before the contract was made, and Govind Ram could not be his agent in consigning the goods. This confusion runs through the defence, as at one time it is said the deceased's agent could sue, and again that, as Lekh Raj was dead, he never had any interest in the goods which could pass to his sons as his heirs.

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An admission by Mr. HENDERSON is to be noted, that as the freight was to be paid by Lekh Raj, i.e., by the consignee, he had a right under the contract to claim and sue for the goods.

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Council
L. 1111 Ram

This obviates my having to discuss the right of the consignee to sue it is admitted I now take the facts as appearing on the record, and I must do so without adding thereto If a man is shown as consignee, or as sending for goods, I need not enquire whether he acted in his private capacity as an individual or whether he really acted and meant to act as a member of a firm It is probable that the goods sent to Lekh Raj were so for the firm, and that he was treated by Govind Ram as a partner in it But the Railway knew nothing of this, and deny any contract with the firm I am justified in taking the consignment as one to Lekh Raj without regard to the fact that he was a member of the firm for which the goods were ultimately intended Govind Ram is not set forth as the firm's agent but as that of one or two persons, and I may look on the consignment as to Lekh Raj himself This is the view which the defendant took of it Clearly, then, on the above facts and admission, had Lekh Raj been alive, he could have sued, but he was dead There was an error on Govind Ram's part—he should have consigned the goods to the son or sons of Lekh Raj named in the consignment note But, as the error was made, I do not see why Lekh Raj's sons cannot come forward and say "an error was made, the name of Lekh Raj we entered by mistake, we were intended to be and are the people affected by the contract We ask that the error should be corrected and we declared entitled to the goods on payment of the freight." Govind Ram might have been required as a party Errors in more solemn documents have been rectified in similar manner As a matter of fact, the other parcel was delivered up Plaintiffs have not made the formal request as to rectification of an error in this suit, but their plaint may be taken as involving its necessity Again, this suit as originally brought by Kimat Rai on defendant's argument, was correct He swears he was the principal of Govind Ram, and at his request the goods were despatched or rather given to the Railway Administration for carriage from Amritsar No question was asked whether he acted for the firm and as a member of it, and I am not bound to enquire beyond the record Govind Ram known to be an agent consigned goods to Lekh Raj, he was then in reality Kimat Rai's agent His

authority from Lekh Raj had lapsed on Lekh Raj's death. Assuming that Lekh Raj's heirs could not sue as said by defendant, Govind Ram's principal, Kimat Rai, could do so and did so. It is true he added Lovida Ram as a co plaintiff who is interested in the property, and whose addition throws no new or additional responsibility on the defendant. At the most the addition would be ineffectual and would not affect Kimat Rai's rights. Kimat Rai, then, who swears he was principal of Govind Ram would have been entitled to sue alone. His right was virtually given up and the heirs of Lekh Raj were added and the suit is now by them. This is so far wrong for Lekh Raj had no interest in the property and was not Govind Ram's principal, though the argument on behalf of defendants allows that he was so. But I do not think this error should affect plaintiffs or Kimat Rai. As shown above Kimat Rai as principal of Govind Ram could have sued alone, or the heirs of Lekh Raj could have come forward (on the argument and admission of defendant as to the right of Lekh Raj's agent to sue) and could have alleged mistake and have asked for rectification of the agreement and have thus obtained the goods. Neither course was strictly adopted though the unamended plaint was so far correct as explained by the evidence of Kimat Rai. The present so called amended plaint in its bold form is wrong, but I do not think the omission is necessarily fatal. The merits are not affected nor is the jurisdiction. Had the District Judge, on account of error in the plaint, dismissed the claim as wrongly brought in the amended plaint, I could not have said he was wrong, but as he did not, so I think Section 578 of the Civil Procedure Code applies and therefore I find that though the plaint is wrong the error is not fatal to the claim.

Now comes the question whether the goods exceeded in value Rs 100. Admittedly the price stated was Rs 107 6 0 from which discount was deducted. This discount is not for ready cash but was allowed "according to mercantile custom." Apparently merchants alone would obtain it; a private customer would not do so. Section 75 of the Railway Act of 1890 declares that when the value of silks, etc., sent by Railway exceeds one hundred rupees, the Administration is not liable for damages.

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caused by loss, destruction, etc., "unless the person sending or delivering the parcel or package to the Administration caused its value and contents to be declared, or declared them at the time of the delivery of the parcel or package for carriage by Railway," and paid, if called on to do so, a percentage by way of compensation for increased risk

The word "value" clearly means market value of the articles, the price for which they would usually sell at the time in the market. The value is shown at Rs 107 6-0 from which an allowance is made of discount. In Redwayne's case (L R C P page 330) it was held that the market value meant "the value in the market independently of any circumstances peculiar to the plaintiff." O'Hanlan's case (L J Q B Vol 34, page 154 *et seq*) was quoted, but is not conclusive. Discount was allowed of 10s 9d, but at one time the cost is spoken of as including that and at another it is not so. In that Judgment it is said that the value must be taken as the market price at a place where there is such a thing and elsewhere it must be calculated on consideration of various circumstances including the results of the "bidding of the market." At Amritsar apparently there is a market price. Now would a person going into a shop and learning the price expect to get discount? I do not think a stranger making local purchases would expect it. At all events it is not shown that there is any such rule for ordinary purchases, and the market value is the price for ordinary purchases. We have the value clearly stated, and discount mentioned, but nothing to show why or to whom such discount is allowed. I may take a similar case—well known—of books in England on which a discount of 25 per cent is often allowed, yet publishers giving booksellers this percentage and also one book in twelve *gratis*, advertise the books at the full rate and booksellers also do so, and books are spoken of as costing that sum. Discount often is granted only when asked for. Now a custom has sprung up of giving a net price. Of course the book seller gets some profit, but the price of the book is still mentioned at the full price in notices of it. If a person for any reason gets an article at a cheap rate, he does not say the "value" is less than the market value. "Value" may be quite different from the "price" actually paid.

Unless there is proof that discount could be claimed by every purchaser, I must take the admitted price to be the 'value' without allowing for discount, given under unknown circumstances to unknown persons. Therefore I hold that the value at Amritsar exceeded Rs 100. It does not matter, therefore, whether it is to be calculated for the purposes of Section 75 at the rate current at Shikarpur or at Amritsar. In either case the value exceeded Rs 100.

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Lor da Rau

The effect of this is clear. Under the 7th Section of the Act the value should have been declared and this was not done. The Railway was not bound to ask questions as to it and the Section declares the Railway Administration 'not responsible for the loss' of the goods. The claim, therefore, must be dismissed, and I amend the decree and dismiss the claim *in toto*. Plaintiffs will bear all costs in the District Court and will bear costs on Rs 101-15 9 in this Court, the proper value of the appeal.

In the Chief Court of the Punjab

*Before Sir J. F. F. J. J., Chief Justice, and
Mr Justice A. W. Stogdon*

MOHAMED ABDUL GHAFUR (PLAINTIFF)

v

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
[NORTH-WESTERN RAILWAY] (DEFENDANT)*

*North Western Railway—Liability of carriers for loss of goods—Indian
Railways Act 1890 ss 274 and 75—Indian Railways Act IV
of 1879 s 11*

1897
August, 12

The plaintiff booked his luggage and obtained a Railway receipt. On arrival at Delhi a leather portmanteau containing articles as entered in the list was found missing and compensation not having been made the defendant was sued to recover the value of the articles. Both parties admitted that the package contained scheduled articles worth Rs 308 10 and the only dispute between them was whether the plaintiff was entitled to any relief which he claimed and which the defendant denied under S 75 of the Railways Act 1890.

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tary of State
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[N W Ry]

Held that luggage of a passenger booked by a Railway servant under S 74 of the Railways Act is a parcel or package delivered to the Railway Administration for carriage and the defendant was exonerated from all liability for the loss of the articles in question as the contents and value of the portmanteau was not declared and insured

Madan Gopal for Plaintiff

Sinclair, Government Advocate for defendant

JUDGMENT of the lower Court —

In this case the plaintiff sues to recover Rs 354 10 0 from the defendant (the North Western Railway) on account of goods booked and lost in transit. It is stated in the plaint that the plaintiff travelled from Lahore via Ghaziabad on the 30th November 1894 and that he got his luggage booked by Railway Receipt No 94 of the same date and obtained a receipt, that on arriving at Delhi a leather portmanteau containing articles as entered in the list was found missing, and as no compensation has been made by the defendant, this suit has been brought to recover the value of the articles. It was stated by the Government Advocate that it has been agreed, with consent of both parties, that no evidence is to be produced in this case, and that there was a point of law which should be decided by this Court. The point for determination is—whether according to law plaintiff is entitled to any part of the relief claimed. The statement signed by both parties is to the following effect—The parties to the above suit mutually agree to admit all the facts, viz, the defendant on his part admits all the facts alleged by the plaintiff, and the plaintiff on his part admits all the facts alleged by the defendant, namely, (1) that the package contained "scheduled" articles (Schedule II) worth Rs 308 10 in value, (2) that the requirements of S 75 of Act IX of 1890 were not complied with by the plaintiff, (3) that the package worth Rs 354 10 0 was delivered by the plaintiff to the railway for carriage by railway, which granted a receipt therefor under S 74 and the parties further agree that the sole controversy between them is, whether in point of law the plaintiff is entitled to any part of the relief which he claims, and which the defendant, relying solely on S 75 of the Railway Act, 1890, denies. It is stated by plaintiff's plea that according to Act, 1890, there are three kinds of goods—(1) goods, (2) parcels and packages

and (3) passengers' luggage That S 72 refers to responsibility of railway with reference to carriage of (1) goods and (2) animals, and that S 74 refers to (3) passengers' luggage, and that S 70 refers to another class, i.e., articles packed in parcels or packages. That Schedule II only refers to articles, and neither to goods nor to animals nor to luggage, and that, under S 75, the Railway's liability is limited only when such articles as are mentioned in Schedule II are packed in parcels or packages. On the other hand, it is urged by the Government Advocate that S 74 is immediately followed by S 75, and according to this, in case of scheduled goods no claim can lie against the railway, unless their contents and value have been declared. In my opinion, Ss 72 and 74 are applicable to passengers' luggage, and in the case of articles of special value, which are being carried as passengers' luggage, the provisions of S 75 must be complied with (See page 253 of the Indian Railways' Act, 1890, by Louis P. Russell), and as this was done, the point must be decided against the plaintiff. It is admitted that the contents of the package was worth Rs 304-10-0, and that the package contained "scheduled articles" worth Rs 308-10-0. In another case against the East Indian Railway it was held by this Court, following the English Law, that, when a parcel or package contained certain articles which were within S 75 and others which were not, the plaintiff, though he had not declared the value of the articles within the section, was entitled to recover the value of the articles not within it but, since then, I have changed my view of the Law. The provisions of S 11 of Act IV of 1879 were consistent with the English Law on the subject, whereas the wording of S 75 is clear, and accordingly, either the Railway Administration is responsible for the contents of the whole parcel or for no part of it. I, therefore, decide the point against the plaintiff, but as the point is not free from doubt and is of general importance, I dismiss the suit contingent upon the opinion of the Chief Court, and refer the case under S 617, Civil Procedure Code.

The above case (No 3 of 1897) on being referred to the Chief Court (under S 617 of the Code of Civil Procedure) by the Judge of the Small Cause Court, Delhi, with his No 118, dated 6th May 1897, was heard by Sir J. Frizelle, Chief Justice, and Mr Justice

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Held that luggage of a passenger booked by a Railway servant under S 74 of the Railways Act is a parcel or package delivered to the Railway Administration for carriage and the defendant was exonerated from all liability for the loss of the articles in question as the contents and value of the portmanteau was not declared and insured

Madan Gopal for Plaintiff.

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In the Chief Court of the Punjab.

REVISION SIDE

Before Mr. Justice Reid

ALWAZ AND ANOTHER (PLAINTIFFS), PETITIONERS

v

SIMLA KALKA RAILWAY COMPANY

(DEFENDANT), RESPONDENT

CIVIL REVISION No 1880 of 1905

*Railways Act IX of 1890 Sections 74 and 75—Passengers Luggage—
Articles of special value—Liability of Railway Company*

1906
Nov 10

A passenger booked his box containing cloths gold and silver ornaments and Government Currency Notes for conveyance in the luggage van and it was lost. The Railway Company repudiated the claim on the ground that the contents of the box and their value were not declared as prescribed by S 70 of the Indian Railways Act IX of 1890.

Held that Luggage booked under S 74 of the Railways Act includes passengers luggage and as the value of the contents was not declared the defendant company is free from all liability.

Muhammed Abdul Gaffur v Secretary of State (56 P R. 1897) referred to.

PETITION for revision of order of Lieutenant Colonel R E S Lailor, Judge, Cantonment Small Cause Court, Umbala, dated 12th August 1905

K C Chatterji for Petitioners

Morrison for Respondent

The judgment of the learned Judge was as follows —

REID, J — This application raises the question whether a Railway passenger whose box containing cloths, gold and silver ornaments of the value of Rs 20 or 30 and Government Currency Notes of the value of Rs 190 has been entrusted to the Railway Company's servants for conveyance in the luggage van and has

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" S K Ry

been lost or stolen, can recover the value of the box or of any part of its contents from the Company without having made the declaration proscribed by Section 75 (1) of the Indian Railways Act, IX of 1890

The first contention for the applicant was that "any parcel or package" in Section 75 (1), does not include passengers' luggage dealt with by Section 74 of the Act. This contention has no force. The object of the rule contained in Section 74 is obviously to make the Company liable only for property entrusted to it and not for property which a passenger chooses to keep in his own custody, whether in his compartment or elsewhere, and "luggage," consists of parcels and packages.

The next contention was that Section 72 of the Act makes the Company liable as a bailee under the Indian Contract Act.

The presence in the section of the words "subject to the other provisions of this Act" adequately meets this contention which has no force.

The next contention was that Currency Notes are not included in the 2nd Schedule to the Act.

Clause (b) of the schedule, in my opinion, covers them. They are promises to pay, made by a person on behalf of the Government of India, although they are not included in the definition of Promissory Notes in Section 4 of the Negotiable Instruments Act for the purposes of that Act.

They are, moreover, securities for the payment of money, even though they may not be bank notes. This contention has no force. The last contention is that the Company were liable for the whole value of the non-scheduled articles of the contents of the box, and of Currency Notes up to Rs. 100.

Muhammed Abdul Ghaffur v Secretary of State for India (1) is directly against this contention, and Section 75 (1) provides for freedom from responsibility, for the "loss, destruction or deterioration of the parcel or package" not merely for freedom from responsibility for the loss of the contents of such parcel or package.

The applicant is not, in my opinion, entitled to recover from the Company in respect of the box or of any part of its contents not having complied with the provisions of Section 75 (1) of the Act.

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The application is dismissed with costs

Application dismissed

**The Indian Law Reports, Vol. XXXIV. (Calcutta)
Series, Page 419.**

APPELLATE CIVIL

Before Mr. Justice Brett

NARANG RAI AGARWALLA (PLAINTIFF), APPELLANT

v.

**RIVER STEAM NAVIGATION COMPANY, LIMITED
(DEFENDANTS), RESPONDENTS ***

*Carriers—Contract to carry partly by river and partly by land—Liability of
Carriers—Damages—Dismissible Contract—Carriers Act (III of 1865)
Ss 3 to 5 & 8—Railways Act (IX of 1890) S 75—Excepted Articles—
Misdescription of goods*

1907
March, 6

In a suit for damages for loss of goods carried partly in steamers of one Company and partly by trains of another, the plaintiff failed to declare the value and description of the goods as required under the provisions of the Carriers' Act and the Railways Act —

Held, that so far as the journey is by river, the Steamer Company is entitled, as regards the acts of its agents and servants, to the protection afforded by the provisions of the Carriers Act and so far as the journey is by rail it is similarly entitled to claim the protection afforded by the Railways Act

Le Contem v The London and South Western Railway Company⁽¹⁾ and *Bazendale v The Great Eastern Railway Company*⁽²⁾ referred to

* Appeal from Appellate Decree No 2303 of 1904 against the decree of F F Jackson, Subordinate Judge of Gauhati dated August 4 1904 confirming the decree of Kedar Nath Sanyal Extra Assistant Commissioner of Gauhati, dated April 30, 1900

(1) (1865) L. R., 1 Q. B. 54

(2) (1869) 43 L. J. Q. B., 137

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SECOND APPEAL by Naring Rai Agarwalla and another, the plaintiffs

The plaintiffs brought an action for damages against the River Steam Navigation Company, Limited, and the Secretary of State for India in Council on behalf of the Eastern Bengal State Railway, for loss of goods under the following circumstances. The plaintiffs shipped a bale of *endi* silk (described as "*endi* cloth") from Gauhati (Assam) to be carried by the River Steam Navigation Company to Calcutta, the Eastern Bengal State Railway having to carry it from Goalundo. The bale was alleged to have been cut open in transit and most of the contents extracted, and the plaintiffs sued to recover the value of the lost goods.

The defendant Company repudiated their liability on the ground, that the plaintiffs did not declare the value and description of the property as required by S 3 of the Carriers' Act, the goods being one of those "excepted articles" mentioned in the Schedule to the Act, and that the bale was not insured under the Company's Goods Tariff Rules.

The second defendant also contended that the suit was not maintainable for want of notice as required under S 424 of the Code of Civil Procedure, and that the Railway Administration was absolved from liability under S 75 of the Railways Act (IX of 1890) as the plaintiffs did not declare the value and contents of the package and pay the insurance rate as required by S 51 (a) of the Goods Tariff Rules of the Eastern Bengal State Railway.

On the 30th April 1900, the Court of first instance dismissed the suit with costs. On appeal preferred by the plaintiffs, the learned Subordinate Judge confirmed the decree of the first Court and dismissed the appeal.

The plaintiffs preferred a second appeal to the High Court and the learned Judges dismissed the appeal as against the Secretary of State for India, the learned vakil for the appellants conceding that the Railway Administration was absolved from liability by S 75 of the Railways Act. As regards the appeal against the River Steam Navigation Company, their Lordships remanded the case, on 6th May 1903, to the Court below for a finding as to whether the loss was occasioned by negligence or criminal act on the part of the Company or their agents and servants, the onus of proof being on the Company under S 9 of the Act.

On the 30th April 1904, the Subordinate Judge of Kamrup found, on remand, that the Railway Administration admitted that they had received the parcel in good condition from the Steamer Company, and held that there was no negligence or criminal act on the part of the Steamer Company, and he accordingly dismissed the appeal with costs.

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The plaintiffs, thereupon, again appealed to the High Court.

Babu Nilmadhab Bose and Babu Jadu Nath Kanyalal, for the Appellants

Mr Caspersz and Babu Manmatha Nath Mookerjee, for the Respondent

BRIEF J.—The plaintiff appellant brought an action in the Court of the Munsif of Kamrup to recover damages from the River Steam Navigation Company, Limited, and the Secretary of State for India on behalf of the Eastern Bengal State Railway, for the loss of a portion of a bundle of *endu* silk. The goods were made over to the agent of the Steam Navigation Company at Gauhati on the 14th November 1897 for transmission to Calcutta, via Goalundo. It was known by both parties when the goods were handed over and received that they would be carried by a steamer of the River Steam Navigation Company as far as Goalundo by river, and thence to Calcutta by the Eastern Bengal Railway Company by land. On delivery of the bundle being taken at the Armenian Ghat Station, Calcutta, it was found that 23 out of the 26 pieces of *endu* silk, of which the bundle was made up, were missing. The suit was brought against the two defendants for damages for failure properly to discharge their duties as common carriers under Act III of 1865.

The suit was dismissed with costs by the Court of first instance, and this decision was confirmed by the Court of first appeal.

The property lost was over Rs. 100 in value, and both the Lower Courts held that as silk was an "excepted article" as included in the Schedule of the Act, and as the plaintiff had failed to properly describe it and to declare its value to the defendant No. 1, the River Steam Navigation Company was protected from liability for the loss by section 3 of Act III of 1865, and that the Railway Company was similarly protected by Section 75 of the Railways Act, IX of 1890.

The plaintiff appealed, and on the appeal coming before a Divisional Bench of this Court, of which I was a member, we held that the lower Courts were right in finding that the Railway

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Company was protected from liability by Section 75 of the Railway Act, but that the lower Courts had erred in dismissing the case against the River Steam Navigation Company, proceeding simply on the provision of Sections 3 and 4 of the Act, without taking into consideration the provisions of Section 8 of the same Act. The case was accordingly remanded in order that the Lower Court might come to a finding whether the loss was occasioned by negligence or criminal act on the part of the River Steam Navigation Company or their agents and servants and then to dispose of the appeal.

The Subordinate Judge has since come to the finding that there was no negligence or criminal act on the part of the Company or its agents or servants, basing his conclusion on the fact that though under the provisions of Section 9 of the Carriers' Act the onus lay on the Company to prove absence of negligence, they had discharged that onus by proving that the Railway Company had admitted that the goods were received from the steamer of the River Steam Navigation Company in good order at Goulundo. He, therefore, dismissed the suit. The plaintiff has again appealed to this Court.

The main ground, which has been taken before me in support of the appeal, is, that the Subordinate Judge has erred in the view which he has taken of the meaning of the word "agents" as applied to the facts of the present case, that he should have held that the Railway Company were agents of the River Steam Navigation Company and that the onus lay on the Steamer Company, in order to save itself from liability, to prove that the loss was not caused by any negligence or criminal act on the part of the servants of the Railway Company. It has been argued that the contract for the conveyance of the goods by the Steamer Company to Calcutta made with the plaintiff was one and indivisible, and that under that contract the Steamer Company was responsible for the custody of the goods up to the time of their delivery at the Armenian Ghat Station in Calcutta.

It is admitted that the Railway Company is protected from liability by the provisions of Section 75 of the Railways Act, and that the Steamer Company is unable to exercise any supervision or control over the servants of the Railway Company, or over the custody of the goods, while they are in the charge of the servants of the Railway Company. But it is suggested that

the Steamer Company was bound to ascertain what was the nature of the goods made over to it for transmission to Calcutta, and to have made the declaration or fulfilled the other conditions required by Section 75 of the Railways Act, so as to fix the responsibility for the loss on the Railway Company. At the same time it is proved that the plaintiff failed to declare to the Steamer Company the true nature of the goods, which he handed over to them, and described them as *endicloth* only. It is not suggested that it is the duty of the Steamer Company to open out all parcels in order to satisfy itself of their contents, and the argument advanced amounts to this, that the River Steam Navigation Company must be held to be responsible for a loss occasioned by the failure of the plaintiff, the consignor, to *correctly describe the nature of the goods handed over*. That view cannot in my opinion be supported by principle or by authority.

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In the first place, if the Railway Company can be taken to be the agents of the Steamer Company and the contract be held to be indivisible, I am of opinion that the River Company is entitled to claim protection from liability to the plaintiff on the ground that he had himself failed to comply with the provisions of the Carriers' Act or of the Railways Act, and had wilfully concealed from them information which would have enabled them to comply with the provisions of the Railways Act, when using the Railway Company for the transmission of the goods from Goalundo to Calcutta.

It seems, however, open to doubt whether the Railway Company can be treated as agents of the River Company within the meaning of Section 9 of the Carriers' Act so as to fix on the River Company a liability from which the Railway Company is specially protected by Section 75 of the Railways Act. In this case the contract was for the carriage of goods, partly by river, and partly by land. It was well known to both parties that the river journey would be performed in the steamer of the River Company, and the land journey in the trains of the Eastern Bengal Railway Company, also it was equally well known, and is clear from the evidence in this case, that the charges for transmission might be paid either at the place of departure, or at the station of destination. In this case the charges were to be paid at the latter place. It is also clear beyond doubt that the charges for transmission of the goods were made according to the rates laid down by the River Company for the journey by river and the

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Railway Company for the journey by land, and that the money was received to be so appropriated between the two Companies. In a case of this sort, where through-booking first by steamer and then by rail, or *vice versa*, is made for the convenience of the public, and when the journey is performed partly in steamers of one Company and partly in trains of the other and the charges creditable to each are subsequently adjusted, it seems as reasonable to treat the Company, which receives the goods as the agents of the other Company, as to treat the other Company as its agents.

In the second place, if it be held that the Eastern Bengal State Railway Company are for the purpose of contract, the agents of the Steamer Company, I am of opinion that the Steamer Company are entitled, in respect of the land portion of the journey, to claim the protection of Section 75 of the Railways Act.

The contract was for the carriage of goods partly by the river, and partly by land, and so far as the two portions of the journey are concerned, I hold that the contract is divisible, and that so far as the journey was by river the Steamer Company is entitled to claim as regards the acts of its agents and servants the protection afforded by the provisions of the Carriers' Act, and so far as the journey was by rail it is similarly entitled to claim the protection afforded by the Railways Act. In this view I am supported by high authority in the Courts in England. In the case of *Le Conteur v The London and South-Western Railway Company*(1) which followed the case of *Pianciani v The London and South-Western Railway Company*,(2) Cockburn C. J. laid down the law as follows:—"Now, it cannot be disputed that the article in question was an article that came within the provisions of the Carriers' Act, but it was said that the provisions of the Act were not applicable to the case because the contract was one to carry not only to the terminus of the Railway by land, but also by water, and that such a contract being to carry both by land and by water, the contract was not divisible, and therefore, although the article was lost on land, that it was not within the terms of the Carriers' Act. I think that that argument fails both on principle and on authority, on authority, because the point was directly before the Court of Common Pleas in the case of *Pianciani v The London and South-Western Railway Company*(2) in which the Court expressed the strongest opinion that the con-

(1) (1865) L. R., 1 Q. B., 54

(2) (1856) 18 C. B., 226

tract was divisible, and that so far as the carriage by land was concerned, the Carriers' Act would afford a protection and defence to the Company, in the event of the terms of that Act not being complied with, and I must say I entirely concur in the view so taken and expressed by the Court. It would be a matter of the most serious inconvenience, if Companies established for the purposes of conveying goods by land but having one of the termini of their railway connected with water communication, should be prevented (as they would practically be) from affording the public the great accommodation which arises from being able to send goods to the ultimate place of destination the water carriage included, without the necessity of separate contracts with separate Companies. If that accommodation were withdrawn from the public, as it might be, if, so far as the land carriage is concerned, Companies were deprived of the protection the Act of Parliament affords, it would be a matter of very serious inconvenience and damage to the public and I see no reason why that damage and inconvenience should be inflicted upon the public, at the same time that loss would accrue to the Companies from not having the opportunity, which they at present possess, of making the entire contract. I see no reason why the contract should not be held to be divisible, and the carrier protected as far as the land carriage is concerned by the Act of Parliament."

The same view was taken in the case of *Barendse v The Great Eastern Railway Company* (1)

The learned pleader for the appellant has attempted to distinguish the present from those cases by the fact that in each of those cases the journeys were performed by sea and by land in steamers and trains, both of which belonged to the same Company, while in this case the proprietors of the Steamer Company and the Railway Company are different. The case for the appellant, however, is that the Eastern Bengal Railway Company are the agents of the Steamer Company, and on this basis it is contended that the Steamer Company as a principal to the contract is liable for the acts of their agents that is to say, the servants of the Railway Company. This is, in fact to place the Steamer Company in a position analogous to that which it would hold as proprietor of the Railway Company. I am of opinion, therefore, that the principle laid down by the learned Chief Justice of England in the case referred to is applicable to the present case, and, so

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far as the journey was by land, the Steamer Company is entitled to the protection afforded by the provisions of the Railways Act

It appears that the Steamer Company issue a printed book of their rules, and in it the conditions are set out under which goods are booked by the Company to through stations on the Eastern Bengal Railway Company and connected lines. These support the conclusion that the part of the journey by river and the part of the journey by rail are to be treated as distinct, the total charge for the journey being the sum of the charges levied at rates fixed by the rules of the Steamer Company for the portion of the journey by river, and by the rules of the Railway Company for the portion of the journey by rail, and, therefore, that the contract is divisible.

I therefore hold, that, whether or not the Eastern Bengal Railway Company be regarded as agents of the Steamer Company, the Steamer Company is equally protected from liability for damages to the plaintiff for the loss of goods of the class of those in the present suit, when the plaintiff had failed to declare their value and description as required under the provisions of the Carriers' Act and the Railways Act.

For the above reasons, I dismiss the appeal with costs.

Appeal dismissed

The Calcutta Weekly Notes, Vol XI Page 1076

CIVIL REVISIONAL JURISDICTION

Before Mitra, J and Caspersz, J

GOKUL CHANDRA DAS AND ANOTHER (PLAINTIFFS),
PETITIONERS

v.

INDIA GENERAL STEAM NAVIGATION AND
RAILWAY COMPANY, LIMITED—(DEFENDANT),
OPPOSITE PARTY

RULE NO 715 OF 1907

1907
May, 2nd

Carriers Act (III of 1865) sections 8 and 9. Through booking of goods by steamer and rail—Liability of Steamer Company for loss during transmission by rail—Railways Act (IX of 1890) Section 7.

The plaintiffs consigned a parcel of silk articles through the India General Steam Navigation and Railway Company, Limited for delivery

at Khagra, knowing that the articles would be carried in the first instance by the defendant Company then by the Eastern Bengal State Railway and then by the East India Railway Company. They did not declare the value of the articles which exceeded Rs 100 nor disclose the contents of the parcel. It was found that the goods were lost after they had been made over to the Eastern Bengal State Railway.

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Held that the agreement was in substance with both the Steam Navigation Company and the Railway Companies and the former could not be held responsible for the loss.

Narang Puri Agarrwalla v. River Steam Navigation Company (1) followed. This was a rule granted on the 7th of March 1907, against an order of Babu Radhakanth Sen, Subordinate Judge of Rajshahiye, passed in the exercise of his powers of a Court of Small Causes and dated the 9th of January 1907, dismissing the suit with costs.

The facts of the case are as follows —

A parcel of *Matka* silk, valued by the plaintiffs at Rs 257 15 3 was booked by them for delivery to one Sudhangsu Sekhar Bagel at Khagra on the E I Railway and the defendant No 1's Agent at Rampore Boallia accepted it for transmission by both Steamers and Railways. The defendant No 1 (the Munsiff found) had no sort of connection in the management of the Railways belonging to Eastern Bengal State Railway Administration and East Indian Railway Company, but by an arrangement themselves the Steamer and the Railway Companies maintained a through traffic of goods booked for transmission from the station of one of them to that of another. The defendant No 1 Company had no Railway of their own but for the purpose of carrying on a through traffic conjointly with the Railway Administration. They styled themselves "The India General Steam Navigation and Railway Company, Limited."

The defendant No 1 Company proved that their agent duly made over the parcel to the assistant parcel clerk of the Railway Station at Damukdia Ghat on the Eastern Bengal State Railway, and so the learned Munsiff was of opinion that there was no negligence or criminal act on the part of their agents or servants occasioning the loss of the parcel (*vide* Sec 8 Carriers' Act).

The learned Munsiff further found that the plaintiffs did not make any declaration, as contemplated by Section 3 of the Carriers' Act, of the contents of the parcel. And he held that

the Company could not be held responsible for the loss of the goods which must have happened during transmission by rail

He accordingly dismissed the suit

Babu Hera Lal Sanyal for the Petitioners

Babu Mahendra Kumar Mitra for the Opposite Party

The Judgment of the Court was as follows —

This case is not distinguishable from the case of *Narang Rai Agarwalla v River Steam Navigation Company* (1) decided by the Hon'ble Mr Justice Brett on the 6th March last

The plaintiffs consigned a parcel containing silk articles through the defendant, India General Steam Navigation and Railway Company, Limited. They did not declare the value of the articles nor disclose the contents of the parcel. The articles were accepted according to the rules of the Company. The plaintiffs knew perfectly well the articles consigned by them had to be carried in the first instance by the defendant Company, then by the Eastern Bengal State Railway and then by the East India Railway Company, to the final destination at Khagra where delivery was to be given.

The defendant has succeeded in proving that there was no negligence or criminal act within the meaning of Section 8 of the Carriers' Act, on its part, or that of its servants, &c, making the Company directly liable.

The argument before us is that the Railway Companies having been the agents of the defendant Company and the loss having occurred in transmission after delivery was made to the Eastern Bengal State Railway the defendant Company is liable for the loss.

The answer to this question depends upon the consideration of the very same question which arose in the case decided by Mr Justice Brett, whether the Railway Companies should be considered agents of the defendant Company. The plaintiffs know that the articles could not be carried by the Steam Navigation Company throughout the Railway Companies must carry them, and it was well understood that the agreement was in substance with both the defendant Company and the Railway Companies. The Railway Companies are absolved from liability under the provisions of Section 75 of the Indian Railways Act

We are, therefore, of opinion that there is no ground for our interference with the judgment of the Small Cause Court Judge

We accordingly discharge the rule with costs, 5 gold mohurs

Rule discharged

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The Indian Law Reports Vol XXXIII. (Bombay) Series,
Page 703.

APPELLATE CIVIL

*Before Sir Basil Scott, Kt, Chief Justice and
Mr. Justice Batchelor*

PUNDALIK UDAJI JADHAV, (PLAINTIFF), APPELLANT

THE AGENT, S M RAILWAY COMPANY,
(DEFENDANT), RESPONDENT

*The Indian Railways Act (IX of 1890) Section 75 Schedule II Clause (a)—
Parcel containing articles liable to be insured and also not liable to be
insured—Loss of the parcel in transit on Railway Line—Suit against
Railway Company to recover damages with respect to goods not liable to
be insured—Railway Company not liable—Articles—Package*

1909
July 22

Plaintiff's Agent at Poona consigned a parcel to plaintiff at Dharwar. The parcel contained goods which according to Section 75 and Schedule II of the Indian Railways Act (IX of 1890) were liable to be insured as well as those not so liable. The parcel was lost in transit on the Southern Mahratta Railway Line. The plaintiff thereupon sued the Railway Company to recover damages for the loss of the goods which were not liable to be insured. The defendant Company denied liability.

Held, that the Railway Company was not liable. The words of Sec 75 of the Railway Act (IX of 1890) draw a distinction between articles mentioned in Schedule II of the Act and the parcel or package in which they are contained and provides that the Railway Administration shall not be responsible for the loss, destruction or deterioration of the parcel or package.

REFERENCE by R G BHADSHADE, First Class Subordinate Judge of Dharwar in his Small Cause Jurisdiction under Order 46, Rule I of the Civil Procedure Code (Act V of 1908)

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The facts which gave rise to the reference were as under —

The plaintiff's Agent at Poona consigned a parcel to the plaintiff at Dharwar. The parcel contained silk and laco-goods worth Rs 145-4-0 and cotton fabrics worth Rs 101-4-0. The parcel was lost in transit on the Southern Mahratta Railway Line owing to the negligence of the Railway Company. The plaintiff therefore brought a suit in the Court of the First Class Subordinate Judge of Dharwar in its Small Cause Jurisdiction to recover damages, namely, Rs 114-13-0 for the loss of the cotton fabrics. He claimed no damages for the loss of the silk fabrics because his agent at Poona had failed to insure the parcel under Section 75 of the Indian Railways Act (IX of 1890).

The defendant Company admitted the loss of the parcel in transit and contended that they were not liable for the loss of the parcel as the plaintiff had not declared the contents of the parcel and had not insured it on payment of a higher charge as required by Sec 75 of the Indian Railways Act and the Rules of the Company.

On the said pleadings the Subordinate Judge raised the following point for decision —

“Whether the plaintiff's Dalal's failure to declare the contents of the mixed parcel and insure the same absolves the defendant Railway Company for loss of the cotton fabrics which were not required by the Railway Act or rules framed thereunder to be insured?”

The opinion of the Subordinate Judge on the point was in the negative.

He was, however, doubtful as to the correctness of his opinion and as his decree in the case was not appealable he referred the said point for an authoritative decision under Order 16, Rule I of the Civil Procedure Code (Act V of 1908). In making the reference the Subordinate Judge made the following observations —

It is admitted by the defendant's pleader that under the repealed Railway Act of 1879 Section 11 the defendants would have been liable for loss of the uninsurable fabrics. The view now pressed on the Court is that stated in the Commentary on the Railway Act by Messrs Russell and Bayley, 2nd Edition, page 199. It is stated therein that under the present Sec 75 protection extends to the entire parcel or package including the articles which should, and those which need not have been declared. The words “of the parcel or package” in this section form an

alteration of the law, and under Sec 11 of the repealed Act of 1879 and Sec 10 of the Act of 1894 protection was only extended to the contents of the parcel which should have been declared under those Acts. The above propositions appear from the footnote (b) of the Commentary to have been stated on the authority of two cases, one decided by the Chief Court of Punjab, (1) *Mohamed Abdul v The Secretary of State for India in Council* and (2) a case decided in 1890 by the Court of the Small Causes at Bombay.

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Defendant's pleader has been able to procure for my perusal Mr Thiruvankata Chari's Railway Cases in which the first case has been reported at page 21. I have not been able to procure the copy of the *Times of India* in which the second case is said to be reported.

With due reverence to the Judges of the Punjab Court, I must say that I do not share in their view and that of the learned Judge who referred the question for their opinion as to the construction of Sec. 75 of the Railways Act of 1890.

In Sec 11 of the Act IV of 1879 the words (material for this case) are "the carrier by Railway shall not be liable for the loss, &c, to such property unless the value, &c, are declared." In the New Act the words "loss, &c of the parcel and package" are substituted for the loss of such property.

A mere cursory reading might lead one to suppose that the Railway Company being exempted for loss of an uninsurable parcel the exemption extends to a mixed parcel containing goods not required to be insured. The Legislature has not made it a criminal offence on the part of a consignor to send a parcel without insurance if he so pleases.

It is admitted that under the English Carriers Act and the old Railway Act the defendants' Company would have been liable for loss of the cotton fabrics.

Section 75 of the present Act appears under Ch VII about the responsibility of Railway Administration as common carriers. That chapter after stating the general liability of the Railway Company under Sec 72 makes further provisions in certain specified cases by Sec 73 as regards animals and by Sec 75 as regards articles of special value.

Under the usual canons of construction Sec 75 must be confined to the articles of special value mentioned in the Second Schedule of the Railway Act as to which insurance may be said to be in a way compulsory if the owner wishes to hold the Company liable for loss of this parcel on any account.

In Maxwell on the Interpretation of Statutes, 4th Edition, page 89, it is stated. In the Interpretation of general words and phrases the principle of strictly adapting the meaning to the subject matter in reference to which the words are used, finds its most frequent application while expressing, truly enough all that the Legislature intended they frequently express more in their literal meaning and natural force.

That in such cases general words are to be restricted to the fitness of the matter with reference to the subject matter in the mind of the

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Legislature Further there is a presumption that the Legislature does not intend to make any alteration in the Law beyond what it expressly declares by express terms or by implication (Maxwell pp 12' 193)

I do not therefore think that the construction of Sec 75 of the Railways Act adopted by the Punjab Court is right Under the Indian Law Reports Act (XVIII of 1870 Sec 3) this Court is not bound to follow that Court's ruling or that of the Bombay Court of Small Causes

However in view of the above rulings and having regard to the liberal grammatical construction of Sec 75 I entertain some doubt as to the correctness of my opinion and as there is no ruling on the point by the other High Courts I submit the question for an authoritative decision by the High Court

Samlarrao N Karnad (amicus curie) for the plaintiff—
The responsibility of a Railway Company for loss of goods entrusted to them is governed by Section 72 of the Railways Act This section saddles the Company with liability in general as that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act If the goods are of special value such as those mentioned in the Second Schedule of the Railways Act, then Section 75 applies This section requires that the sender, in order to claim compensation for loss, must cause the value of the goods contained in the package to be declared at the time of delivery of the parcel to the Railway Company The package in this case was a mixed parcel It contained cotton as well as silk goods Section 75 contemplates a package of silk goods alone It does not refer to a package of mixed goods The words 'of the parcel or package' have made an alteration in the old law The section in the Acts of 1854 and 1879 which correspond to Section 75 of the present Act should be considered in determining the scope of that section It is submitted that Section 75 should be construed liberally Maxwell on the Interpretation of Statutes, 4th Edition, pp 89, 122 and 123, Sections 72 and 75 do not exclude each other Where the package contains articles of special value along with others, Section 75 would apply to the goods of special value, in the case of the other goods, Section 72 would apply Section 75 applies only to goods mentioned in the Second Schedule, while, with respect to other goods contained in the package, the Railway Company would be responsible for their loss under Section 72 The Punjab case referred to by the Subordinate Judge in his reference was decided under the Old Acts

S T Palekar (amicus curie) for the defendant was not called upon

SCOTT, C J—We are of opinion that the protection given by Section 75 of the Indian Railways Act (IX of 1890) extends to the whole parcel in which silk goods such as are mentioned in clause (1) of the Second Schedule are contained, whether the rest of the parcel is composed of articles mentioned in the Second Schedule or not

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This appears from the words of the Section, which draws a distinction between the articles mentioned in the schedule and the parcel or package in which they are contained and provides that the Railway Administration shall not be responsible for the loss, destruction or deterioration of the parcel or package

We, therefore, answer the point submitted for our decision in the affirmative

Order accordingly

The Allahabad Law Journal Vol. VII. Page 606.

APPELLATE CIVIL

Before Mr. Justice Richards and Mr. Justice Tudball.

ROHILKHAND AND KUMAON RAILWAY
(DEFENDANTS), APPELLANTS

v.

JAGDAMBA SAHAI, (PLAINTIFF), RESPONDENT

Railways Act (IX of 1890) Section 75—Contents declared—No insurance charges demanded—Liability of Company—Bye laws framed by Company—Bye law No 26—Modifying Section 75—Effect of

1910
April 8

The plaintiff booked a box requesting that special care should be taken of the contents. On being required to declare the contents he showed a list of the same. The Company did not require him to pay any extra charges. They handed him a receipt on the back of which was printed Bye law No 26 (framed under Sec 75 of the Railways Act) which declared that the Company is not responsible for any loss, destruction or deterioration of goods. The goods were damaged in transit.

Held, that the declaration made by the plaintiff was a sufficient declaration within the meaning of Sec 75 and the Railway Company not having demanded any extra payment were not exonerated from liability by reason of the provision of that section.

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Hell, further that the Bye law 26 framed under Sec 75 so far as it made the making of a demand from the owner of the goods unnecessary was *ultra vires*. The Bye law could not be considered as amounting to a demand and a reference to them on the receipt did not affect the plaintiff *Great Indian Peninsula Railway v Harsett Chand Mull*, 19 Bom 160 distinguished.

SECOND APPEAL from a decree of MOULVI MUHAMMAD HUSSAIN, Officiating Additional Subordinate Judge of Aligarh, reversing the decree of Babu Kameshwar Nath, Munsiff of Kasjang.

Suit for damages

The material facts will appear from the judgment

H. H. Allack (with him *B. E. O'Connor*) for the Appellant

Sundar Lal, for the Respondent

The judgment of the Court was delivered by

RICHARDS, J.—This appeal arises out of a suit in which the plaintiff claimed Rs 1,000, the value of the contents of a box, which he had delivered to the defendant Railway Company for carriage from Katbgodam to Kasjang city station. It appears that at the time of booking the box the plaintiff made a representation to an officer of the Company that the box contained articles of the value of about Rs 1,000 and he wished that special care should be taken to prevent the box or its contents from being injured by rain. He was asked the nature of the contents and he showed a list of the contents. The defendant Railway Company contend that they are relieved from all liability by the virtue of the provisions of Sec 75 of the Indian Railways Act IX of 1890 and clause 26 of the Bye-laws of the defendant Company, Sec. 75 of the Railways Act is as follows—

“(1) When any articles mentioned in the Second Schedule are contained in any parcel or package delivered to a Railway Administration for carriage by railway and the value of such articles in the parcel or package exceeds one hundred rupees the Railway Administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by Railway, and if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk.

(2) When any parcel or package of which the value has been declared under sub section (1) has been lost or destroyed or has deteriorated, the compensation recoverable in respect of such loss, destruction or deterioration shall not exceed the value so declared and the burden of proving the value so declared to have been the true value shall notwithstanding anything in the declaration, be on the person claiming the compensation.

(3) A Railway Administration may make it a condition of carrying a parcel or package declared to contain any article mentioned in the Second Schedule that a Railway servant authorized in this behalf has been satisfied by examination or otherwise that the parcel actually contains the articles declared to be therein.

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Clause 26 of the Bye laws is as follows —

“The Railway Company is not responsible for the loss, destruction or deterioration of any luggage or property belonging to or in charge of a passenger unless a Railway servant has booked and given a receipt therefor.”

Then follows an enumeration of the articles. The Bye law then proceeds —

“When the value of such articles exceeds Rs 100, unless the value and nature of such articles or the parcel or package containing the same, shall have been declared by the sender, and an insurance rate or compensation for increased risk over and above the Railway charge for carriage, shall have been paid to and accepted by some person duly authorized to receive the same on behalf of the Company, and who had satisfied himself by examination or otherwise that the parcel actually contains the articles declared to be therein.”

So far as Sec 75 of the Railways Act is concerned, it is admitted that the officials of the defendant Company never made any demand on the plaintiff to pay any percentage over and above the ordinary railway charge of the goods. It is contended on behalf of the appellant Company, that notwithstanding that no such demand was made, they are protected by Sec 75, because the declaration that was made by the plaintiff was not made with a view to insurance, and reliance is placed on the case of the *Great Indian Peninsula Railway v Russell and Mill* (1). We may point out at once that in this decision the provisions of a different Act were being construed. Sec-

(1) (1894) 1 L J, 19 Bom 160

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tion 11 of Act IV of 1879, although a corresponding section to Section 75, differs in an important particular. It has no provision, requiring the Railway Company to demand the percentage, and it expressly provides that the carrier is not liable for loss unless not only is a declaration made but the increased charge or an engagement to pay such charge has actually been paid or entered into by the owner of goods and accepted by the Railway servant who must be specially authorized in that behalf. In that case reliance was placed on the decision in the case of *Robinson v Great Western Railway Company* (1)

A reference to this last mentioned case shows that the Court was referring to an entirely different set of circumstances. There the plaintiff was suing the Railway Company for refusing to carry his horse. The Railway Company refused to carry his horse because they knew it was of a greater value than £50. The plaintiff so far from relying on any declaration made by him of the horse expressly stated that he never intended to make any declaration at all as to the value. The plaintiff in that case was insisting that the Railway Company could not refuse to carry his horse even though it were valued for more than £50, and that he was not ready and willing to pay the insurance. In our opinion, as found by the lower Court the declaration made by the plaintiff was a sufficient declaration within the meaning of Sec 75, and as the Railway Company did not require him to pay or engage to pay a percentage on the value of the contents of the box the defendant Railway Company are not protected by the provisions of Sec 75. The next point is whether the defendants are protected by the provisions of clause 26 of the Bye laws to which we have already referred. When the goods were booked, a receipt was handed to the plaintiff which contains in a note at the foot the conditions on which the luggage is carried (see the notice on the back of the ticket, the time bill and the general rules and regulations of the Company). A number of conditions are mentioned on the back. No 3 is as follows —

"The Railways over which luggage is carried are not in any way responsible for any loss of or injury to any of the articles mentioned in the Second Schedule of the Indian Railways Act, 1890, except as provided for in Sec 75 of that Act, and all luggage is carried on the terms and conditions prescribed in the said Act."

It will be seen at once that this condition expressly alleges that the contract between the parties is as provided by Sec 75, and we have already held that under the circumstances of the present case Sec 75 is no defence. The appellants, however, argue that a reference on the face of the receipt to time bills and the general rules of the Company fastens the plaintiff with the conditions in accordance with Sec 26 of the Bye laws. This contention is in itself most unreasonable, having regard to clause 3 endorsed on the receipt. As to clause 26 of the Bye laws it seems to be nothing more than an interpretation placed by the Railway Company on Sec 75 most favourable to themselves. It omits all that portion of Sec 75 which provides that a demand is necessary before the owner of goods is liable to pay extra percentage. Clause 26 is more in accordance with the law prior to the Act of 1890. So far as the Bye laws purport to render unnecessary the making of demand by the Railway Company from the owner of the goods, they are in our opinion *ultra vires*. The Bye laws cannot for a moment be considered as amounting to a demand, and in our opinion the reference to the Bye laws on the face of the receipt in no way affects the plaintiff under the circumstances of the present case. We accordingly dismiss the appeal with costs.

Appeal dismissed

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ORIGINAL CIVIL

Before Sir M R Westropp, Kt, Chief Justice, and
Mr Justice Green

ISHWARDAS GULABCHAND (PLAINTIFF)

THE GREAT INDIAN PENINSULA RAILWAY
COMPANY (DEFENDANTS) *

Railway Company—Carriers—Evidence—Burden of proof of negligence—
Misdescription of goods—Act III of 1865 (Carriers Act) S 9 Act
XVIII of 1854 S 11

The plaintiff caused to be delivered to the defendants for carriage from
Bombay to Ooriss certain goods among which were 12 bags of sugar
candy. His agent when signing the consignment note at the Railway

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* Small Cause Court Reference No 13993 of 1878.

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Station, erroneously, but without fraudulent intent, stated the contents of the 12 bags to be alum, for which a lower freight was charged by the defendants. The railway clerk received the goods, and gave a receipt note, on which the following condition was printed — 'The Company give notice that they are not responsible for loss or damage arising from fire the act of God or civil commotion.' In the course of the journey a fire broke out in the train, and a large portion of the plaintiff's goods, including ten bags of the sugarcandy was destroyed. In an action for damages for non delivery, —

Held,

(1) Under the provisions of S 9 of the Carriers Act (III of 1865) the burden of proving negligence on the part of the defendants did not rest upon the plaintiff notwithstanding the condition in the receipt note.

(2) The misdescription, by the plaintiff's agent, of the twelve bags of sugarcandy as alum did not exonerate the defendants from all liability to the plaintiff in respect of these bags. The plaintiff however, was only entitled to recover, in respect of the ten lost bags the value of alum only, and not sugarcandy, while the defendants on the other hand could not in respect of the said 10 bags charge freight as for sugarcandy. *McCance v London and N W Railway Company*⁽¹⁾ and *Le Beau v G'n Steam Navigation Co*⁽²⁾ followed.

CASE stated for the opinion of the High Court, under S 7 of Act XXVI of 1864, at the request of the defendants' attorney, by W E HART, First Judge of the Court of Small Causes at Bombay —

"1 The plaintiff sued to recover the sum of Rs 905 0 3 as damages for the non-delivery of the plaintiff's goods received by the defendants for carriage for reward from Borri Bunder to Oojem on the 22nd March 1878.

"2 The goods consisted of 5 slabs of tin, 1 bundle of copper sheets, and 12 bags of sugarcandy, and were taken on the afore said date by the plaintiff's *muladum*, who had obtained them from the respective vendors, at the station, and there handed over to a broker to be by him consigned to the plaintiff's agent at Oojem.

"3 The broker, on signing the consignment note at the station, voluntarily stated the contents of the twelve bags to be alum, for which a lower freight was charged by the defendants than for the sugarcandy, but this he did in ignorance and without fraudulent intention, and I find, as a fact, that no fraud is to be charged in this respect against the broker, the *muladum*, or the plaintiff.

"4 The railway clerk accepted the said statement of the broker without question, and, on payment of the lump sum demanded as freight for the whole consignment in which that payable in respect of the bags was calculated as for alum, handed to the broker a goods receipt note, stating the number of packages to be twenty one, and twelve of these to be bags of alum

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"5 On the back of the goods receipt note was printed a number of conditions, of which I hold the plaintiff to have had notice at the time of the despatch of these goods, and of which the third is in these words—

"The Company further give notice that they are not responsible for loss or damage arising from fire, the act of God, or civil commotion'

"6 The goods were sent in due course in a goods wagon the only other contents of which were a quantity of coconuts, but on the road a fire broke out in that waggon on the Holkar State Railway, the result of which was so far as the plaintiff's goods were concerned, the loss of 28 mounds of the tin, and the destruction of 10 bags of the sugarcandy

"7 The only witness examined as to the circumstances under which the fire broke out, was Mr Beard, the Traffic Inspector on the Holkar State Railway, who happened to be a passenger in that same train. He was called by the defendants, and professed himself quite unable to account for the origin of the fire, but admitted in cross examination that it might have been purposely kindled, or, he added, 'it may have been the act of God' It further appeared from his evidence that the fire must have made considerable way before it was discovered, for the coconuts were destroyed, as was also the whole wood work of the waggon. The loss was occasioned entirely by the fire, and not by any negligence on the part of the railway servants.

"8 The defendants then for the first time discovered that what had been consigned as alum was, in fact, sugarcandy. They, however, tendered to the plaintiff's agent at Oojein such of the goods as had been saved from the fire, viz, all the copper, all the tin except 28 mounds, and two out of the 12 bags of sugarcandy, on condition that the plaintiff's agent should give up the goods receipt note, or pass a bond of indemnity. The agent, acting on instructions from the plaintiff, absolutely refused to take delivery of the goods offered with or without conditions of any kind whatsoever. The plaintiff then brought this action to recover the cost

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price of his goods in Bombay, together with the freight paid here for their carriage to Oojom. That is, apparently, he seeks entirely to avoid the contract between the defendants and himself, on the ground that they have not safely carried to their destination all the goods entrusted to them.

"9 The defendants did not dispute the amount claimed by the plaintiff correctly to represent the cost price of his goods and the freight paid by him, but denied all liability, saying that, as to that part of the consignment which had been destroyed by fire, they were protected by the three conditions above stated, while as to the rest they had tendered the same before action. They also contended, as to the whole consignment, that inasmuch as they came under the definition of the term *bailor* as contained in Section 148 of the Indian Contract Act (IX of 1872), and had taken as much care of the goods as a man of ordinary prudence would have taken of his own property, they were protected from all liability by the provisions of Section 152 of the last mentioned Act. They further pleaded, as to the sugarcandy, that their contract was to carry alum, and they were, therefore, not liable for anything in respect of the ten bags of sugarcandy. They, lastly, claimed to set off wharfage of the goods offered to the plaintiff of which he had refused to take delivery, and the difference in freight between twelve bags of alum and the like quantity of sugarcandy.

"10 It will be observed that the words of the condition relied on by the defendants are so wide as to include all loss occasioned by fire, however caused. But the power of the Railway Company to protect themselves by such a condition seemed to me to be restricted by Section 11 of Act XVIII of 1854, which is in the words:—'The liability of such Railway Company for loss of, or injury to, any articles or goods to be carried by them, other than those specially provided for by this Act, shall not be deemed or construed to be limited or in any wise affected by any public notice given, or any private contract made, by them, but such Railway Company shall be answerable for such loss or injury when it shall have been caused by gross negligence or misconduct on the part of their agents or servants.'

"11 It is difficult to put any construction whatever upon an ill-drawn condition as this, the first part of which would seem to mean that in no case may the Railway Company, by public

notification or private contract, avoid their liability in respect of goods such as these, which are not among those specially provided for by the Act, while the latter part would seem to mean that the Railway Company are only to be liable for loss or injury occasioned by the gross negligence or misconduct of its servants. On a consideration of the section as a whole, however I was of opinion that what the Legislature intended by it was that the Railway Company should be at liberty to protect itself from liability by public notification or private contract but that, whatever the terms of such notification or contract might be, still the Company should remain liable if the loss or injury were occasioned by the negligent or wilful misconduct of its agents or servants. That is, to take a simple case, even if the consignor chose to contract with the Company that it should not be liable if his goods were stolen by one of its servants, yet the Company should not be allowed to plead such contract, and by showing that the loss of the goods was occasioned by the theft of one of its own servants avoid all liability in respect of such loss.

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' 12 The defendants then contended that it was for the plaintiff, in the first place, to give affirmative evidence that the fire was occasioned by the negligence or misconduct of a servant or agent of the Company, and as he offered no evidence whatever on the subject, they were entitled to rely on the special condition above stated. I was, however, of opinion that in the circumstances of the present case it was for the defendants to show that there had been no negligence or misconduct on the part of their agents or servants, and that, as they could give no evidence of the cause or origin of the fire, they could not avail themselves of the special condition on which they relied. It seemed to me, in the first place, that it was incumbent on the defendants, seeking to avail themselves of a statutory provision in their favour which was to relieve them from the ordinary common law liability of common carriers, to show how they complied with the terms of that provision so as to come under its protection. In the next place, I was of opinion that it was for the defendants to displace the presumption of negligence which ordinarily arises against the carrier from the mere fact of non delivery. Thirdly, I thought that as the defendants assumed complete and absolute control over the goods until their arrival at O join, while the plaintiff had no means of knowing the measures taken for their bestowal and disposal, and could himself take no precautions whatever for their safety, it was for the defendants to show that they were in no way

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price of his goods in Bombay, together with the freight paid here for their carriage to Oojem. That is, apparently, he seeks entirely to avoid the contract between the defendants and himself, on the ground that they have not safely carried to their destination all the goods entrusted to them.

' 9 The defendants did not dispute the amount claimed by the plaintiff correctly to represent the cost price of his goods and the freight paid by him, but denied all liability, saying that, as to that part of the consignment which had been destroyed by fire they were protected by the three conditions above stated, while as to the rest they had tendered the same before action. They also contended as to the whole consignment, that inasmuch as they came under the definition of the term *bailee* as contained in Section 148 of the Indian Contract Act (IX of 1872), and had taken as much care of the goods as a man of ordinary prudence would have taken of his own property, they were protected from all liability by the provisions of Section 152 of the last mentioned Act. They further pleaded, as to the sugarcandy, that their contract was to carry alum, and they were, therefore, not liable for anything in respect of the ten bags of sugarcandy. They, lastly, claimed to set off wharfage of the goods offered to the plaintiff of which he had refused to take delivery, and the difference in freight between twelve bags of alum and the like quantity of sugarcandy.

' 10 It will be observed that the words of the condition relied on by the defendants are so wide as to include all loss occasioned by fire however caused. But the power of the Railway Company to protect themselves by such a condition seemed to me to be restricted by Section 11 of Act XVIII of 1854, which is in the following words:—'The liability of such Railway Company for loss of, or injury to any articles or goods to be carried by them, other than those specially provided for by this Act, shall not be deemed or construed to be limited or in any wise affected by any public notice given or any private contract made, by them, but such Railway Company shall be answerable for such loss or injury when it shall have been caused by gross negligence or misconduct on the part of their agents or servants.'

" 11 It is difficult to put any construction whatever upon the ill-drawn section as thus, the first part of which would seem to mean that in no case may the Railway Company, by public

notification or private contract, void their liability in respect of goods such as these, which are not among those specially provided for by the Act, while the latter part would seem to mean that the Railway Company are only to be liable for loss or injury occasioned by the *gross* negligence or misconduct of its servants. On a consideration of the section as a whole, however I was of opinion that what the Legislature intended by it was that the Railway Company should be at liberty to protect itself from liability by public notification or private contract, but that, whatever the terms of such notification or contract might be, still the Company should remain liable if the loss or injury were occasioned by the negligent or wilful misconduct of its agents or servants. That is, to take a simple case, even if the consignor chose to contract with the Company that it should not be liable if his goods were stolen by one of its servants, yet the Company should not be allowed to plead such contract, and by showing that the loss of the goods was occasioned by the theft of one of its own servants avoid all liability in respect of such loss.

"12 The defendants then contended that it was for the plaintiff, in the first place, to give affirmative evidence that the fire was occasioned by the negligence or misconduct of a servant or agent of the Company, and as he offered no evidence whatever on the subject, they were entitled to rely on the special condition above stated. I was, however, of opinion that in the circumstances of the present case it was for the defendants to show that there had been no negligence or misconduct on the part of their agents or servants, and that as they could give no evidence of the cause or origin of the fire, they could not avail themselves of the special condition on which they relied. It seemed to me in the first place that it was incumbent on the defendants, seeking to avail themselves of a statutory provision in their favour which was to relieve them from the ordinary common law liability of common carriers, to show how they complied with the terms of that provision so as to come under its protection. In the next place, I was of opinion that it was for the defendants to displace the presumption of negligence which ordinarily arises against the carrier from the mere fact of non delivery. Thirdly, I thought that as the defendants assumed complete and absolute control over the goods until their arrival at Oojem, while the plaintiff had no means of knowing the measures taken for their bestowal and disposal, and could himself take no precautions whatever for their safety, it was for the defendants to show that they were in no way

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price of his goods in Bombay, together with the freight paid here for their carriage to Osejem. That is, apparently, he seeks entirely to avoid the contract between the defendants and himself, on the ground that they have not safely carried to their destination all the goods entrusted to them.

"9 The defendants did not dispute the amount claimed by the plaintiff correctly to represent the cost price of his goods and the freight paid by him, but denied all liability, saying that, as to that part of the consignment which had been destroyed by fire they were protected by the three conditions above stated, while as to the rest they had tendered the sum before action. They also contended, as to the whole consignment, that inasmuch as they came under the definition of the term *haleco* as contained in Section 148 of the Indian Contract Act (IX of 1872), and had taken as much care of the goods as a man of ordinary prudence would have taken of his own property, they were protected from all liability by the provisions of Section 152 of the last mentioned Act. They further pleaded, as to the sugarcandy, that their contract was to carry *alum*, and they were, therefore, not liable for anything in respect of the ten bags of sugarcandy. They, lastly, claimed to set off wharfage of the goods offered to the plaintiff of which he had refused to take delivery, and the difference in freight between twelve bags of *alum* and the like quantity of sugarcandy.

"10 It will be observed that the words of the condition relied on by the defendants are so wide as to include all loss occasioned by fire, however caused. But the power of the Railway Company to protect themselves by such a condition seemed to me to be restricted by Section 11 of Act XVIII of 1854, which is in the following words:—"The liability of such Railway Company for loss of, or injury to, any articles or goods to be carried by them, other than those specially provided for by this Act shall not be deemed or construed to be limited or in any way affected by any public notice given, or any private contract made by them but such Railway Company shall be answerable for such loss or injury when it shall have been caused by gross negligence or misconduct on the part of their agents or servants."

"11 It is difficult to put any construction whatever upon so ill-drawn a section as this, the first part of which would seem to mean that in no case may the Railway Company, by public

of ordinary bailees. Furthermore, this special liability of carriers was, before the passing of the Contract Act, apparently recognized by the Legislature in several enactments, e g, the Railway Act and the Carriers' Act. Then was passed the Contract Act, which, on the face of it in the preamble and in Section 1, is not intended to be exhaustive and applicable in every instance, and no mention is anywhere made in it of the Railway Act, the Carriers' Act, or of carriers for hire, the only reference, indeed, to carriage at all, in the sections relating to bailment, being in Section 158, where the bailment is expressly stated to be gratuitous. I thought that, had the Legislature intended by Sections 151 and 152 of the Contract Act to effect a complete revolution of the law as applied to carriers (for, if the construction contended for by the defendants be correct, it must apply, not only to the Railway Companies, but to ship captains, and, in fact, to all who, as carriers for reward, are under special liabilities to the owners of the goods entrusted to them), express words would have been used for the purpose of giving effect to such intention.

"10 As to the third defence, I hold, on the authority of *McCance v The I and N W Railway Company* (34 L J Ex 39) and of certain dicta in *Le Beau v The General Steam Navigation Company* (L R 8 C P 88), which, however, were not essential for the decision of that case, that the description by the consignor not being a part of the contract but only the basis of the contemplated contract, the defendants in this case had contracted to carry the packages consigned, and not only the goods described by the consignor. Apart from those authorities, however, I was of opinion that the correctness of the description of the goods is not, ordinarily speaking, essential to the contract to carry and deliver, for, if it were, we should not have certain goods made the subject of express statutory provision, as in the Railway Act and Carriers' Act. Moreover, that the defendants themselves did not consider the misdescription of the sugarcandy as aum to go to the root of the contract to carry and deliver, was, I thought, evident from the fact that they offered delivery of the portion saved. I, therefore, held that the defendants were liable to the plaintiff in respect of the goods lost, but, on the authority of the two cases cited above, that the plaintiff could recover, in respect of the ten lost bags, the value of aum only, and not sugarcandy, while the defendants, on the other hand, could not, in respect of these ten bags, charge freight as for sugarcandy. The goods saved having been tendered to the plaintiff before action, I hold

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in fault, (1) where is the facts proved point rather to the contrary conclusion, for not only is nothing known of the cause, time, or place of the origin of the fire but it must already have made considerable way before it was discovered

"13 Next as to the defence based on the Contract Act I was of opinion that Section 152 did not avail the defendants in the present instance. If that section be applied to carriers for reward, the burden would clearly be on the defendants of proving that they took as much care of the plaintiff's goods as a man of ordinary prudence would have taken of his own. This the defendant failed to do. For as has been seen, they cannot account for the fire, admit that it may have been purposely ignited, and show that it was not discovered until it had made considerable progress.

"14 Apart from this question of fact, however, as no judicial authority was cited to show that Section 152 of the Contract Act applied to carriers for reward and considering the number of years that that Act had been in force I declined to be the first to put upon the section in question a construction of which the effect would be to declare that a Railway Company is exonerated from all liability in every case in which the ordinary precautions have been taken for the safety of the goods, especially as out of the numerous cases tried by myself against this very Railway Company this defence had only once been raised.

"15 I further however, I was of opinion that Section 152 of the Contract Act did not apply to carriers for reward. The term *hauke* as defined in Section 148, is no doubt, sufficiently wide to include all carriers, and there is no express exclusion of carriers for reward from Chap IX of the Contract Act, which relates to the subject of bailment. But Sections 151 and 152 only declare the law as it existed before the passing of the Contract Act in regard to ordinary bailees other than carriers, and side by side with that law there also existed the special common law liability of common carriers, who nevertheless then equally as now might have been included within the strict letter of the definition

(1) See & lect 13, this case I have recommended to report (the case of *Herple v The Great Eastern Ry Co*) (1876) 2111 which the Court of Appeal (11 (see p. 11) that the carrier was liable to throw upon the Company the burden of affirmatively proving the negligence of the passenger whose luggage was stolen will alter his own immediate control.

of ordinary bailees. Furthermore, this special liability of carriers was, before the passing of the Contract Act, apparently recognized by the Legislature in several enactments, e.g., the Railway Act and the Carriers' Act. Then was passed the Contract Act, which, on the face of it in the preamble and in Section 1, is not intended to be exhaustive and applicable in every instance, and no mention is anywhere made in it of the Railway Act, the Carriers' Act, or of carriers for hire, the only reference, indeed, to carriage at all, in the sections relating to bailment, being in Section 158, where the bailment is expressly stated to be gratuitous. I thought that, had the Legislature intended by Sections 151 and 152 of the Contract Act to effect a complete revolution of the law as applied to carriers (for, if the construction contended for by the defendants be correct, it must apply, not only to the Railway Companies, but to ship captains, and, in fact, to all who, as carriers for reward, are under special liabilities to the owners of the goods entrusted to them), express words would have been used for the purpose of giving effect to such intention.

"16 As to the third defence, I held, on the authority of *McCance v The L and N W Railway Company* (34 L J Lx 39) and of certain dicta in *Le Beau v The General Steam Navigation Company* (L R 8 C P 88), which, however, were not essential for the decision of that case, that the description by the consignor not being a part of the contract but only the basis of the contemplated contract, the defendants in this case had contracted to carry the packages consigned, and not only the goods described by the consignor. Apart from those authorities, however, I was of opinion that the correctness of the description of the goods is not, ordinarily speaking, essential to the contract to carry and deliver, for, if it were, we should not have certain goods made the subject of express statutory provision, as in the Railway Act and Carriers' Act. Moreover, that the defendants themselves did not consider the misdescription of the sugarcandy as alum to go to the root of the contract to carry and deliver, was, I thought, evident from the fact that they offered delivery of the portion saved. I, therefore, held that the defendants were liable to the plaintiff in respect of the goods lost, but, on the authority of the two cases cited above, that the plaintiff could recover, in respect of the ten lost bags, the value of alum only, and not sugarcandy, while the defendants, on the other hand, could not, in respect of these ten bags, charge freight as for sugarcandy. The goods saved having been tendered to the plaintiff before action, I held

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he was bound to accept them, and could not claim their value, and I allowed the defendants' set off in respect of the wharfage of these goods, and the difference in freight between two bags of alum and a like quantity of sugarcandy, and passed a verdict for the plaintiff for Rs 51-2-7 and costs

"17 At the request of the defendants' attorney the above verdict was made contingent on the opinion of the High Court on the questions stated below —

"(1) Ought the plaintiff to have been called on, in the first instance, affirmatively to prove that the fire which occasioned the loss of his goods was caused by the gross negligence or misconduct of the servants or agents of the defendants? If the answer to this question is in the affirmative, the verdict for the plaintiff will be set aside, and a non suit entered

"(2) Can the defendants, as bailees defined in S 148 of the Indian Contract Act, rely on the provisions of S 152 as protecting them from liability in respect of goods carried by them for reward?

"The answer to this question will not affect the verdict in the present case, as the defendants have failed to prove that they took of the plaintiff's goods the care required by S 151 of the Contract Act, but as the verdict in Cause No 11211 is contingent on the opinion of the High Court on this question, I respectfully request that their Lordships will be pleased to consider it

"(3) Does the misdescription, by the plaintiff's broker, of the twelve bags of sugarcandy as alum exonerate the defendants from all liability to the plaintiff in respect of those bags?

"If the answer to this question be in the affirmative, the amount of the verdict will be reduced to Rs 9-11-7

"To these questions I have, at the request of the plaintiff pleader added —

"(4) Are the defendants liable to the plaintiff in respect of the ten lost bags, for the value of the actual contents, *i. e.*, sugarcandy, and not, as found, for the value of the declared contents, *i. e.*, alum

"If the answer to this question be in the affirmative the verdict will be increased to Rs 120-7-0

The plaintiff did not appear

The Advocate General (Honorable J Marriott) and Latham for Defendants.

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Gulabchand

G I P Ry

The question is, whether the onus lay on the defendants to show that the fire was not occasioned by their own gross negligence or misconduct. *Bergheim v Great Eastern Railway Company* (1) *Pelk v North Staff Railway Company* (2). We say the burden lies on the plaintiff, and that no evidence having been given, a non suit should be entered—*The P & O S N Co v Somaji Visram*, (3) *Ohrloff v Briscall*, (4) *Czech v General Steam Navigation Company*, (5) *Angell on Carriers*, p 202. As to the effect of the misdescription of the goods in the absence of fraud, the question is concluded by the cases of *McCance v London and North Western Railway Company*, (6) and *Reilly v Hill* (7). The first Judge (para 12 of case stated) seems to have thought that the defendants were seeking to bring themselves within a statutory exemption. Section 11 of Act XVIII of 1854 leaves untouched the common-law liability of carriers in cases of gross negligence or misconduct. By the common law a carrier might, by special contract, protect himself for any loss even though caused by gross negligence. *Leek v North Staff Railway Company* (2). Section 11 of Act XVIII of 1854 limits his right thus to protect himself, and is not a statutory exemption in his favour.

[WESTROFF, C J.—Does not S 9 of Act III of 1865 rule this case?]

We say that section should be read with S 8. *McQueen v Great Western Railway Company* (8).

WESTROFF, C J.—The first question submitted to us by the learned Chief Judge of the Court of Small Causes, is—"Ought the plaintiff to have been called on, in the first instance, affirmatively to prove that the fire which occasioned the loss of his goods was caused by the gross negligence or misconduct of the servants or agents of the defendants?" This question we answer in the negative, as we think we are bound to do by S 9 of the Carriers' Act (III of 1865). That section runs thus:—"In any suit brought against a common carrier for the loss, damage or non delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non delivery was owing to the negligence or criminal act of the carrier, his servants

(1) L R 3 C 1 Div 221

(2) 10 H 1 C 473 per Blackburn at p 506 and per Lord Wensleydale at p 570

(3) 5 Bom H C Rep 117 (4) L R 1 P C, 231 (5) L R 3 C P, 14

(6) 7 H and N 478 S C 3 H and C 343 (7) 5 Beng L R, 217

(8) L R, 10 Q B 569

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or agents" The defendants have relied on the exception of fire in the consignment note as throwing upon the plaintiff the burden of proof of negligence, and cite *Ohrloff v. Briscall*,⁽¹⁾ *Creech v. General Steam Navigation Company*,⁽²⁾ and *P & O S N Co v. Somaji Piram*,⁽³⁾ as establishing that proposition. The 9th Section of Act III of 1865 is, however, general, and says that "in any suit" brought against a common carrier for loss, damage or non-delivery of goods, the burden of proof of negligence or criminality shall not be cast upon the plaintiff. That Act being confined (S. 2) to carriers by land or inland navigation, the Bombay case last above cited, was not governed by it, inasmuch as the action there was in respect of goods conveyed by sea from China to Bombay. The 2nd Section shows that the term "common carrier" would include "any association or body of persons whether incorporated or not," and, therefore, would be applicable to a Railway Company, unless it be excluded by some other part of the Act. We have not overlooked S. 10, which enacts that "nothing in this Act shall affect the provisions contained in the 9th, 10th, and 11th Sections of Act XVIII of 1854 (relating to Railways in India)." We have examined those sections of Act XVIII of 1854 most carefully, and discover nothing laid down in them as to the party on whom the burden of proof of negligence or no negligence of misconduct or no misconduct, shall be placed. However the special saving contained in S. 10 of the Carriers' Act (III of 1865) and Ss. 9, 10 and 11 of the Railway Act (XVIII of 1854) is pregnant with the implication that in other respects the Carriers' Act is applicable to Railway Companies where there is nothing in it repugnant to such a construction.

The second question — as to the defendants, as bailees defined in S. 148 of the Indian Contract Act, rely on the provisions of S. 152 as precluding them from liability in respect of goods carried by them for reward. — is in this case immaterial as the Chief Judge has found as a fact that the defendants have not proved that they took such care of the plaintiff's goods as a man of ordinary prudence would have taken of similar goods of his own. A full reply has already been given here to a like question in *Suit No. 1221 of 1878 (Kumari Tulundar v. The G I P Railway Company)*,⁽⁴⁾ recently referred to this Court by the Chief Judge.

(1) 11 B. C. 231. (2) L. R., 3 C. 111. (3) 5 B. M. H. C. Rep., 1130 C. J.

(4) 11 P., 3 Bom. 109.

The third question—"Does the misdescription, by the plaintiff's broker, of the twelve bags of sugarcandy as alum exonerate, the defendants from all liability to the plaintiff in respect of those bags?"—we answer in the negative

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The fourth question—"Are the defendants liable to the plaintiff in respect of the ten lost bags for the value of the actual contents, viz, sugarcandy, and not, as found, for the value of the declared contents, viz, alum?"—we answer in the negative

Our reasons for replying to the third and fourth questions in the negative being those assigned by the learned Chief Judge for his similar conclusions, we deem it unnecessary to state them here

We affirm the judgment of the Court of Small Causes with costs of the reference to be paid by the defendants to the plaintiff

Order accordingly

Attorneys for the defendants —*Messrs Hearn, Cleveland and Little*

**The Indian Law Reports, Vol. XXIII. (Allahabad)
Series, Page 367.**

Before Mr Justice Knox and Mr Justice Aikman.

BANNA MAL AND OTHERS (PLAINTIFFS), APPELLANTS

v

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT), RESPONDENT *

Act No 1X of 1890 (Indian Railways Act) Section 47 (b)—Responsibility of Railway Company for goods left on its premises without a Receipt being obtained for them—Rules framed by the Company under the Act

1901
April 22

Held—That a rule by which a Railway Company disclaimed all responsibility for goods left on the Company's premises unless certain conditions were fulfilled the principle of which was that the goods should have

* Second Appeal No 407 of 1899 from a decree of J Sanders, Esq District Judge of Cawnpore, dated the 6th March 1899 confirming the decree of Pandit Kanhaya Lal, Munsif of Havel District, Cawnpore dated the 29th June 1897

Banna Mal been accepted and a receipt given for them by a duly authorized employee of the Company was a rule properly made under the provisions of the Indian Railways Act 1890 and that no suit in respect of the loss of goods merely deposited upon the Company's premises without such a receipt being taken for them could be maintained *Slim v The Great Northern Railway Company*⁽¹⁾ referred to

The Secretary
of State for
India.

This was a suit for damages for the loss of goods alleged to have been delivered to the Oudh and Rohilkhand Railway Company at Cawnpore on the 28th January, 1895, which goods, according to the plaintiffs, never reached their destination. The defendant denied delivery. It was found that the goods in question had been brought on to the Company's premises, but the defendant replied that the Company was under no liability in respect thereof, because the goods had never been accepted for transmission, and no receipt had been given for them by any duly authorized employee of the Company, as required by rules 49 and 50 of the Goods Tariff Rules of the Company, which were rules duly made under the powers conferred by the Indian Railways Act, 1890, Section 17 (b). The particular rules applicable were as follows—

ODDH AND ROHILKHAND RAILWAY—GOODS TARIFF

"Paragraph 19.—The Railway hereby gives public notice that it will not be responsible for articles of any description, whether booked as parcels, as luggage or as goods, and whether for conveyance by passenger or goods trains, unless they shall have been properly packed, marked, directed and described, and shall have been signed for as received by one of the authorized clerks or agents of the Railway.

"Paragraph 50.—Also that the Railway will not undertake responsibility for loss of, injury or damage to, goods brought on to the Railway premises to be dispatched, unless they shall have been weighed and accepted and a printed receipt granted for the same by a duly authorized employee of the Railway."

The Court of first instance (Munsif of Cawnpore) dismissed the suit. The plaintiffs appealed and the lower appellate Court (District Judge of Cawnpore) dismissed the appeal. The plaintiffs thereupon appealed to the High Court, urging, as before, that the provisions in question were inequitable and should not be enforced.

Balu Jagendra Nath Chaudhri (for whom *Balu Satish Chandra Buejri*) for the Appellants

Mr J. Chatterjee, for the Respondent

KNOX and AIRMAN, JJ.—This appeal arises out of a suit brought by the plaintiffs, who are now appellants, for damages on account of goods detained, and for the value of a package of goods alleged by them to have been delivered to the defendant the Oudh and Rohilkhand Railway, on the 28th of January, 1897, at the Station of Cawnpore, for despatch to Bareilly. The allegation of the appellants is that the package was delivered to the defendant, but never reached its destination. The defendant denies delivery. It is found that the goods now missing did pass on to the Railway premises. But the defendant contends that this does not amount to delivery and that in any case the defendant is not responsible for the loss of the goods brought on the Railway premises, unless they have been weighed and accepted and a printed receipt granted for the same by a duly authorized employé of the Railway. In support of this contention the defendant refers the Court to paragraph 50 to be found at page 14 of what are called Goods Tariff Rules, dated the 1st of January, 1895. This paragraph has been put forward and treated as a general rule made by the Railway Company under Section 47 of Act No IX of 1890, clause (b). All that we have to see is, whether it is a rule consistent with Act No IX of 1890. Presumably it has received the sanction of the Governor General in Council and been printed in the *Gazette of India*. No question upon these points has been raised. Indeed, it is not alleged, except in a side way, that it is inconsistent with the Act. The learned Vakil who appeared for the appellants, referred us to Section 42 sub-section (1) and contended that in making the rule the Railway Administration was not according to its powers, affording all reasonable facilities for the receiving, forwarding, and delivering of traffic. One obvious answer to this is, that the rule in question, or one similar to it appears to have found place in rules made by other Railway Companies. The only point taken in the memorandum of appeal is based upon an expression of opinion given by the lower appellate Court to the effect that the rule is inequitable. We have not to see whether a rule is or is not inequitable if it is found to be a rule made consistently with the Act, and duly sanctioned and published as required by the Act. The decision of the case is in accordance with the principle laid down in *Slim v The Great Northern Railway Company* (1). We think the plaintiffs' suit was properly

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Banda Mal dismissed The pleas taken in appeal fail, and the appeal is dismissed with costs.

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Appeal dismissed

The Indian Law Reports, Vol. XXXI. (Calcutta) Series,
Page 951.

ORIGINAL CIVIL.

Before Mr. Justice Stephen.

JALIM SINGH KOTARY

SECRETARY OF STATE FOR INDIA *

1904
June 9

*Carriers—Indian Railways Act, 1890 (IX of 1890) S. 72—Delivery in an
ing of.—Railway Company liability of as carriers—Rules, bye laws and
conditions under Ss 47 & 48 of Act IX of 1890—Reasonableness of*

"Delivered" in S 72 of the Indian Railways Act refers merely to a physical event and is a word devoid of any legal significance.

A Railway Company has cast upon it by S 72 the duties of an ordinary bailee but it may determine the conditions under which those duties may rest and in particular may specify the point of time at which they shall rest by rules under Ss 47 and 48.

These rules however must be consistent with the Act and reasonable. Where a consignor had delivered goods to a Railway Company, for transmission and had had the forwarding note in respect thereof duly registered and marked by the Railway Company but had obtained no receipt from the Railway Company and the goods were lost—

Held—that rules framed by the Railway Company under Ss 47 and 48 whereby goods were to stand at owners risk and the Railway Company were not to be liable therefor until a receipt had been granted by them were inconsistent with the Act and unreasonable and that the Railway Company were liable to pay compensation for the loss incurred.

In this suit the plaintiff sued the defendant as representing the Eastern Bengal State Railway for the value of four bales of cotton piece-goods, which he alleged had been lost through the negligence of the Railway administration or their servants under the following circumstances:

On Friday, February 1st, 1901 the plaintiff's servants delivered to the Railway Administration at the Armenian Ghat Railway Station in Calcutta five bales of piece-goods for transmission to Tezpur in Assam. Four of the bales were delivered in one consignment and the remaining one bale separately.

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The procedure necessary to be gone through for the transmission of goods may be briefly stated as follows.—The goods are taken to the railway station and there a forwarding note for them is filled in, which after passing various officials is registered by the registering clerk. Then the consignor on production of the registered forwarding note gets the goods marked and weighed, and after that does not see either the goods or the note again.

The plaintiff's servants were unable on the above date to get the process above mentioned completed, as news was received of the death of the Queen Empress Victoria and the offices were closed and remained closed on the two following days.

On Monday, February 4th, the offices were reopened and the plaintiff's servants resumed the operation of booking the goods, had them duly entered in the Railway register by the registering clerk and carried the process through, until they arrived at the point when the goods were to be weighed, when they were informed by the Railway authorities that the goods would be weighed in due course and that it was not necessary for them to remain further. The forwarding note and risk note were accordingly left with the Railway authorities and nothing further remained to be done with the goods by the plaintiff except to obtain a formal receipt for them.

On the day following the plaintiff's servants attended at the station to obtain receipts for the two consignments and were handed a receipt for the consignment of one bale, but were informed that there was no receipt for the other consignment of four bales and that no forwarding note could be found for those bales.

After a prolonged search the bales could not be found in the station goods down and the Railway Administration finally denied the delivery of the four bales and the marking of them and denied their liability for the loss inasmuch as they had granted no receipt for the goods.

The Advocate General (Mr P O Kinealy) (with him Mr Sinha) for the Defendant. There is an elaborate procedure to be gone through before the Railway Administration assume responsibility

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for goods to be transmitted, all leading up to the grant of a receipt, that is the first moment when the goods are really taken charge of by the Railway Administration and responsibility undertaken by them. Railway Companies have been given power to make general rules consistent with the Railway Act for regulating the terms and conditions for warehousing or returning goods on behalf of a consignee and to impose conditions not inconsistent with the Act or any general rule thereunder with respect to the forwarding of goods. In this connection rules, which it is submitted are responsible, have been made under S 47 (1) (f) of the Indian Railway Act, 1890 (IX of 1890) (published in the *Gazette of India*, 1902, P I, p 504) and conditions have been imposed under S 54 of the Act.

See also the form of Risk Notes which have been approved by Government on which exhaustive conditions are endorsed. Forms of such Risk Notes are given in Russell and Bayley's book on the Indian Railways Act, p 266.

The Courts have already dealt with this point.

Nanku Ram v The Indian Midland Railway Company (1) *Loonysa Ram v The East Indian Railway Company* (2) *Malkarjun Shidapa v The Southern Mahratta Railway Company* (3) *Slum v Great Northern Railway Company* (4)

Assuming that the goods in this case were brought to the station the Railway Administration did not assume responsibility for them.

They may have been on the railway premises, it is true, but it would be dangerous to hold the Railway liable on that ground.

[STEWART, J.—The usual procedure was interrupted on this occasion.]

That is so, and it is admitted that the consignors cannot take their goods away without the written permission of the Railway authorities but it would be a strong thing to hold the Railway liable because goods have been given house room.

[STEWART, J.—] on no ticket and doing it as part of the carriage. The rules we intend to read do exclude all responsibility until a certain point is reached, that is till receipt is given.

[STEWART, J.—But the rule must be reasonable.] They must be rules consistent with the Act. The Court will have to say

(1) I L L., 22 All., 361

(2) I L L., 30 Cal., 237

(3) I L R. 27 Bom. 16

(4) 11 C. B., 617

that the rules in question, namely, those under Ss 47 and 54, are inconsistent with the Act to make them unreasonable

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Mr A M Dunn (Mr Knight with him) for the Plaintiff Under the Railway proceeding once the consignee has delivered his goods to the weighman to be weighed he parts with both goods and forwarding note altogether, until he gets a receipt All the conditions were satisfied by the plaintiff up to that stage and there was nothing further to be done by him The goods remain in the possession of the Railway, whilst the forwarding note goes through the remaining stages of the process The defendant's case is that delivery is no delivery, until a receipt is given That is not so The receipt is not equivalent to a delivery, but is an acknowledgment of a prior delivery It may be that there is no responsibility until a receipt is given There is no express definition of delivery to be found in the Act But it is submitted that delivery under the Act means delivery under S 72 and under that section the Railway are liable as bailees The argument that there is some point of time up to which the Railway are relieved of all responsibility will not stand With respect to the Rules under S 47 (1) (f) this is not a question of wharfage and the rule itself is inconsistent with S 72 of the Act, inasmuch as it defines the point of responsibility but takes away a period of time during which the Railway are responsible under S 72 The words "subject to other provisions" in S 72 do not relate to the question of responsibility being otherwise defined under S 47 The inconsistency of the rules can be shown by the following example — Assuming that goods have been weighed, put in wagons and sent on the journey to their destination and no receipt has been given for them by the Railway and afterwards the goods are burnt or lost, could it be contended in that case by the Railway that under then rules or bye laws they were entitled to give a receipt at their convenience and that until then they were not responsible? If such a contention were allowed Railway Companies would only have to procrastinate with the receipt sufficiently to save themselves from all responsibility There must be some measure of responsibility (see S 56) Under the Act moreover, reasonable facilities for the reception of goods are to be given S 76 lays down the point of time at which responsibility will attach by delivery The receipt is given as a matter of course, if the forwarding notes come through The cases cited on the other side turn upon the question whether there was in fact a delivery *Slim v Great Northern Railway*

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The Courts have already dealt with this point.

Daulu Ram v The Indian Midland Railway Company (1) *Forays Ram v The East Indian Railway Company* (2) *Mallarjun Shidapa v The Southern Mahratta Railway Company*, (3) *Slim v Great Northern Railway Company* (4)

Assuming that the goods in this case were brought to the station the Railway Administration did not assume responsibility for them.

They may have been on the railway premises, it is true, but it would be dangerous to hold the Railway liable on that ground.

[STREUMER, J.—The usual procedure was interrupted on this occasion.]

That is so, and it is admitted that the consignors cannot take their goods away without the written permission of the Railway authorities, but it would be a strong thing to hold the Railway liable because goods have been given house room.

[STREUMER, J.—You are broke and doing it as part of the circus.] The rules are intended to and do exclude all responsibility until a certain point is reached, that is till receipt is given.

[STREUMER, J.—But the rules must be reasonable.] They must be rules consistent with the Act. The Court will have to say

(1) I I L., 22 All, 361

(2) I I P., 30 Cal., 257

(3) I L R., 27 Bom., 174

(4) 11 C. B., 617

that the rules in question namely those under Ss 17 and 54, are inconsistent with the Act to make them unreasonable

Mr J M Dunn (Mr Knight with him) for the Plaintiff Under the Railway procedure once the consignor has delivered his goods to the weighman to be weighed he parts with both goods and forwarding note altogether until he gets a receipt All the conditions were satisfied by the plaintiff up to that stage and there was nothing further to be done by him The goods remain in the possession of the Railway whilst the forwarding note goes through the remaining stages of the process The defendant says that delivery is no delivery, until a receipt is given That is not so The receipt is not equivalent to a delivery, but is an acknowledgment of a prior delivery It may be that there is no responsibility until receipt is given There is no express definition of delivery to be found in the Act But it is submitted that delivery under the Act means delivery under S 72, and under that section the Railway are liable as bailees The argument that there is some point of time up to which the Railway are relieved of all responsibility will not stand With respect to the Rules under S 47 (1) (f) this is not a question of wharfage and the rule itself is inconsistent with S 72 of the Act, inasmuch as it defines the point of responsibility but takes away a period of time during which the Railway are responsible under S 72 The words "subject to other provisions" in S 72 do not relate to the question of responsibility being otherwise defined under S 47 The inconsistency of the rules can be shown by the following example — Assuming that goods have been weighed, put in wagons and sent on the journey to their destination and no receipt has been given for them by the Railway and afterwards the goods are burnt or lost, could it be contended in that case by the Railway that under their rules or bye laws they were entitled to give a receipt at their convenience and that until then they were not responsible? If such a contention were allowed, Railway Companies would only have to procrastinate with the receipt sufficiently to save themselves from all responsibility There must be some measure of responsibility (see S 56) Under the Act moreover, reasonable facilities for the reception of goods are to be given S 76 lays down the point of time at which responsibility will attach by delivery The receipt is given as a matter of course, if the forwarding notes come through The cases cited on the other side turn upon the question whether there was in fact a delivery *Slim v Great Northern Railway*,

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Jahm Singh Company⁽¹⁾ does not touch the point. (See Macnamara on Carriers, p. 385, note) *Toorji Ram v. East Indian Railway*
 Secretary of Company⁽²⁾ does not apply

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STERN J.—This is a case in which the plaintiff sues the Secretary of State as the authority responsible for the Eastern Bengal State Railway, for the value of four bales of piece-goods, which he delivered to the Railway and which, he says, were lost while they were in the custody of the Railway.

I will first consider the facts of the case, which are not in themselves complicated, but as to which there is a substantial dispute. We have had the procedure for taking goods by Railway detailed to us very fully by one of the witnesses for the defence, and his statement of the procedure may be taken as substantially accurate. I need not go through it in detail, but the general lines on which the operation of sending off goods by train is performed is that the consignor takes his goods to the station and there has filled in a document called the forwarding note which, after he has seen various officials, is registered by the registering clerk. Then the consignor, on production of the registered forwarding note, gets the goods marked and afterwards he gets them weighed. After they have been weighed he does not see either the goods or the forwarding note again. The latter is sent back to the office and various steps are taken with regard to it and the former are sent to their destination.

Now the evidence of the plaintiff is that he sent what we may for purposes of this case, take as two lots of goods to the Railway Station on Friday, the 1st February 1901. The one lot consisted of four bales and the other of one, which was sent at a later time, because additional goods had to be inserted in it. On that day the beginning of the rather lengthy process necessary for transmission of the goods had begun, but before it proceeded far, it stopped, because the office closed on account of the death of the Queen Empress. The office remained closed until the ensuing Monday. On the Monday, the servants of the plaintiff resumed the operation of booking those goods and they carried it through, according to them, in its regular course, until they arrived at the point where the goods are marked. According to them, the four bales and the one bale were marked. Then the Railway officer stated that they would see them weighed and they accordingly came away believing all would be well.

(1) 11 C. B. 617

(2) 1 L. R., 20 Cal. 257

Next day, on going for the receipt, the delivery of which by the Railway Company is the final operation of booking the goods, the plaintiff's servants were told that the one bale had gone through all right, and they got the receipt, but the other four bales were not to be found. Search was made and eventually they went to Goalundo, which is a point on the journey towards the final destination of the goods, and there they failed to find any trace of them. Meanwhile the one bale went safely through to its destination.

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Taking the story so far as supporting their case, the plaintiff proves that he purchased these goods through a broker, that is satisfactorily proved by his books. He also produced the forwarding register book of the Railway Company, where there is an entry of those four bales which so far corroborates his story.

The evidence produced by the defendant goes to show that those four bales in fact never existed. The various officials, who might have spoken to this point are unavailable, for different reasons. One is said to have left the defendant's service and gone elsewhere. The absence of other important officials have been satisfactorily accounted for and all the evidence that we really have on the point is that of the Station Master, who saw the consignor's servants alter the receipt for the goods had not been given. The circumstances of that interview are all in dispute.

The plaintiff's gomastah says that when he went to see the Station Master on failing to get information, the Marker and other officials made certain statements before him. This is denied by the Station Master, who gives an entirely different account of the matter and in particular denies the statements said to have been made by the Marker. One of the few important documents produced is the letter, which the Station Master gave to the consignor to allow him to have the goods in the goods shed at Goalundo overhauled by his servants in order to see if those goods had been transmitted there by any irregular manner.

It is argued strenuously by the plaintiff that he could not possibly have suggested this on his own account. This letter must have been given on the suggestion of the Station Master. This I doubt, but I think the letter is not a very strong piece of evidence, either one way or the other. Taking the story as told by the plaintiff and considering the credibility which I attach

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to the witnesses, I incline decidedly to the story told by the plaintiff, one of my reasons being that very little of the Station Master's evidence was put to the plaintiff in cross examination. Also, there are parts of the written statement which are not fully consistent with that story. Further, it appears that the Station Master has never in any way recorded the story he tells us, until long after the event occurred. I, therefore, find as a fact that the four bales were brought to the defendant's premises by the plaintiff, and were left there by the plaintiff under the control of the defendant's servants with the defendant's knowledge and consent. Now this raises the second point in the case I have to consider. What is the legal position of the Railway Company under the facts which I have found? Three sections of the Indian Railway Act of 1890, which governs this case, seems to me to be of importance. The first is Section 72, which puts in a legislative form what I take to be the ordinary law upon the subject, which is that, when goods are delivered to the Railway to be carried, they become liable like any other bailee. It is argued that there was no delivery in this case, because under the circumstances stated delivery does not take place until a receipt is given by the Railway Company. I cannot read this section in that way. Delivery I take to be a purely lay word, devoid of any legal significance at all, it alludes to a physical event, I do not think one can say that whether there is delivery or not is in any way affected by any legal event. Therefore, I took delivery in that section to refer to a physical event, an important element of which is that, whatever is delivered passes from the physical custody of one man to the physical custody of another.

The real question depends upon the construction that is to be placed upon Sections 47 and 54 of the Railway Act. For the present purposes these two sections need not be distinguished. By Section 47 the Railway Company may in the general rules for regulating the terms in which it will warehouse or retain goods at any station. By Section 54 the Railway Company may impose conditions for receiving goods. For the present purposes, these two things are the same. In both cases these rules and conditions have to be consistent with this Act. Now what does that mean? The Railway Company has cast upon it the duties of an ordinary bailee. As I read the Act it cannot wholly divest itself of these duties, but it may determine the conditions under which that duty may vest, and in particular it may specify the point of time at which it shall vest. The general common law

embodied in Section 72 is by those sections liable to be cut down to a certain extent by those rules under Sections 17 and 54. The question is to what extent? And the answer is as far as is reasonable, which really means the same thing as being consistent with the Act.

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This brings me to the further point that any of the bye laws or conditions of the Company are void if and in so far as they are unreasonable, and I have to consider whether the conditions imposed by the rules in this case are or are not reasonable. Two rules have been so imposed—one under Section 47, the other under Section 54, and again we need to distinguish between the two. By the former the goods are at the owner's risk, until a receipt has been signed by an authorized Railway servant; by the latter, which in this case is endorsed on the back of the forwarding note, the Company are not accountable for any article received, unless a receipt has been given. In both cases what the Railway say is, we are not liable for your goods until we have given you a receipt for them.

We have seen in the procedure detailed to us that giving that receipt is the last act performed by the Company in booking the goods.

But there appears to be no rule as to when the receipt is to be given. It might not be given for a considerable time, and we have evidence that it is sometimes given on the day after the goods have been received. I suppose it might be given after the goods had arrived at their destination. In the present case the receipt for the bale that went through was not given until the bale had been for three nights in the Company's possession, and in any case when the process of booking is interrupted by the end of office hours, goods must necessarily be so left.

The Company, however, claims a right to delay the beginning of its own responsibility until a performance of a formal act of its own, which may be delayed until the goods have passed out of their possession at the other end of their journey. This seems to me unfair, and I cannot think the condition is reasonable. It is also open to this view, that that construction was never intended by the framers of the rules. I think it is not unreasonable that as long as the consignee's servant is seeing the goods through the process of booking, marking and weighing, the Railway Company should not be responsible, but that the Company should become responsible, if the booking process is

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to the witnesses, I incline decidedly to the story told by the plaintiff, one of my reasons being that very little of the Station Master's evidence was put to the plaintiff in cross examination. Also, there are parts of the written statement which are not fully consistent with that story. Further, it appears that the Station Master has never in any way recorded the story he tells us, until long after the event occurred. I, therefore, find as a fact that the four bales were brought to the defendant's premises by the plaintiff, and were left there by the plaintiff under the control of the defendant's servants with the defendant's knowledge and consent. Now, this raises the second point in the case I have to consider. What is the legal position of the Railway Company under the facts which I have found? Three sections of the Indian Railway Act of 1890, which governs this case, seems to me to be of importance. The first is Section 72, which puts in a legislative form what I take to be the ordinary law upon the subject, which is that, when goods are delivered to the Railway to be carried, they become liable like any other bailee. It is argued that there was no delivery in this case, because under the circumstances stated delivery does not take place until a receipt is given by the Railway Company. I cannot read this section in that way. Delivery I take to be a purely lay word, devoid of any legal significance at all. It alludes to a physical event, I do not think one can say that whether there is delivery or not is in any way affected by any legal event. Therefore, I took delivery in that section to refer to a physical event, an important element of which is that whatever is delivered passes from the physical custody of one man to the physical custody of another.

The real question depends upon the construction that is to be placed upon Sections 47 and 51 of the Railway Act. For the present purposes these two sections need not be distinguished. By Section 47 the Railway Company may make general rules for regulating the terms in which it will warehouse or retain goods at any station. By Section 51 the Railway Company may impose conditions for receiving goods. For the present purposes, these two things are the same. In both cases these rules and conditions have to be consistent with this Act. Now what does that mean? The Railway Company has cast upon it the duties of an ordinary bailee. As I read the Act it cannot wholly divest itself of these duties, but it may determine the conditions under which that duty may rest, and in particular it may specify the point of time at which it shall rest. The general common law

embodied in Section 72 is by those sections liable to be cut down to a certain extent by those rules under Sections 47 and 54. The question is to what extent? And the answer is as far as is reasonable, which really means the same thing as being consistent with the Act.

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This brings me to the further point that any of the bye laws or conditions of the Company are void if and in so far as they are unreasonable, and I have to consider whether the conditions imposed by the rules in this case are or are not reasonable. Two rules have been so imposed—one under Section 47, the other under Section 54 and again we need to distinguish between the two. By the former the goods are at the owner's risk, until a receipt has been signed by an authorized Railway servant, by the latter, which in this case is endorsed on the back of the forwarding note, the Company are not accountable for any article received, unless a receipt has been given. In both cases what the Railway say is, we are not liable for your goods until we have given you a receipt for them.

We have seen in the procedure detailed to us that giving that receipt is the last act performed by the Company in booking the goods.

But there appears to be no rule as to when the receipt is to be given. It might not be given for a considerable time, and we have evidence that it is sometimes given on the day after the goods have been received. I suppose it might be given after the goods had arrived at their destination. In the present case the receipt for the bale that went through was not given until the bale had been for three nights in the Company's possession, and in any case when the process of booking is interrupted by the end of office hours goods must necessarily be so left.

The Company, however, claims a right to delay the beginning of its own responsibility until a performance of a formal act of its own, which may be delayed until the goods have passed out of their possession at the other end of their journey. This seems to me unfair and I cannot think the condition is reasonable. It is also open to this view, that that construction was never intended by the framers of the rules. I think it is not unreasonable that as long as the consignor's servant is seeing the goods through the process of looking, marking and weighing, the Railway Company should not be responsible but that the Company should become responsible, if the booking process is

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interrupted for any substantial time and the goods are left in their possession, as in such a case they practically must be. I think this construction might not unreasonably be put on the rules in question. But then they could not apply to the present case.

Under these circumstances I hold that the defendant is liable for the loss of these four bales. There has been no question as to the value of the bales. Judgment will accordingly be for the plaintiff for Rs 2,381-11-0 with interest at 6 per cent from the 4th February 1901 until date of action and costs on scale No 2.

The Bengal Law Reports, Vol. IV. Page 97, O C.

*Before Sir Barnes Peacock, Kt., Chief Justice, and
Mr. Justice Macpherson.*

THE EAST INDIAN RAILWAY COMPANY
(DEFENDANTS), APPELLANTS

v.

F. J. JORDAN AND OTHERS (PLAINTIFFS), RESPONDENTS

1867
Sept 10

Plaint Striking names out of—Issues, Amending of—Merits of case, Error not affecting—Act VIII of 1850, S. 370—East Indian Railway Company, Liability of—Act XVIII of 1854, S. 11.

Four plaintiffs sued as partners but it was found during the trial, that they were not all partners at the time the cause of action accrued, and the Judge thereupon amended the issue which had been raised on that point, and raised the question whether the plaintiffs were or were not partners, and it being decided in the negative, the Judge ordered two of the plaintiffs' names to be struck out of the plaint, and he gave a decree in favour of the other plaintiffs.

Held,—That the Judge acted rightly in amending the issue, but that he should have done so without striking the names of the plaintiffs out of the plaint. Such an error is "an error in an interlocutory order not affecting the merits of the case", and therefore, under Section 30, Act VIII of 1850, not a ground for reversing the decree on appeal.

The East Indian Railway Company cannot, under Section 11 of Act XVIII of 1854, limit their responsibility as carriers in respect of ordinary goods, so as not to be liable for loss or injury caused by gross negligence or misconduct, though possibly they may, with the consent of Government, limit their liability by contract or notice, for loss arising otherwise than by gross neglect.

THIS was an appeal from a decree of Mr Justice Norman. The plaintiffs (respondents) were F J Jordan and Edward Jordan of Jabbalpore, Mathura Prasad of Cawnpore, and Richard Rose of Agra, members of a firm carrying on business in partnership under the style of the Inland Billock Train Company. The suit was brought against the East Indian Railway Company for breach of contract. The plaint stated that on the 25th January 1865, the plaintiffs delivered to the defendants at Cawnpore, 52 bales of cotton, for carriage to Howrah, there to be delivered to the plaintiffs or to their order, and that the defendants had agreed so to carry and deliver the said goods. The breach of contract alleged was that the defendants failed to deliver 12 of the said bales, whereby the plaintiffs sustained damage to the extent of 1,759 Rupees 12 annas 9 pies, for which amount the action was brought. The goods in question had been delivered to the plaintiffs by one Elahi Bakhsh, to be forwarded to Calcutta, and the defendants gave them a bill of lading for the same, when the goods were accepted for the purpose of being forwarded to Calcutta, which bill of lading was sent to the plaintiff Richard Rose then at Howrah, that he might take delivery of the said goods from the defendants. The bill of lading was presented to the defendants by the plaintiff Rose, who then signed a receipt for the goods, and thereupon obtained an order to the party in charge of the defendant's godowns to deliver the said goods. Thirteen bales were delivered on the 14th March 1865 and four on the 20th March, but the defendants failed to deliver the other twelve. The defendants offered the plaintiff Rose twelve other bales of cotton in lieu of those lost, but he refused to receive them as the agent of the said Elahi Bakhsh said they were not of the same quality. Elahi Bakhsh sued the plaintiffs in the Civil Court at Cawnpore, and recovered the sum of Rs 1,759 12 9 for damages and costs.

The defendants admitted having received the goods in the initials I B F, and stated that they had given a receipt to the consignees which contained particulars of the goods and the terms and conditions on which they were received, and which the defendants alleged constituted the contract between the defendants and the consignees. They contended that this receipt ought to have been produced by the consignees and the portion of goods delivered indorsed on it, but that there was nothing to show that it had been produced, or that the whole of the goods had not been delivered according to the contract. Some correspondence took

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Jordan
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place between the attorneys of the respective parties, the defendants asking that the receipt in question might be produced, and the plaintiffs alleging that it had been stolen together with other papers from the defendant Richard Rose. There was some doubt as to whether all the plaintiffs were members of the Indian Bullock Train Company, and an issue which had been raised on that point was allowed by the Court to be amended.

The case came on for hearing on the 11th August 1867, and the following decree was made by NORMAN, J.—“It is ordered and decreed that the plaint be amended by striking out the names of Richard Rose and Mathura Prasad as parties, plaintiffs to this suit, and it is further ordered and decreed that the defendant Company do pay to the plaintiffs F J Jordan and E Jordan, lately carrying on business in co partnership, under the style of the Inland Bullock Train Company, the sum of Rupees 1,204 with interest thereon at 6 per cent from date of decree to date of realization, and also the costs of the suit.

From this decree the defendants appealed, on the following grounds—

(1) That the suit ought to have been dismissed with costs, the defendants being sued as common carriers, and there being no evidence to show that they were, and they were not, in fact, common carriers.

(2) That the suit ought to have been dismissed with costs, it being brought by four persons as plaintiffs upon an alleged bailment and it being proved that two of them,—viz, Richard Rose and Mathura Prasad—had no interest whatever in the subject matter of and did not join in, the bailment.

(3) That the Judge ought not to have allowed the plaintiffs to amend the plaint by striking out the names of the plaintiffs Richard Rose and Mathura Prasad.

(4) That the suit ought to have been dismissed with costs there being no evidence that the loss of the goods in question was caused by gross negligence or misconduct on the part of the defendants' agents or servants.

(5) That the learned Judge decided the case on an erroneous construction of Section 11 of the Railway Act XVIII of 1854.

The Advocate General and Mr Woorloff for the Appellants

Mr Kennedy and Mr Hyde for the Respondents

Judgment was delivered by

PEACOCK, C J—It appears to me that the Judgment is correct, and ought to be affirmed. This suit was brought by several persons, who alleged that they carried on business in co partnership, under the style of the Indian Bullock Train Company, and that at the time of the delivery of the goods to the East Indian Railway Company they were partners. It turned out on the evidence that all the plaintiffs were not co partners at the time the cause of action accrued, or when the goods were delivered. The Court, under the provisions of the Act, amended the issue, and raised the question whether the plaintiffs were or were not partners. It appears to me that the Judge had power to amend the issue, and that it is the correct mode of amending errors in the plaint. You do not amend the plaint but you may amend the issues at any time. Section 111 Act VIII of 1859, says "At any time before the decision of the case the Court may amend the issues, or frame additional issues, on such terms as to it shall seem fit, and all such amendments as may be necessary for the purpose of determining the real question or controversy between the parties shall be so made." This was necessary for the purpose of determining the real question in controversy as to whether the plaintiffs or any of them were entitled to recover. In England, when several plaintiffs are improperly joined in an action of tort not of contract, the misjoinder can only be taken advantage of by a plea in abatement. There is nothing of the kind here, and, therefore there must be some mode of proceeding. The more correct course would have been for the Judge merely to have amended the issue, and to have allowed the names of the plaintiffs to stand in the plaint. If upon the amended issue it had been found that only two of the plaintiffs were partners at that time of the delivery, or when the cause of action accrued, the Court would have found that only two were partners at the time, and would have decreed that they should recover the value of the goods, and that decision would have been binding and conclusive on all the parties. If there was an error, it has only been in striking out the names of two of the plaintiffs, instead of leaving them in the plaint, and giving a decree in favour of other plaintiffs who were found to have been partners. It may make a difference if you strike out the names of any of the plaintiffs, because if the suit fail, the defendants would have to look to the remaining plaintiffs, and they would be injured. In this case the defendants have failed, and have, therefore, not been injured. There were four

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Jordan

plaintiffs, and two have been struck out, but they would be bound as much as if they had remained. There has been no substantial injury done, if striking them out was an error.

Section 350 of Act VIII of 1859 applies. It says "The Judgment may be for confirming or reversing or modifying the decree of the lower Court, but no decree shall be reversed or modified, nor shall any case be remanded to the Lower Court on account of any error, defect or irregularity either in the decision or in any interlocutory order passed in the suit not affecting the merits of the case or the jurisdiction of the Court. If this was a wrong order, it was an interlocutory order striking out two of the plaintiffs instead of leaving them on the record, but it was in error which has caused no injury to the defendants, and, consequently, it is not a ground for reversing the decree on appeal.

The only remaining question is what is the effect of Section 11 of Act VIII of 1854 cited to us. By the Act of Incorporation of the East Indian Railway Company, the Company was incorporated 'for the purpose of making and constructing, working and maintaining such railway or railways in the East Indies including all necessary or accessory or convenient extensions, branches, stocks and works as may be agreed upon by the said Railway Company and the East India Company, and also of doing and performing all such matters and things necessary or convenient for carrying into effect the objects and purposes aforesaid as may also be agreed upon by the said Railway Company and the East India Company.' Therefore, they are to work the line in such a manner as may be agreed upon. Possibly the agreements between the plaintiff company, and the East Indian Railway Company, cannot be looked at by us as they are not in evidence and shutting them out of view, we do not find whether the Railway Company agreed to act as common carriers, but we find, in point of fact, that the defendants acted as common carriers, and took the goods as such, and, therefore, we must assume as against the Company that they were only carrying on that business which they would have been authorized to do, if they had entered into an agreement. But we cannot assume that they have carried on business as carriers without authority. Under the circumstances it appears to me that there is sufficient evidence that the East Indian Railway Company were carrying on business as carriers, and received the goods as such.

Then have they limited their responsibility, or are they liable as common carriers, the goods having been received by them and not delivered?

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The only limitation is by Section 11, which says "The liability of such Railway Company for loss or injury to any article or goods to be carried by them other than those specially provided for by this Act, shall not be deemed or construed to be limited or in any wise affected by any public notice given, or any private contract made by them, but such Railway Company shall be answerable for such loss or injury when it shall have been caused by gross negligence or misconduct on the part of their agents or servants." It appears to me that the clause is merely a saving clause restraining them from limiting their liability with regard to ordinary goods, beyond gross negligence and misconduct, they possibly may, with the consent of the Government, limit their liability for loss arising not by gross neglect, but they have not obtained the consent of Government, and have not entered into a contract, or given notice limiting their liability. Section 11 means that, notwithstanding any contract or notice, they shall be liable for loss when caused by gross negligence or misconduct, leaving other cases, where there is not gross negligence or misconduct, to be dealt with according to ordinary law.

Decree of the Court below affirmed with costs.

Attorneys for the Appellants—*Messrs Stack, Collis, and
Mirfield.*

Attorneys for the Respondents—*Messrs Goodall and
Leslie.*

Sutherland's Weekly Reporter, Vol. XXI. Page 380.

*Before the Hon'ble Louis S. Jackson and
W Ainslie, Judges.*

MESSRS. F SCHLAEPFER, PUTZ & CO (PLAINTIFFS)

v.

THE EASTERN BENGAL RAILWAY
COMPANY (DEFENDANTS) *

Consignee's claim—Carriers liability

1874
March 23

The consignees of two bundles of cow hides which had been carried by a Railway Company having refused to take delivery on the ground of shortness in the number of pieces, the Railway Company pleaded that they were not indebted, as they had contracted to carry such and such a number of bundles, and had done so. The bills of lading showed so many bundles said to contain such a number of pieces. The company also contested plaintiffs' enumeration of pieces.

Held—That the Railway Company was not liable, there being no evidence that the bundles had been broken or the hides counted to pieces.

UNDER Section 22 of Act XI of 1865, I have the honor to solicit instructions of the Hon'ble Court on the following case.

Messrs F Schlaepfer, Putz, and Co. sue the Eastern Bengal Railway for Rs 59-14, being value of two bundles of cow hides, part of two consignments carried by the Company, of which the plaintiffs had refused to take delivery as being short in number of pieces. The two bills of lading show 613 and 450 bundles of hides said to contain (at ten pieces each) 6,130 and 4,500 pieces only. The Railway Company plead not indebted on the ground that they contracted to carry such and such a number of bundles and that they have done so. They also contest the correctness of the plaintiffs' enumeration of pieces.

I fixed the following issues —

1st.—Is the Eastern Bengal Railway liable on the enumeration of bundles only, or also on the enumeration of pieces?

2nd —If the Eastern Bengal Railway is liable according to pieces, what was the number of pieces in this instance?

* Reference to the High Court by the Officiating Judge of the Small Cause Court at Bealadah, dated the 20th September 1873

On the second issue, after careful examination, I have found that the plaintiffs' enumeration has been correct

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The first issue is the one on which I solicit guidance. The particular claim is small, but the question is an important one, for the Railway Company's business in hides amounts yearly to over two lakhs of pieces exceeding six lakhs of rupees in value.

It appears that for the inland business hides are dealt with in tied and unassorted bundles of 10 each, whereas for sea-borne business they are assorted in Calcutta and screwed tight by powerful presses. There was nothing therefore to guide this Court in regard to practice with other carriers or consignees. The question is thus limited to the legal interpretation of the bills of lading. These are submitted herewith for the Hon'ble Court's inspection.

On this matter it has been urged against the Railway Company that their freight is charged by pieces and not by bundles, viz, Rs 25 per thousand pieces. The Railway Company reply that the enumeration of pieces is adopted merely for convenience of reckoning. (Some years ago it had been the practice to carry hides loose and to enumerate them thus).

I think the Railway Company is bound by their freight reckoning, and ought to account for the hides by pieces and not merely by bundles, and consequently that they are liable for the present claim. In future they could protect themselves by altering the tariff mode of enumeration and therewith the terms of bills of lading.

The Judgment of the High Court was delivered as follows by JACKSON, J. —Under the facts stated by the Small Cause Court Judge, we think the Railway Company is not liable. There is no evidence that the bundles have been broken, or that the hides *had been counted by pieces*. The circumstance that the Company charges freight by the piece, and not by bundles, and accepts the enumeration showing that each bundle contains 10 pieces, is not, in our opinion, sufficient to fix the Company with liability to account for the hides by the piece.

In the High Court of Judicature at Bombay.

CIVIL REFERENCE.

Before Mr. Justice Westropp and Mr. Justice Pinhey.

MOHAN MOTI (PLAINTIFF) APPELLANT

v.

THE BOMBAY, BARODA, AND CENTRAL INDIA
RAILWAY COMPANY (DEPENDANTS), RESPONDENTS *

1882
February, 22 *Short delivery of goods—Trespass—Plaintiff's refusal to take delivery—
Damage—Demurrage.*

The plaintiff consigned 18 bags of rice from Bombay to Viramgam and they were carried by the defendants Railway. On arrival of the goods at the destination, the plaintiff paid the freight charges and gave a receipt for the same. But when he went to take delivery of the consignment, he alleged that he found some of the bags torn and part of their contents missing, the result being that there was a shortage of 6 maunds and 28 seers. The plaintiff thereupon, refused to take delivery of the consignment unless he was permitted to alter the receipt which he gave to the defendants servants but as they would not permit him to do so he sued them for the value of the goods.

The defendant Company contended that they did not guarantee the correctness of the weight shown on the Bill of Lading at Bombay, that the goods were in good condition when they arrived at the destination, that, as the plaintiff did not take delivery, although he was repeatedly called on to do so they were sold in auction, and that the defendants were willing to pay him the proceeds of the sale after deducting the demurrage.

Held—That the plaintiff wholly failed to prove that the bags were torn or damaged, or that any portion of the rice was missing and that he was therefore bound to take delivery of the consignment.

REFERENCE from A. H. URAW, Esq., Acting Assistant Judge of Ahmedabad, under Section 617 of Act X of 1877.

This is a reference to the High Court under Section 617 of the Code of Civil Procedure from the District Court of Ahmedabad, (by A. H. URAW, Assistant Judge). The District

Court under Section 618 of the Code of Civil Procedure, passed a decree contingent upon the opinion of the High Court on the points referred

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By

This suit was instituted by the plaintiff, Mohan Moti, a grain dealer at Viramgam, to recover from the defendants, the B B & C I Railway Company, Rs 480 principal and Rs 7 interest making a total sum of Rs 487. The Rs 480 was represented in the plaint to be the value of 42 bags of rice weighing 84 maunds which were consigned in May 1878 by the plaintiff's agent in Bombay to the plaintiff at Viramgam, and were carried by the defendants' Railway to Viramgam. The plaintiff averred that when the rice arrived at Viramgam he paid the freight due thereon and gave a receipt to the defendants for the 42 bags of rice but that when he went to take delivery of the rice he found some of the bags torn and part of their contents missing, so that the bags weighed 6 maunds and 28 seers less than the 84 maunds specified in the Bill of Lading that upon this plaintiff refused to take delivery of the rice unless he was allowed to rectify the receipt which he had passed, and that as the defendants would not allow him to rectify the receipt, he sued to recover from them the value of the rice.

The defence of the Railway Company was that in the contract made with the plaintiff's agent in Bombay it was distinctly specified that the Railway did not guarantee, and were not responsible for the weights shown in the Bill of Lading, that the 42 bags of rice arrived at Viramgam in good condition, but plaintiff two days after signing a receipt for them urged unfounded objections to taking delivery that the defendants repeatedly celled on the plaintiff to take delivery of the goods and warned him that he was incurring demurrage for every day the bags remained on the Company's premises, but plaintiff did not take delivery, that as the monsoon was approaching which would damage the bags of rice at the Viramgam station, and as the price of rice was better at Ahmedabad the defendants removed the rice to Ahmedabad where it was sold for Rs 383 5 0, and that the defendants were willing to hand over the proceeds of the sale to the plaintiff, after deducting their charge of Rs 148 on account of seventy four days demurrage.

The Second Class Subordinate Court at Viramgam awarded to plaintiff Rs 383, but ordered him to pay all costs.

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C I By

The plaintiff appealed against this decree to the District Court of Ahmedabad, and that Court (A. H. UNWIN, Assistant Judge) reversed the decree of the Subordinate Court and awarded the whole amount claimed by the plaintiff with costs on the grounds that (1) the plaintiff was not bound to take delivery of the rice, (2) the defendants are not entitled to claim demurrage, and (3) the plaintiff had been damaged to the extent of his claim, the decree in plaintiff's favour to operate contingently upon the opinion of the High Court upon the issues —

1. Was the plaintiff in the case bound to take delivery? and
2. Are defendants entitled to demurrage?

When the case came before us for consideration, no one appeared for the plaintiff, but *Mr. Jardine* appeared for the defendants, and he argued on the first issue only, because he admitted that they could not succeed on the second issue. The Subordinate Court awarded to the plaintiff Rs. 383, that is, the whole amount realised by the sale of the rice at Ahmedabad and as the defendants neither appealed against the Subordinate Court's decree, nor filed any objections against it, they are not now entitled to any award of demurrage.

On the first issue we are of opinion that the plaintiff was bound to take delivery of the 42 bags of rice at Viramgam, as soon as he had signed the receipt for them. He has, in our opinion, wholly failed to prove either that the bags were torn or damaged, or that any portion of the rice handed by his consignor in Bombay to the Railway Company was missing when he was offered delivery of the 42 bags at Viramgam. The sole foundation for the claim seems to be that the Railway Clerk in Bombay entered 84 maunds as the approximate weight of the consignment for the purpose of calculating the freight which he entered in the Bill of Lading. But the Bill of Lading contained an express provision that the defendants did not guarantee, and would not be responsible for, the accuracy of the weight therein entered, and, moreover, it is proved that the Clerk who made out the Bill of Lading in Bombay did not weigh the whole consignment, but merely weighed one bag, and finding it weighed two maunds entered in the Bill of Lading 84 maunds as the weight of the whole consignment. The 42 bags were consigned from Bombay on the 7th May 1878, and reached Viramgam on

the 13th May The plaintiff attended at the Viramgam station, paid the freight, signed a receipt for the rice and got an order or pass for delivery and removal After this and on the same day plaintiff complained to the Station Master that some of the bags had been opened and that part of his rice had been removed, and he asked to have his bags weighed, he was told that the weighing machine was just then blocked but that his bags of rice should be weighed the next day The next day the truck on which his rice was laden was weighed and the approximate weight of the truck and of the tarpaulin covering the bags being deducted from the gross weight, his bags of rice were found to weigh exactly 77½ maunds Upon this the plaintiff refused to take delivery of the bags unless he were allowed to make an entry on his receipt that his bags were torn and that some of his rice was missing And he never did take delivery of his 42 bags of rice because he was not allowed so to alter the receipt Now what is the evidence that the bags were torn and that some of the contents were missing We have first the plaintiff who says 7 or 8 bags were torn The Subordinate Judge before whom he was examined and by whom his credibility could best be tested describes him as a consummate liar from beginning to end "We have also the evidence of Chagan Surchand who said that 5 or 6 of the bags were torn and as he had agreed to buy the rice from plaintiff he wanted the plaintiff to make a deduction of one anna per bag as if they had been untorn each bag would have been worth 4 annas This witness, although he says he saw the bags lying in the wagon neither turned them over nor touched them Lastly we have the bharty (as it is called) or letter of advice received by plaintiff from his consignor in Bombay, in which the weight of the rice is given as 82½ maunds, but unfortunately this document is dated 26th June, 1878 that is weeks after plaintiff was at arms length with the defendants On the other side the evidence is as strong as it well can be The statements of the plaintiff are categorically denied by every one of the Railway servants who inspected the bags at Viramgam, and Mr Major, the Station Master, and Mr Wilkinson, the District Traffic Superintendent, both say that when they met the plaintiff at the Viramgam station on the 17th May, the plaintiff was unable to point out to them any damaged bags

In this state of facts we must answer the first question of the District Court, i.e., 'Was the plaintiff in the case bound to take delivery?' in the affirmative

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And as for the reason already given we consider that no answer is necessary to the second question, we are of opinion that the decree of the Assistant Judge should be reversed and that of the Subordinate Court restored, and that plaintiff should bear the costs in the District Court and in this Court

The Indian Law Reports, Vol. XVII. (Madras)
Series. Page 445

APPELLATE CIVIL.

Before Mr. Justice Mathusami Ayyar.

SESHAM PATTER and ANOTHER

(Plaintiffs), Petitioners

v.

L S MOSS (Defendant), Respondent *

1893
December,
8 12
1894
April, 5

Indian Railways Act—Act IX of 1890, Ss 72 and 76—The Carriers' Act—Act III of 1865—Indian Contract Act, IX of 1872, Ss 151, 152 and 161—Liability of Railway Companies as bailees

Subject to the provisions of Act IX of 1890, the responsibility of Railway Companies for loss of goods delivered to them for carriage is that of a bailee under Ss 151 152 and 161 of the Indian Contract Act. In a suit for damages occasioned by such a loss, the plaintiff need not prove how the loss occurred but on proof of the loss, the Company will, in absence of proof of any ground upon which it can be exonerated, be liable as a bailee.

PETITION under Section 25 of Act IX of 1887, praying the High Court to revise the decree of V. Kulu Eradi, District Munsiff of Plighat, in Small Cause Suit No 889 of 1892

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court

Mahadala Ayyar for Petitioners

Barclay, Morgan and Orr for Respondent

JUDGMENT.—Under Section 72 of the Indian Railways Act, the responsibility of the Railway Company for loss of goods delivered to be carried by the Railway is, subject to the provisions of that Act, that of a bailee under Sections 151, 152 and 161 of the Indian

Contract Act Under Section 76 of the former enactment, it is not necessary for the plaintiffs to prove how the loss was caused. Act III of 1865, Sections 8 and 9 are declared by Section 72 not to affect the responsibility of the Railway Company as defined by the latter section. The plaintiffs must show in the first instance the alleged loss or deficiency, and then the Railway Company will be bound to show that the loss occurred under circumstances which would exempt a bailee from responsibility for it.

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The District Munsiff finds that the plaintiff's allegation that the bags of pepper were cut open and their contents were extracted whilst they remained in the custody of the Railway Company is not proved. Adverting to the several possible causes of the loss on which the defendant relied, he finds that they are not made out, but as regards the carelessness of the weighing clerks, he does not record a distinct finding. He eventually dismisses the suit on the ground that the plaintiffs did not prove their allegation that the bags of pepper were cut open and their contents extracted. The District Munsiff has not tried this suit with reference to the requirements of the Railway Act and recorded distinct findings as to whether the quantity delivered was proved to be what is alleged in the plaint or whether the quantity entered in the forwarding note in excess of the quantity delivered is due to a mistake on the part of weighing clerks and as to whether the Railway Company has proved any ground upon which they can be exonerated from liability as bailees. He will submit distinct findings on the questions mentioned above upon the evidence on record within three weeks of the re-opening of the Court after the Christmas vacation, and seven days will be allowed for filing objections after the finding has been posted up in this Court.

The Calcutta Weekly Notes, Vol. XVI. Page 329.

CIVIL REVISIONAL JURISDICTION.

Before Mookerjee, J., and Cannduff, J.

THE EAST INDIAN RAILWAY COMPANY, PETITIONER,

v

SISPAI LAL, OPPOSITE PARTY.

RULE No 3026 of 1911.

1911
September, 5.

Railway Company—Goods sent by rail—Delivery to consignee—Clear Receipt, grant of—Suit for damages for loss, if lies.

The grant by the consignee of a clear receipt for goods delivered by a Railway Company and acceptance of delivery by him do not affect the right to compensation for loss or damage actually proved to have been caused to the goods while in the custody of the Company. Such a receipt only raises a presumption that the alleged loss has not taken place, but the presumption may be rebutted by the consignee.

This was a Rule granted on the 1st of June 1911, against an order of Mr S K RAHMAN, Small Cause Court Judge of Buxar, dated the 10th of April 1911.

The facts of the case will appear from the Judgment.

Mr G B McNair and Babu Jay Gopal Ghosha for the Petitioner.

Babu Biraj Mohun Majumdar for the Opposite Party.

The Judgment of the Court was as follows :—

MOOKERJEE, J—This Rule raises no important question of law about the liability of a Railway Company to pay compensation for loss of goods or damage caused to them while in their custody, though the claim is not put forward by the consignee till after he has taken delivery and granted "a clear receipt." The circumstances under which the question requires consideration may be briefly narrated as found by the Small Cause Court Judge. On the 7th October 1910, the Opposite Party tendered to the East Indian Railway Company at Delhi four bales of cloth for despatch to Buxar. The goods arrived at Buxar on the 11th October, the consignee took delivery of the bales which were

apparently in good condition, and granted a simple receipt. On the 5th December 1910, another bale was delivered to the Company at Delhi for carriage to Buxar, and duly carried there in apparent good condition. The consignee took delivery on the 14th December, and granted receipt as before. He subsequently reported to the Company that some pieces of cloths were missing from the bales the Company refused to entertain the claim. Thereupon on the 7th March 1911 the consignee instituted this suit in the Court of Small Causes at Buxar for recovery of Rs. 100, as damages for the loss of the pieces of cloth. The Company resisted the claim substantially on two grounds: they denied in the first place that the goods had been lost, while the bales were in their custody; they contended, in the second place that, as the consignee had accepted delivery and granted "a clear receipt" his right to compensation had been extinguished, even if it was proved that the loss had taken place while the goods were in the custody of the Company. The Small Cause Court Judge has found upon the evidence that the articles were taken out of the bales while they were in the custody of the Company, he has negatived the suggestion of the defence that the articles had been abstracted by the plaintiff himself or his men after delivery of the goods. It may be observed at this stage that the Small Cause Court Judge has recorded the evidence somewhat carelessly, and the notes of the depositions of the witnesses are not always intelligible. The Court is bound, however, to accept his finding upon the question of fact, namely, that a portion of the goods consigned was lost while the bales were in the custody of the Company. Upon this finding, the Small Cause Court Judge has stated that in his view of the law, the plaintiff is not entitled to succeed, because he has taken delivery and granted a clear receipt, but the Small Cause Court Judge has held that, "in order to safeguard the public interest, the Company is bound to take some step to stop this sort of action" and he has accordingly made a decree in favor of the plaintiff for Rs. 50. On behalf of the Company, we have been invited to set aside this decree on the ground that it is obviously erroneous and that the judgment itself is not self-consistent. In answer to the Rule, it has been argued on the other hand by the learned Vakil for the plaintiff, that the view of the law accepted by the Small Cause Court Judge is erroneous, and that, if his decree is open to attack, it is liable to be assailed on the ground that the plaintiff has not been awarded damages in

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full The question, therefore, arises, whether the plaintiff has lost his right of action, because he has taken delivery and granted a clear receipt

In support of the Rule, it has been argued that the question ought to be answered in the affirmative and reference has been made to *Macnamara on Carriers*, 1908, Section 214, where it is stated that, when goods are delivered by a Railway Company at a proper place and at the proper time, the consignee is bound to examine them and ascertain whether they are in good order, and, if he does not intimate objection, it will be presumed that they were delivered in good order. The learned author relies upon the case of *Stewart v North British Railway Co*,⁽¹⁾ as authority for this proposition. The principle in question is perfectly sound, but is of no assistance to the petitioners. The case of *Stewart v North British Railway Company*,⁽¹⁾ is not an authority for the proposition that if a consignee takes delivery and grants a clear receipt he loses his remedy even if he is able to establish conclusively that the goods were damaged or partially lost while in transit. In fact, the contrary view was adopted in *Johnston & Sons v Dole*,⁽²⁾ where it was ruled that, if a consignee of goods (which as a matter of fact have been damaged in transit though such damage is not visible at first sight) grants a clear receipt, accepts delivery, and breaks bulk without judicious inspection or notice to the carrier, he does not lose his right to compensation. The fact that he has granted a receipt is an element in the proof of damage, but is no bar to the claim. A similar view was taken in *Pearcy v Player*,⁽³⁾ where Lord Craghull observed as follows — "The Counsel for the defender has also argued that the neglect of the pursuer to examine the luggage after delivery and the delay of 24 hours in reporting the loss to the defender bars his right to recover. The former may affect the proof of the question, was the portmanteau delivered. But assuming non delivery to be proved, it cannot operate as a bar, there not having been in the contract between the parties a provision or an implication that should the goods delivered be taken without challenge at the time, right to recover for any undelivered article should be forfeited." This obviously good sense, and based on sound legal principles. The right to compensation has accrued as the result of the loss, the acceptance

(1) 5 R. 446, 425 (1878)

(2) 3 Rottie 202 (1875)

(3) 10 Rottie, 561 20 S L R 376 (1893)

of the good without protest may raise a strong presumption that the alleged loss has not taken place but, if it is proved by reliable evidence that, as a matter of fact, there was loss or damage to the goods while they were in the custody of the Railway Company, it is difficult to appreciate how on principle the position can be maintained that the acceptance of delivery operates to extinguish the right to compensation. The question has been repeatedly raised in the Court of the United States, and the view has been uniformly maintained as well-founded on principle that grant of clear receipt and acceptance of delivery do not affect the right to compensation for loss or damage proved to have been caused to the goods while in the custody of the carriers. One of the earliest cases on the subject is *Pakey v Russell* (1) where it was ruled that, although acceptance of the goods by the consignee without objection and with knowledge of their defective condition precludes recovery for damages thereto [*Munro v Ship Baltic*, (2) *Mary v Warner*, (3)] yet acceptance will not operate as waiver of objection for damage not apparent. Again in *Bouman v Teall*, (4) it was held that the receipt of the goods alone, with no stipulation that they be accepted in full performance of the contract does not constitute a waiver of claim for damages for which the carrier may be liable [*Alden v Pearson* (5) and *Lesinby v Great Western Despatch* (6)]. The question was elaborately discussed in the case of the *Elm v Shepherd*, (7) where it was ruled that the claim for compensation was not lost though the consignee had granted a clear receipt, accepted delivery, and sold the goods. Woodruff, J., observed that in cases of this description, the conduct of the consignee would be scrutinized carefully and the Court would receive his evidence with caution but if the evidence proved that the loss or damage occurred while the goods were in transit, compensation could be claimed notwithstanding delivery and acceptance. To put the matter briefly, a receipt acknowledging the delivery of the goods in good condition is only *prima facie* evidence of the fact [*Porter v Chicago Railway Company*, (8) which must be taken to qualify the somewhat broad statement in *Skinner v Chicago Railway Company* (9)]. As recent illustration of this principle,

(1) 6 Martin N S (La.) 58 (1827) (2) 1 Martin O S (La.) 194 (1810)
 (3) 17 La. Anr. 34 (1865) (4) 23 Wendell N Y 368 3d Am Dec 562 (1840)
 (5) 69 Mass 312 (1855) (6) 10 Mo App 134 (1881)
 (7) 8 Blatchford 341 8 Fed Cir 579 (8) 20 Iowa 73 (1862)
 (9) 12 Iowa 191 (1861)

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reference may be made to the cases of *Mears v New York Railway Company*(1) and *Southern Railway Company v Aslford*(2). In the former of these cases, a piano was delivered by the carrier to the consignee who signed a clear receipt. When the package was taken home and opened, it was discovered that the piano had been spoiled by water. It was held that the consignee was entitled to damages, notwithstanding the grant of a clear receipt, and acceptance of delivery. In the second case, the consignee removed his log from the railway van, but when he took it home, he discovered that it had been injured. It was held that he was entitled to claim damages, and that the fact that he had granted a receipt for delivery in good condition was not a conclusive defence against recovery of compensation. The principle, therefore, that a receipt acknowledging a delivery of the goods in good condition is only *prima facie* evidence of the fact, and raises a presumption in favor of the carrier which may be rebutted by the consignee, is firmly established, and it is manifestly consistent with rules of justice, equity and good conscience. The inference, therefore, follows that the decree made by the Small Cause Court Judge is correct, though his reasons are erroneous.

The result is that the Rule is discharged with costs one gold mohur.

CARNDUFF, J.—I agree. The short point of law raised by this Rule seems to be as to whether a bailor, who, in the absence of any agreement on the subject, has given the bailee a receipt for the goods bailed, is *ipso facto*, precluded from proving that the goods were in reality damaged or deficient in quantity when delivered to him. I have myself been unable to find any authority either in England or here for holding that he is and my learned brother has shown that it has been held elsewhere for reasons which seem to me to be most cogent and convincing, that he is not.

Rule discharged

(1) 5 L. ALJ 610 5 L. R. A 884 (1902) (2) 178 Ala, 591, 24 South, 737 (1900)

The Indian Law Reports, Vol. III. (Bombay) Series.
Page 96.

ORIGINAL CIVIL.

Before Sir M. R. Westropp, Kt, Chief Justice, and
Mr. Justice Green.

SURUTRAM BHAYA (PLAINTIFF)

v.

THE GREAT INDIAN PENINSULA RAILWAY
COMPANY (DEFENDANTS) *

*Railway Company—Act XVIII of 1854 Ss 11 and 43—Carriers—
Evidence—Burden of proof*

1878
November,
29 and 30

The defendants having made arrangements with the Madras Railway Company for the through carriage of goods, received from the plaintiff's agent at Poona thirty bags of *jowari* to be conveyed thence to Bellary and delivered to the plaintiff's agent there. The 'goods consignment note,' which was signed by the plaintiff's agent at Poona, contained the following condition, of which he had due notice —

"The Company receive goods for conveyance to stations on other railways with which they have made arrangements to book through, *subject to the rules and regulations and rates and fares of the respective Companies over whose lines the goods may pass*. On reaching Raichore the bags of *jowari* were transferred from the defendants' waggon, in which they had left Poona, into a waggon of the Madras Railway Company. One bag was subsequently lost, but the remaining twenty nine arrived, and were unloaded in good condition at Bellary on the 19th September 1877. No steps were taken either by the defendants or by the Madras Railway Company, to give information of the arrival of the bags to the consignee, and he never received them. The plaintiff sued to recover their value. The defendants pleaded, 1st, that, under a rule of the Madras Railway Company in force at the time of the making of the contract between the plaintiff and the defendants, delivery was complete the instant the bags were unloaded at Bellary; and (2) that the plaintiff's agent at Bellary did not apply for the goods, but allowed them to remain in the station yard until they became rotten by rain and were destroyed by order of the Collector sometime in November. The Madras Railway Company had issued a public notice of the above rule in the following terms:—"The Madras Railway Company hereby give public notice that they will not be

* Small Cause Court Reference, Suit No 1503 of 1878

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responsible for loss of, or damage to grain after it has been unloaded from the company's waggons' The defendants sought to incorporate this notice into their contract with the plaintiff by virtue of the condition printed in their 'goods consignment note'

Held,—That the said public notice afforded no protection to the defendants, on the ground that it was invalid as a regulation for non compliance with the provisions of Sec 43 of Act XVIII of 1854, inasmuch as it had not been sanctioned by the local Government, and had not been posted up at all the stations of the Madras line of railway, and that it could not otherwise be binding against the plaintiff as neither the plaintiff nor his agents were shown to have had any knowledge of it at the time of entering into the contract with the defendants

Quære—Whether, if the plaintiff or his agents had such knowledge at the time of making the consignment, the notice would have constituted such a stipulation as to contravene Sec 11 of Act XVIII of 1854, or whether it might be read together with that section, and treated as effectual, except so far as its operation would be limited in its scope by that section

Held, also, that the arrival of the grain at the station of destination (Bellary) having been proved, the burden of showing that the goods were ready for delivery to the plaintiff for a reasonable time after such arrival lay on the defendants although no proof had been given of any application for delivery by the plaintiff within a reasonable time

It is the duty of a Railway Company to keep goods, which have reached the station of their destination, ready there for delivery until the consignee in the exercise of due diligence can call for and remove them and it is the duty of the consignee to call for and remove them within a reasonable time

Semle The object of Sec 11 of Act XVIII of 1854 is to preclude Railway Companies from being able by any stipulation to escape from liability for loss or injury to goods caused by the gross negligence or misconduct of their agents or servants

CASE stated for the opinion of the High Court, under S 7 of Act XXVI of 1864, by W E Hart, First Judge of Small Cause Court at Bombay —

"1 This was an action to recover the sum of Rs 540 as the value of 30 bags of *jowari*, delivered by the plaintiff's agent at Poona to the defendant Company, to be by them carried thence for him to Bellary, on the Madras Railway line.

"2. The contract is contained in the 'goods consignment note' which was signed by the plaintiff's agent at Poona and on the back of which are printed a number of conditions, of which I hold the plaintiff to have had notice at the time of the making of the contract

"3 From this contract it appears that the said goods of the plaintiff were to be carried by the defendants to Bellary, and there delivered to Samurmul Acharya, who was the plaintiff's agent at that place, subject to the said conditions. The last of these conditions is in the following words — 'The Company receive goods for conveyance to stations on other railways with which they have made arrangements to hook through, *subject to the rules and regulations and rates and fares of the respective companies over whose lines the goods may pass*'

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"4 The defendants have made arrangements with the Madras Railway Company for the through carriage of goods, and to get from Poona to Bellary goods have to be put upon the Madras Railway at Raichore whence they proceed the rest of the way by the line of the latter Company

"5 The goods in question were at Raichore transferred from the two waggons of the defendants, in which they left Poona, into a waggon of the Madras Company which arrived at Bellary, and was there unloaded on the 19th September 1877, when it was found to contain 29 bags only bearing the plaintiff's marks. These 29 bags arrived in good condition, but no steps were ever taken either by defendants or the Madras Company to inform the consignee of their arrival

"6 At the hearing before me the defendants admitted liability in respect of the one bag found short at Bellary, but set off against it the sum of Rs 45 12 1 as freight for the thirty bags which the plaintiff admitted he had not paid. As to the remaining 29 bags, the defendants pleaded—1st, that, under a rule of the Madras Railway Company in force at the time of the making of the contract between the plaintiff and the defendants delivery was complete the instant the bags were unloaded at Bellary, and, 2nd, that the plaintiff's agent at Bellary did not apply for the goods, but allowed them to remain in the station yard until they became rotten by rain, and were destroyed by order of the Collector some time in November

"7 As to the first defence, the rule on which the defendants relied, and which was referred to throughout the proceedings before me as the 'Madras Rule' was not one of those placarded at every station on the line, which had obtained the sanction of the local Government, and had been in force for a considerable time, but was one that had been introduced in November 1876

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at Bellary, Adoni, Caddappah, and Bangalore only, and related merely to the grain traffic, and in determining the validity of the defence it is important to consider the history of this 'Madras Rule'

"8 On the 20th November 1876 the Madras Railway Company, without having previously obtained the sanction of the local Government issued a public notice in the following terms —

'The Madras Railway Company hereby give public notice that they will not be responsible for loss of or damage to grain after it has been unloaded from the Company's wagens' On the 15th April 1877 the Madras Railway Company commenced to use, for the grain traffic only, and in respect only of consignments originally sent from stations on their own line, a new form of forwarding note for which they had not previously obtained the sanction of the local Government, and which contained the following condition — 'The above goods shall be taken delivery of immediately the same are unloaded at the station of destination and the Company shall not be liable in respect of loss or damage done thereto arising from theft, rain, fire, or from any other cause whatsoever, notwithstanding that the same be permitted to remain on the Railway Company's premises, it being agreed the delivery shall be completed on the unloading of the goods, and that from that time they remain at the sole risk of the party entitled thereto' This condition, in conjunction with the public notice, constituted the 'Madras Rule' on which the defendants relied, and which they sought to incorporate into their contract with the plaintiff by virtue of the last condition printed on the back of the goods consignment note

"9 On the introduction of the new form of grain-forwarding note, the Madras Chamber of Commerce addressed a letter of remonstrance on the subject to the local Government, and the Madras Government, after receiving various reports, made an order, on the 20th June 1877, in the following words — 'His Grace the Governor in Council is of opinion that the explanation furnished by the Traffic Manager is satisfactory, and that fair cause is shown for the additional clause in the forwarding note to which the Chamber of Commerce have drawn attention'

"10 No further publication of the 'Madras Rule' took place after the passing of the above order by the local Government which order, it will, moreover, be observed, was passed, not at

the request of the Railway Company that its new rule might be sanctioned, but in answer to objections to its legality raised by the Chamber of Commerce

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" 11 There was no evidence whatever that, at the time of the making of the contract between the plaintiff and the defendants, the plaintiff or the defendants, or either of the plaintiff's agents at Poona or Bellary, had seen either the public notice or the new form of forwarding note, or had even so much as heard of the existence of the 'Madras Rule'

' 12 The object of the last of the special conditions, printed at the back of the plaintiff's contract with the defendants, appeared to me to be to protect the defendants from liability to make good to the plaintiff a loss arising on the line of another Company in respect of which they were precluded by the rules of that Company from demanding compensation in their turn. The 'rules and regulations' contemplated by that special condition must, therefore, be only such rules and regulations as the Madras Company could plead against the defendants, supposing the latter had compensated the plaintiff for his loss, and sought to recover the amount from the Madras Company

' 13 It is evident that if the 'Madras Rule' is such a regulation as is contemplated by S 43 of Act XVIII of 1854, it is wholly invalid for want of compliance with the provisions of that section. On the other hand, if it be contended that the 'Madras Rule' is not such a regulation as is contemplated by S 43, then it appears to me that neither is it such a 'rule or regulation' as was in the contemplation of the parties to the contract in the present case. At any rate, if the 'Madras Rule' be not a regulation within the scope of S 43 of Act XVIII of 1854, it can only be regarded as a notice, but, as such, it cannot bind the plaintiff, for it was never brought to the knowledge of himself or his agents. In the hypothetical case suggested in the last paragraph the Madras Company could not be heard to say to the Great Indian Peninsula Company 'We are protected by this rule, which is not one of our general regulations, but merely a notice of limited effect and restricted application which we have never brought to your knowledge'. Neither, therefore, can the Great Indian Peninsula Company say this to the plaintiff

" 14 Again, the 'Madras Rule' appeared to me to be in contravention of the provisions of S 11 of Act XVIII of 1854, because its terms are so wide as necessarily to include loss or

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damage arising from the neglect or default of the Company or its servants. It is impossible to put any more restricted interpretation on those words, and according to them the Company would still not be liable even if its own servants stole the bags as fast as they were placed on the unloading platform. The case of *Patacheider v The Great Western Railway Company*⁽¹⁾ shows that the liability of a Railway Company as carriers continues for a reasonable time after the arrival of the goods at the station of destination, and it is of this liability that the Madras Company seek to rid themselves (by means of the 'Madras Rule' expressed in terms so wide and general as necessarily to include even loss occasioned by the Company's own servants

"15 I accordingly held that the defendants could not avail themselves of the 'Madras Rule', but must show that, for a reasonable time after the arrival of the plaintiff's goods at Bellary, they were ready for delivery to him at the usual place of delivery. Of this there was not the slightest evidence. All trace of the 29 bags was lost immediately they were unloaded, and, for all that appeared to the contrary, they might have been stolen, or destroyed, or removed by mistake for other goods, within five minutes of their arrival, and the defendants entirely failed to identify the plaintiff's bags as being among those said to have been destroyed in November by order of the Collector. With regard to the Collector's order, moreover, it is worthy of remark that it is apparently not an order to destroy, but a suggestion that the work of destruction already voluntarily begun should be proceeded with more rapidly.

"16 The plaintiff offered some evidence, which I did not believe of repeated applications having been made by his agent for delivery in the months of September and October, and of his having been informed by the company's servants that his goods had not arrived. But I held that the plaintiff's failure to prove this part of his case did not affect the question, as he could not be called upon to prove that he applied for delivery within a reasonable time until the company had first shown that for a reasonable time after arrival they had the goods ready for delivery to the plaintiff. I, accordingly, passed a verdict for the plaintiff for Rs. 297-5-11 (being the value of his 30 bags of *jeonars*, at the Bellary market rate of the day, less the sum of Rs. 45-12-1 for freight chargeable in respect of their carriage

thither), together with costs, but at the request of the defendants' counsel this verdict was made subject to the opinion of the High Court on the following questions, which I accordingly submit, and request that the Honorable Judges of the High Court will make such order in the case as they may think proper —

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1st —Is the 'Madras Rule' invalid for non compliance with the provisions of Section 43 of Act XVIII of 1854?

2nd —Is the 'Madras Rule' void as being in contravention of the provisions of Section 11 of Act XVIII of 1854?

3rd —Arrival of the goods at Bellary having been proved, and no application by the plaintiff within a reasonable time for delivery having been proved, was the *onus* rightly laid on the defendants, of proving that the goods were ready for delivery to the plaintiff for a reasonable time after their arrival?

"The plaintiff's pleader states that he has no question which he wishes to refer in the case, but it strikes me that one may arise in the event of its being held that the 'Madras Rule' is not within the scope of Section 43 of Act XVIII of 1854, in which case it would, of course, not be invalid for non compliance with the terms of that section, but, in that case, would it not still be inoperative as against the plaintiff, seeing that it was not brought to the knowledge of himself, his agents, or the defendants at the time of the making of the contract?"

Plaintiff appeared in person

The Advocate General (Honourable J. Marriott), Latham and Farran for Defendants

The public notice given at Bellary and the other stations mentioned, is not a public notice within Section 43 of Act XVIII of 1854. If it be so, it has received the sanction of Government. No special form of sanction is required, and it is not necessary that sanction should be applied for by the company. *Mitchell v Lancashire and Yorkshire Railway Company* (1). Our liability as carriers would cease within a reasonable time (Angell on Carriers, p 302) after the arrival of goods. As bailees only ordinary and reasonable care is required from us, and no negligence was found against us. No letter of demand was sent for the goods, nor was any notice given before suit. The bringing of an action in

(1) L R., 10 Q B 256 per Blackburn, J at p 260

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Bombay is not a demand as the goods were not to be delivered at Bombay. It has been found by the first Judge that the 29 bags were unloaded in good condition. The presumption, then, should be that we were ready and willing to deliver them. *Midland Railway Company v Bromley*, (1) *Gilbert v Dale* (2). Twenty-four hours would be a reasonable time to keep the goods. The evidence is that it did not destroy the grain until it had become rotten from exposure to the rain. By the Madras Railway Company's Regulation No. II, perishable goods are liable to sale or destruction if not removed within 36 hours, and by Regulation No. I the Company is not responsible for loss or injury occasioned by fire, water, theft, or any cause whatever to goods left on the Company's premises, and not removed within 36 hours after their arrival. The consignee should have applied for the grain. *See v G W Railway Company* (3). *The East Indian Railway Company v Jordan* (4) limits the application of S. 11 of Act XVIII of 1854 although the first portion of that section appears wider than that of the latter portion.

WESTROP, C J.—The first question is, whether a certain notice, published (posted) by the Madras Railway Company on the 20th November 1876 to the effect "that they will not be responsible for loss of or damage to grain after it has been unloaded from the Company's wagons," and styled in that question the "Madras Rule" is "invalid for non-compliance with the provisions of S. 48 of Act XVIII of 1854." That section provides that "a copy of this Act, and of the General Regulations, Time Tables, and Tariff of Charges which shall from time to time be published by any Railway Company, with the sanction of the Local Government, shall be exhibited in some conspicuous place at each station of every railway, so that they may be easily seen and read, and all such documents shall be so exhibited in English and in the vernacular language of the district in which the station is situated, and in such other language, if any, as shall be required by order of the local Government." It does not appear, upon the case submitted to us, that the notice in question ever did receive the sanction of the Government of Madras, or ever was submitted to that Government. The Madras Chamber of Commerce did, in May 1877, invite the attention of that Government to a clause in a forwarding note, then newly framed by the Madras Railway

(1) 17 C. B. 372

(2) 5 Ad. and E., 543 5 T. 3 339

(3) 25 L. J. Ex., 261 5 C. 1 H. and N., 63

(4) 4 Ben. L. R. 97 O. C.

Company, and took exception to that clause, which, though resembling, is not identical in its terms with the notice of the 20th November 1876. And even if such identity existed, it does not thence follow that the Madras Government, although it seems to have in June 1877 sanctioned the clause or, at least to have pronounced it to be a fair one, would have sanctioned, or can be regarded as having sanctioned, the notice of November 1876. To sanction a clause in a form of contract which the consignor of goods is required to sign before the Company accepts the goods for transmission, is one act, and to sanction the publication of a notice which the consignor may or may not have an opportunity of seeing, is another and quite different act. Without intending to give any opinion whether S 6 of Act III of 1867 is applicable to this case, we may observe that such a distinction as we have been now suggesting, is clearly drawn and enforced in that enactment. There not being any such sanction of the Government of Madras as S 43 of Act XVIII of 1854 contemplates, we think that the notice of November 1876 is unsupported by that section. There is, also this further defect in the same notice, considered in connection with that section, that there was not any such posting of that notice at each station on the Madras line as is enjoined by the same section. The posting took place only at Bellary and three other stations on that line. We hold that S 43 affords no protection to the defendant in this case, so far as the notice of November 1876 is concerned.

The second question submitted to us is whether the Madras Rule, 112, the same notice, is void as being in contravention of the provisions of S 11 of Act XVIII of 1854. That section runs thus "The liability of such Railway Company for loss or injury to any articles or goods to be carried by them, other than those specially provided for by this Act, shall not be deemed or construed to be limited, or in anywise affected, by any public notice given or any private contract made by them, but such Railway Company shall be answerable for such loss or injury when it shall have been caused by gross negligence or misconduct on the part of their agents or servants." The first portion of that section seems to be qualified by the concluding sentence. Taken as a whole, the section appears to us to mean that a Railway Company shall be responsible for loss or injury caused by gross negligence or misconduct of their agents or servants (except in cases otherwise specially provided for by the Act, *eg*, such cases, at least, as are mentioned in Ss 9 and 10), notwithstanding any public

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notice given or private contract made by such Companies to the contrary At common law an ordinary carrier for hire might, by special contract, protect himself even against loss or injury occasioned by the gross negligence of himself or his agents—*Austin v The Manchester Sheffield and Lancashire Railway Company*,⁽¹⁾ *Chippendale v The Lancashire and Yorkshire Railway Company*,⁽²⁾ *Carr v The Lancashire and Yorkshire Railway Company*,⁽³⁾ and per BLACKBURN, J, in *Pick v North Staffordshire Railway Company*,⁽⁴⁾ and per COCKBURN, C J⁽⁵⁾ The object of the 11th Section appears to have been to fetter Railway Companies thus far in their power of contracting as to preclude them from being able by any stipulation to escape from liability for loss or injury to articles or goods caused by the gross negligence or misconduct of their agents or servants True, the words “public notice” occur in the 11th Section as well as the words “private contract” But there is not, for the purposes of this section and irrespectively of Section 43 (of which we have already disposed), any substantial difference between those phrases BLACKBURN, J, in the case last quoted said “But in *Kerr v Willan*⁽⁶⁾ decided in 1817, and I think in all of the subsequent cases, it was held that the notice to be effectual must be brought home to the particular customer, which, in my opinion shows that the condition” (i.e., in the public notice) “operated entirely by way of contract and not by way of restriction in the public profession So completely was the necessity of bringing the notice home to the particular party established, that Mr Smith in the first edition of his *Leading Cases* (which was published in 1837) says ‘If this notice was not communicated to the employer it was, of course, ineffectual’ And this expression of the self evident nature of the proposition has been allowed to stand in all of the editions of his work, without remark or qualification by any of his very learned editors Mr Smith proceeds to add ‘But if it could be brought home to his knowledge, it was looked upon as incorporated into his agreement with the carrier, and he became bound by the contents’ That very learned gentleman evidently considered that, at the time when he wrote (1837) it had become settled that the notice operated as a special contract with those to whom it was brought home, and not as a public condition, limiting the profession of the

(1) 16 Q B 600 and see 10 C B, 454

(2) 7 Exch 70

(3) 11 L R 558 to 563

(4) 21 L J Q B, 22

(5) 10 H L C 473 see 500 to 506

(6) 8 M and Bel 150

carrier." In the present case, it has been expressly found by the learned Chief Judge of the Court of Small Causes, that there was not any evidence that either the plaintiff or his agents at Poona or Bellary had ever seen or heard of the public notice of November 1876, or the subsequently framed new consignment note approved by the Government of Madras. In the consignment note given to the plaintiff's agent at Poona, when he delivered the grain to the defendants for conveyance to Bellary, there is not any such stipulation as that in the public notice of November 1876 or in the Madras new consignment note, and it has not been contended or alleged that there was any other special contract between the parties than that sought to be built upon the notice of November 1876 taken in connection with the Poona note. As neither the plaintiff nor his agents are shown to have had any knowledge of that notice, it is unnecessary for us to say whether, if the plaintiff or his agents had knowledge of that notice at the time of making the consignment note (the notice) would have constituted such a stipulation as might contravene Sec 11 of Act XVIII of 1854, or whether it might be read together with that section, and treated as effectual, except so far as its operation would be limited in its scope by that section. Nor do we deem it necessary to consider now whether the consent of the local Government would be indispensable to public notices or private contracts under Sec 11, as suggested by Sir BARNES PEACOCK C J, in *The East India Railway v Jordan* (1).

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The third question is this "Arrival of the goods at Bellary having been proved, and no application by the plaintiff within a reasonable time for delivery having been proved was the *onus* rightly laid on the defendants of proving that the goods were ready for delivery to the plaintiff for a reasonable time after their arrival." We answer this question in the affirmative. The case of *Patscheider v Great Western Railway Company*, (2) cited by the Chief Judge, related to the personal baggage of a passenger, but we think that the same principle there quoted by CLEASBY, J, from Redfield on Carriers—that "it is the duty of a Railway Company, in regard to the luggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can call and receive it, and it is the owner's duty to call for and remove it within a reasonable

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(1) 16 Q B 600 and see 10 C B, 454

(3) 7 Fich 707

(5) *Rail p* 553 to 558

(2) 21 L J Q B 22

(4) 10 H L C 473 see 500 to 506

(6) 6 M and Sel 150

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time"—applies to a consignment of goods, and that the Railway Company ought to have the goods after they have reached the station at their destination ready there for delivery until the consignee, in the exercise of due diligence, can call for and receive them, and it is his duty to call for and remove them within a reasonable time. The burden lies on the Railway Company to show that they had the goods ready for delivery for a reasonable time after arrival. This burden, the Chief Judge considered that the defendants had not discharged. It seems, however, that the plaintiff assumed that the *onus* lay upon himself, in the first instance, to prove that he demanded delivery of the goods, and that he failed to obtain it. This he essayed to establish, but the Chief Judge disbelieved the evidence, given on behalf of the plaintiff that application had been made on his behalf at the station at Bellary for the goods and we do not gather that during the trial it was contended that the defendants were bound to show that they had the goods ready for delivery for a reasonable time after their arrival at Bellary Station. The struggle at the trial seems to have been on the plaintiff's side to prove that delivery had been ineffectually demanded. This was enunciated to throw the defendants off their guard. It would appear, and so we are informed by the learned counsel for the defendants, that the point as to the necessity for proof, by them, that the goods were, for a reasonable time after arrival, ready for delivery, was first raised in the judgment of the Court of Small Causes. The struggle being what it was, we think that the defendants must to a considerable extent have been taken by surprise, by the raising of that point, for the first time, at the twelfth hour, viz., in the judgment of the Court, and ought to have further opportunity of proving readiness to deliver within a reasonable time, and we are of opinion that under Sec. 8 of Act XXVI of 1861, we have power to direct, and we do now accordingly direct, a new trial for that purpose, and that it shall not be necessary for the Court of Small Causes to retake the evidence already taken, but that it may use the same on the re-trial, and take such further evidence as may be admissible and relevant on the questions of the readiness of the Railway Company to deliver within a reasonable time—and as to what is a reasonable time. Had these questions been distinctly raised at the original trial, we think it probable that the defendants would have offered in evidence Rule No. 1 of the Madras Railway Company's regulations, which points to thirty-six hours after arrival as a

reasonable time We are of opinion that the defendants should be at liberty to prove that the publication of that rule was sanctioned by the Madras Government, and then to put the rule itself in evidence The concluding passage in the consignment note, signed at Poona by the plaintiff's agent, would render that rule binding on the plaintiff, if it and its sanction by the Madras Government be proved The circumstance, already found by the Court of Small Causes, that the goods (*minus* one bag) reached Bellary Station in safety the improbability that they would have suddenly disappeared, the deliberate avoidance, by the consignee, of any attempt to obtain delivery, the bringing of this suit being, apparently, the first act in the nature of a demand on behalf of the plaintiff for delivery, and that, too, in Bombay, where the defendants are not and never were bound to deliver, the circumstance that the absence of any demand at Bellary prevented the attention of the defendant's servants being very specially called to the plaintiff's goods—are facts which, if they do not remove from the defendants, at least to some extent lighten the burden cast upon them of proving readiness to deliver within a reasonable time after arrival of the goods The cost of this reference and of the suit should be disposed of by the Court of Small Causes on the re-trial in such manner as it may deem just

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Order accordingly

Plaintiff appeared in person

Attorneys for the defendants--Messrs Hearn, Cleveland
and Little

**The Indian Law Reports, Vol. VIII. (Calcutta)
Series. Page 427.**

SMALL CAUSE COURT REFERENCE

*Before Sir W. Comer Petheram, Knight, Chief Justice,
Mr. Justice Pigot, and Mr. Justice Macpherson.*

CHOGEMUL AND OTHERS (PLAINTIFFS)

v

**THE COMMISSIONERS FOR THE IMPROVEMENT OF
THE PORT OF CALCUTTA (DEFENDANTS) ***

1891
April, 10

Carrier—Carriers by Railway liability of—Railway Act (IV of 1879) Section 2 10—Common Carriers—Insurer—Act of God

A carrier by Railway is under Act IV of 1879 liable as an insurer of goods entrusted to him and not merely for loss occasioned by negligence

REFERENCE to the High Court made by R S T MACEWEN, Esq., 2nd Judge of the Calcutta Court of Small Causes.

The following was the referring order —

"The first set of plaintiffs are the consignors and the second set the consignees of 1 bundle of piece goods and 1 box of woollen goods delivered to the defendants for conveyance to Moogal Hat, a station on the Northern Bengal State Railway. The goods were delivered at the Armenian Ghat station of the Port Trust Railway in Calcutta on 23rd October 1889, and a receipt note No 162 was granted for them. The goods had to be carried by the Eastern Bengal and Northern Bengal State Railways.

"The suit is one for damages for the non delivery of the goods, and is for Rs 1,836 1 9, being the price of the goods and certain other charges. The following matters were admitted by the defendants, the receipt of the goods and the price at which they have been valued by the plaintiffs by the plaintiffs, that the goods were lost on board a flat, AI, attached to the Eastern Bengal State Railway's steamer *Saorma* in transit from Kooshla to Sara.

* Small Cause Court Reference No 7 of 1890 from the Judgment of R. S. T. MacEwen, Esq., 2nd Judge of the Calcutta Court of Small Causes, dated the 11th October 1890.

"The defendants denied their liability to pay damages, and pleaded that their responsibility for loss was governed by Sections 151 and 152 of the Indian Contract Act. They took upon themselves the onus of proving that they had taken as much care of the goods as a prudent man would take, under Section 151 of goods entrusted to him.

"The plaintiffs called no witnesses; the defendants called four—the commander of the steamer *Soorma*, the native pilot, the cook, and the crew of the steamer, and the owner of the *Tura* belonging to the Indian General Steam Navigation Company. The Commander's evidence was that the *Soorma* with 2 flats, A1 and A2, left Koochur at 9 10 A.M. on the 26th October last for Sur. The draught of the steamer was 6 feet 10 inches forward and 4 feet 7 inches aft, that of the flat A1 was 2 feet 9 inches forward and 3 feet aft, A2 was 2 feet 4 inches forward and 4 feet aft. These were lighter draughts than usual. Flat A1 was lashed on the starboard side and A2 on the port side of the steamer. They were lashed on either side by one 1", one 8", two 7" and two 6" hawsers, fore and aft. The hawsers were new and strong, and had only been about 10 days in use. The steamer had one 13 cwt anchor at her starboard bow, one 11 cwt at her port bow, and three 5 to 8 cwt kedge anchors on deck. The flats had each two anchors (one at either bow) and two 5 cwt kedges. The steamer was a paddle in good order. Everything that was necessary for working the steamer and flats was on board and good, the flats were in good sound working order, the steamer and flats were sufficiently manned and found in tackle. The steamer carried a native pilot who knew the channel and gave the course and the soundings. The pilot had a boat and 4 men, whose duty it was to watch the shifting of the sands and channel, and mark with bamboos tipped with grass the dangerous parts of the navigable channels. All went well till about 10 45 A.M., when the steamer and flats came to a long bend in the river. There was a low sand bank on the right hand side and a high bank on the left. The channel at that point was about 80 yards wide and the river (the Gorai) about 3½ miles. The channel is close to the river bank. The dangerous sand banks to the right were marked by the Bamboo stakes. At 10-40 a squall was seen approaching which struck the steamer and flats end on, and drove them back with the current which was running with great force against them at the time. The engines were going full speed. At this time another steamer, the *Ory ray*, with two flats passed the *Soorma* on the left and under

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the high bank on shore. The *Soorma* gave way a little to allow the *Ospray* pass her. After she had passed, the *Soorma* got back into mid channel, when the squall increased and sent the steamer and flats on the sand bank. The engines were still going full speed, but the steamer could not make way against the wind and current. The commander's evidence was that he did everything in his power to prevent the steamer going on the bank, but was powerless. The stern of the steamer took the ground first, two of the hawsers of flat A1 were carried away, and the stern of the flat got away from the steamer. The other flat did not part. The rush of water caused the sand to accumulate between the steamer and flat A1, and raised the steamer, but not the flat, causing greater tension on the hawsers. Another line was passed to the flat, and attempts were made to bring her back into position, but these failed. An anchor from flat A2 was thrown out to prevent the steamer and flats from being carried down with the current and an endeavour was made to get them into the centre of the channel. This failed, as the anchor would not catch.

"The steamer's starboard anchor was next thrown out to prevent the vessels swinging back into their old position, it held and had the desired result. The steamer's port anchor with 30 fathoms of chain and a coil of new 7 inch rope was passed to flat A2 and thrown out at the stern and made fast to the steamer's capstan. After waiting for an hour the steamer and flats got away with the current leaving the anchor on the port bow of A2. The starboard anchor was then picked up as the steamer was swinging off into the channel and to prevent the flat going over it in case she should again go ahead. It was hauled up to the bow of the steamer and hung there out of the water. It was so left to be ready at a moment's notice in case of need. This is said to have been the safest position for all emergencies. It was now 7-30 P.M., dark and raining. The steamer and flat A1 were still aground. There was another steamer about 600 yards ahead also aground. By observing the light on board that steamer, it was seen how the *Soorma* was swinging, a sound of something bursting was heard, and it was found that the 8 inch backing hawser of A1 had carried away, the result of the strain caused by the swinging of the steamer into the channel. A1 immediately crossed the steamer's bow, going on the top of the starboard anchor which made a hole in her side, and she began at once to fill with water. An attempt was made to beach the flat by going full speed ahead. An order was given when the starboard steering

gear was carried away, as the steamer swung off. The port anchor's hawser was also carried away. The engines were stopped, and the steamer and flats were carried down by the force of the current against the opposite bank. A1 was attached to the steamer by one forward hawser only. A2's port anchor was let go. All the men and what could be saved from the deck of A1 were got off. She was sinking fast, dragging the steamer down with her, so that the only remaining hawser had to be cut. She sank in about 5 minutes after striking the anchor and at a minutes to 8 o'clock at night. The commander and sookaney further said that immediately the flat A1 was seen to be coming across the steamer, the order was given to put the helm round to get out of the way of the flat and to let go the anchor, but before it could be carried out, the flat struck. To secure it the anchor had been chained to the lower part of the capstan, and could have been released in 12 seconds, but the flat struck in half that time. The men were at their posts and carried out all orders given to them promptly. The reason assigned for the breaking of the starboard steering gear was that the rudder had got buried in the sand, and when the helm was ported, the strain caused the chain to break. The pilot's evidence on this point was that the chain gave way at 11 o'clock in the morning, when the steamer and flats were working against the squall, and that this was the cause of their being unable to hold up against the wind which drove them on the sand. The sookaney was positive that it was not until he got the order to put the helm round at night, so as to get out the way of the flat just before she struck, that the chain gave way. The commander says it was not till then, when he gave the order to go full speed ahead, that he discovered the steering gear would not work. The sookaney was at the wheel in the morning, when the steamer first took the ground during the day, and again at night, when the collision occurred. He attributed the breaking of the chain to the same cause as the commander. He and the commander were in a much better position to judge of the matter than the pilot, who had nothing to do with the working of the ship, he was unable to state at what place the chain gave way, and yet he said it had been mended during the day. There was nothing to account for its breaking in the morning before the steamer touched the sand. The sookaney said he had examined it before leaving Keoshtea, when it was in good order. On this point I held in favor of the commander's evidence.

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"It is unnecessary to enter more fully into the details of the evidence. The pilot the sookaney, and the serang of the *Tura* all corroborated the commander as to the state of the weather on the 26th October, the pilot and sookaney also describe the squall as of unusual force and the current as very strong. They and the commander stated that all possible efforts were made during the day to get the steamer and flats off the sand, but without effect, that these efforts were of the usual kind, and were carried out in a proper manner, that the steamer and flats were well found and manned, the engines were properly worked and orders carried out promptly, all that it was possible to save out of the flat was saved before she sank, no other assistance was available. Another steamer, the *Lakea*, passed the *Soorma* about noon after she had got aground, but at that time the *Soorma's* position was not considered dangerous, and the commander expected to get off in the ordinary way. He whistled to the *Lakea* to let it be known he was aground that it might be reported, but she could not have assisted the *Soorma* by reason of the weather and could not have left her flats in safety, there were no country boats anywhere in the neighbourhood which could have been availed of, it was raining with a strong wind blowing, and the current running all day. The witnesses were cross examined and the evidence was uncontradicted in any material particular except as to the time when the rudder chain broke, already referred to.

"It was proved that the transhipment of the goods to a flat at Hooshien was necessary, and that at the time of their loss the route taken from Hooshien to Sara by water was the only one open for goods traffic. In the dry weather the route is by Dussokden, but in October of last year that route was only open for passengers, passengers' luggage and small parcels.

"On a full and careful consideration of the facts relating to the accident and the measures taken to save the flat and cargo, I held for the defendants. I found as a fact, in terms of Section 151 of the Contract Act that they had taken as much care of the goods bailed to them as a man of ordinary prudence would under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.

"Mr Upton for the defendants contended, in the first instance, that the measure of the defendants' liability as carriers by railway was governed by Section 72 of Act IX of 1859. That section is as follows —

- ' (1) The responsibility of a Railway Administration for the loss, destruction, or deterioration of animals or goods delivered to the administration to be carried by railway shall, subject to the other provisions of the Act, be that of a bailee under Sections 151, 152, and 161 of the Indian Contract Act, 1872 '

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- ' (3) Nothing in the common law of England or in the Carriers' Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a Railway Administration '

"This Act only came into force on the 1st May 1890. It has no retrospective effect except that by Section 2, clauses (2) and (3), it declares all rules, declarations, appointments, sanctions, directions, forms, powers, and notifications made, given, approved, conferred and published under previous enactments to be in force as if made, &c., under that Act and any enactment or document referring to any of those enactments, so far as may be, is to be construed as referring to the Act of 1890, or to the corresponding portion thereof. The matter is not saved by these provisions, nor is it merely a matter of procedure, but of the rights and liabilities of the parties.

" 'When an enactment would prejudicially affect vested rights or the legal character of past Acts, the presumption against a retrospective operation is strongest. Every statute which takes away or impairs vested rights acquired under existing laws, creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed, must be presumed, out of respect to the legislature, to be intended not to have a retrospective operation.' And 'when the law is altered pending an action, the rights of the parties are decided according to the law as it existed when the action was commenced, unless the new statute shows a clear intention to vary such rights' (Maxwell on the Interpretation of Statutes, pages 192-93). I take it, then, that the Act of 1890 has no retrospective effect as applied to the present case, and that the defendants cannot claim the benefit of Section 72 of that Act.

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"It was subsequently contended that if the defendants' responsibility was to be measured by the law as it stood before 1st May 1890, the effect was still the same, as the law then applicable was Section 10 of Act IV of 1879

"That section enacts —

'Every agreement purporting to limit the obligation or responsibility imposed on a carrier by railway by the Indian Contract Act 1872, Sections 151 and 161, in the case of loss, destruction or deterioration of, or damage to property shall, in so far as it purports to limit such obligation or responsibility, be void unless—

'(a) it is in writing signed by or on behalf of the person sending or delivering such property, and

'(b) is otherwise in a form approved by the Governor General in Council'

'In the present case there was no special contract signed by or on behalf of the consignors of the goods

'The question then arises, what was the measure of the defendants' responsibility as carriers by railway in October 1889? It will be observed that there is a great difference in the language of Section 72 of Act IX of 1890 and Section 10 of Act IV of 1879. The former declares what shall in future be the responsibility of a carrier by railway. The latter merely assumes that Sections 151 and 161 of the Contract Act apply to carriers by railway. The Bombay High Court in *Kutery's Tulsidas v. The Great Indian Peninsula Railway Company*(1) held that the said sections of the Indian Contract Act applied to carriers by railway. But the High Court of Calcutta in *Molloora Kant Shaw v. The India General Steam Navigation Company*(2) dissented from that view, and it may be that Section 72 of the Act 1890 is the outcome of that decision. It is true the point was not in fact decided in that case because the defendants were carriers by water and the case was decided with reference specially to the Carriers' Act, 1865. So that the question which arises in this case has not been decided by the High Court of Calcutta. But having regard to the observations of the learned judges in that case (which was a Full Bench decision), and to the doubts expressed by Mr Justice O'KENEALY in *Molloora Das*

v Carter(1) that the question is by no means free from doubt, it would appear to be the view of the High Court of Calcutta that Section 10 of Act IV of 1879 effected no change in the law on the subject

"It was contended for the plaintiff in the present case and as it seems to me rightly, that the defendants at the time the goods were lost were common carriers, to whom the English common law, as applicable to common carriers, applied and that they were insurers of the goods, except only as to an act of God or the Queen's enemies, and such other conditions of the contract as appear on the back of the receipt note none of which affect the present question

"It was argued in *Mothoora Kant Shan's* case, on the authority of *Pooley v Drier*,(2) that where an existing law is different from what the Legislature supposes it to be, implication arising from statutes cannot be followed, and it was suggested that Section 10 was passed on the assumption that the Bombay case had been rightly decided. It was distinctly held in *Mothoora Kant Shan's* case that at the time of the passing of the Indian Carriers' Act in 1865 the English law relating to common carriers was in force in this country, and that that Act effected no alteration in the law in relation to the responsibility of a common carrier for goods entrusted to him for carriage. That Act did not apply to railways. Did Section 10 of Act IV of 1879 alter the law as applied to railways? GARTH, C J, in that case says, referring to that section (page 187), 'From this section we are asked to infer that the Legislature has put a construction upon Sections 152 and 161 of the Contract Act which relieves all carriers in India from any common law liability. But if, in our opinion, the Contract Act was not intended to have that effect, but, on the contrary, was intended to leave the liability of common carriers, as it was before the Act passed, the fact that the Railways Act several years afterwards alluded to Sections 152 and 161 as applying to carriers by railway, is not, I think, sufficient to justify us in giving the Contract Act a construction which we disapprove and which we believe to be contrary to its meaning. Besides, it is really difficult to say what the Legislature did intend by Section 10 of the Railways Act. Very possibly it may have been taken for granted that the view of the Bombay Court was right, or it may have supposed that carriers by railway were not common carriers.' The result of the decision in this case is that the

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bailment sections of the Contract Act were never intended to apply to common carriers, and do not apply. Having regard, then, to that decision and to the views expressed with reference to Section 10 of the Railway Act of 1879, I am of opinion that that section effected no change in the responsibilities of railways as common carriers, or of the position of the defendants as such in 1890, and that they were, at the time of the occurrences out of which this case has arisen, common carriers, and as such, insurers of the goods, the act of God and the Queen's enemies only excepted.

'The next question is, can the accident be said to have been the act of God? The point was not argued before me, but Mr Upton said he was prepared to argue that it was. I think it is clear on the authorities that the act of God, which excuses a carrier, must be a direct and violent act of nature. The words of this exception designate the immediate operation of purely natural agents, such as lightning, earthquake and tempest, exclusive altogether of human intervention, and not so extensive as to comprehend what is merely inevitable (McLachlan on Shipping, 2nd edition 199). In *Smith v Shepherd* (referred to in Abbott on Shipping, 11th edition, pp 328-30) it was held that the act of God which could excuse the carrier must be immediate and not remote. I am allowing that the primary cause of the accident was the violent squall which sent the steamer and flats on the sand bank the grounding was not the sole or the immediate cause of injury to the flat which caused her to sink and destroy the plaintiff's goods. *Smith v Shepherd* seems to me very much in point, in the present case likewise the act was too remote. I held, therefore, that this was not an act of God which excused the defendants.

"It was suggested that if Act IX of 1890 was inapplicable to the case, the plaintiffs were not entitled to the benefit of Section 80 (which allows a suit to be brought either against the Railway Administration to which the goods were delivered or against the Railway Administration on whose railway the loss occurred), and inasmuch as the accident occurred when the goods were in the custody of the Imperial Bengal State Railway, the suit ought to have been brought against that railway. Now, whether Section 80 applies to the present case or not, I think that the defendants have been properly sued. The contract was with them, and they were bound to the plaintiffs under the contract. In

the *Great Indian Peninsula Railway Company v Radhakisan Khushal Das*(1) it was held that the appellants had been rightly sued, although the goods had been delivered to the Madras Railway Company on the ground that the appellants were the agents of the Madras Railway Company. It has not been shown in the present case what agreement exists between the defendants and the other railways over which the goods were to be carried but the defendants received the goods for carriage to Mongal Hat and granted a receipt note for them, which constituted the contract between the parties, and on that contract the defendants may be sued, whether or not the suit would also lie against the Eastern Bengal State Railway. There is a question as to which of the two sets of plaintiffs ought to receive a decree. The goods are deliverable to the consignees or to any person to whom the receipt note may be endorsed. There is no contest as between the consignors and consignees and it was stated that the goods had not been paid for by the consignees, and as they are parties, plaintiffs, and have made no objection to a decree in favour of the consignors, I have made the decree in their favour with costs.

"My Judgment is contingent on the opinion of the High Court on the following question, which I have been requested by Mr Upton on behalf of the defendants to submit —

'Whether or not upon the facts of the case as they have been found and stated the Judgment is correct in law?'"

At the hearing of the reference before the High Court the following authorities were referred to in the course of the arguments given below:—The Indian Railway Act (IV of 1879), Sections 10 and 13, 'The Common Carriers' Act (III of 1865), Sections 6, 8 and 9, The Indian Railways Act (IX of 1890), Section 7, The Railways Act (XVIII of 1851), Sections 9, 10, 11, The Indian Contract Act (IX of 1872), Sections 150, 151 and 161, *Mothoora Kant Shau v The India General Steam Navigation Company*(2), *Moheswar Das v Carter*(3), *Kuterya Tulsi Das v. The Great Indian Peninsula Railway Company*(4), *Nugent v Smith*(5), *Abbott on shipping*, edition II, p 338, and the case of *Smith v Shepherd* there cited, *Pooley v Driver*(6), *Queen v Mayor of Oldham*(7), *Peel v North Staffordshire Rail*

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(1) 11 B 5 Bom 371

(2) 1 L R 10 Cal 210

(3) L R, 1 C 1 D 43

(4) L R, 3 Q B, 474

(5) 11 P 10 Cal 168

(6) 11 B, 1 Bom 109

(7) L R 5 C 1 D 110

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way Company⁽¹⁾, *India General Steam Navigation Company v. Joykrishn Shaha*⁽²⁾; *Abdulla v. Mohan Gir*⁽³⁾, Wilberforce on Statutes, pp 15, 16

Mr Dias (with him *Mr Stol*)—The questions are: (1) whether upon the findings of fact this is an act of God, (2) as to the liability of Railway Companies as carriers of goods under the repealed Act (IV of 1879). As regards the first question, the leading authority is *Nugent v. Smith*⁽⁴⁾. The accident must have been directly caused by elemental force which could not have been averted by any amount of reasonable skill and care. The carrier does not insure against acts of Nature and here the facts found bring us within the ruling in *Nugent v. Smith*. That case was not before the lower Court which relied on *Smith v. Shepherd*, a case cited in the notes to *Abbott on Shipping* (11th Ed. 338, 339) and *McLachlan on Shipping* (2nd Ed. 199), which was a very different case.

As to the second question, I admit that, having regard to the Full Bench decision in *Muthoora Kant Shan v. The India General Steam Navigation Company*⁽⁵⁾ common carriers are governed by the common law, and are hitherto as matters subject to any statutory law affecting them. Then the effect of the Carriers' Act (III of 1865) was to provide that the known liability of common carriers as insurers was to be capable of being cut down by special contract to a minimum (Section 6). There was upon them a higher liability which could be cut down, but not so as to excuse negligence (Section 8) or criminal acts. It is provided by Section 9 that the onus of proof lies on the defendant to rebut negligence, and there is a corresponding provision in the case of railway carriers in Act IV of 1879, Section 13, which is imported into the latter Act from the Carriers' Act, and must be read in the same sense. If the Carriers' Act be excluded, I say that railway carriers are free from all liability except that governing bailees as defined in the Contract Act (Sections 151, 152 and 161). A railway carrier's liability, then, is that of the ordinary bailee, and we may find even that by Section 10 of the Carriers' Act. All that Section 13 says is that the loss itself is evidence of negligence *res ipsa loquitur*. Section 11 of the Railway Act of 1854 makes railways liable only on proof of negligence. The definition of a common carrier is wide enough to include all

(1) 32 L.J. Q.B. 211.

(4) L.R., 1 C 70, 41.

(2) I.L.R., 17 Cal. 29.

(3) I.L.R., 10 Cal., 10.

(5) I.L.R. 11 All., 421.

railways other than Government and railways are a species of common carriers. The Contract Act does not affect statutes not expressly repealed by it, so the Contract Act could not apply without affecting the Carriers' Act. The Bombay decision in *Kuterp Tulsi* *vs.* *The Great Indian Peninsular Railway* (1) held that the Contract Act does not affect the Carriers' Act but affords its purpose and renders it unnecessary. The Full Bench case here could not follow that, and said that if the Act is rendered unnecessary and the insurance liability of the carrier is lowered down to a liability for negligence that must have the effect of affecting the Act. I put a case which was not before the Full Bench in *Mothoora Kant Shuk's* case. The course of decision for many years shows that it has never been held that railways were liable if they took reasonable care. Now it is sought to place upon them an insurance liability which cannot be upon them unless by virtue of the Act of 1879. The Contract Act would apply to all bailees if it does not affect the Carriers' Act which applies to railways, and renders it unnecessary for them to have a special Act. The liability for negligence is an irreducible minimum. The Act of 1879 allowed railway carriers to reduce their liability by a special contract. The result of removing the Carriers' Act is that they become bailees under Sections 151, 152 and 161 of the Contract Act, which is identical with their obligations under the Carriers' Act, as they are a specially favoured class. The Act of 1879 must be interpreted with reference to the history of the matter and the prohibitions. An erroneous recital in an Act may become correct by reason of the changes it has effected—*Wilberforce on Statutes*, pages 15, 16. *Queen v. Mayor of Oldham* (2), *Abdulla v. Mohan Gir* (3). They are bailees clear of statute, and their liability is governed by Section 151, which is practically identical with Section 8 of the Carriers' Act except that they may limit it. An intelligent purpose must be attributed to the legislature. Railways have never been liable for more than negligence, and three judges in the case of *Moheswar Das v. Carter* (4) assumed that the Contract Act applied to railways. The express provision in Section 73 of the new Railway Act (18 of 1890) was intended to get rid of the doubt raised by O'KINFALY, J., at page 213. It would be unreasonable to say that there was an interval between 1879 and 1890 in which the liability

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(1) I L R 3 Bom 109

(2) L R 3 Q B 474

(3) I L R 11 All. 490

(4) I L R, 10 Cal 210

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of insurers was imposed upon railways. It is more reasonable to assume the continuity and consistency of the legislature culminating in the Act of 1890.

Mr Henderson — The primary and immediate cause of the accident in this case was not the squall which took place eight hours before. There was, therefore, no act of God within the principles in *Nugent v Smith* (1). As to the other question, my argument shortly is that the Contract Act when passed in 1872 was never intended to apply to carriers, there being two Acts expressly dealing with them—the Railway Act of 1854 and the Carriers' Act of 1865—and it was at that time intended to amend and consolidate the law relating to carriers (2). This being the case, the Railway Act of 1879 repealed entirely the two previous Acts, and nothing else being substituted, and the Contract Act not being made expressly applicable the English common law revived, and they became liable as insurers. The legislature was under a misapprehension as to what the law really was. There was nothing to prevent them from expressly declaring in the Act of 1879 the law to be what it was afterwards stated to be in the Act of 1890, when the legislature appears to have been alive to the fact that there was some doubt. It was necessary to use clear and unmistakable words, in order that the liability imposed by Sections 151, 152 of the Contract Act should attach. Section 161 could only apply on loss or deterioration of goods after the time the goods were to be delivered.

Mr Evans was heard in reply.

The opinion of the Court (PETHEIAM, C J, PRIOR and MACHERON, J J) was delivered by

PETHEIAM, C J — The facts of this case are so fully and clearly set out in the judgment of the Judge of the Small Cause Court that it is not necessary to restate them.

The two questions which have to be considered are, first, whether the liability of a carrier of goods by railway in India was, between the passing of the Railway Act of 1879 and the passing of the Railway Act of 1890, that of insurer against everything but what is known as the act of God, or was that of a bailee as defined in the Contract Act, and second, if the liability was that of an insurer, whether this particular loss was caused by the act of God within the legal meaning of the term.

In order to answer the first question it is necessary to ascertain what has been the history of the law relating to carriers by railway, in this country. The first legislation on the subject is that contained in Act XVIII of 1854 Section 11 of which is as follows — 'The liability of such Railway Company for loss or injury to any articles or goods to be carried by them other than those specially provided for by this Act, shall not be deemed or construed to be limited or in anywise affected by any public notice given, or any private contract made by them but such Railway Company shall be answerable for such loss or injury when it shall have been caused by gross negligence or misconduct on the part of their agents or servants. This continued to be the case until the passing of the Carriers' Act, 1865, Section 7 of which related specifically to the owners of railways, and was in these words — 'The liability of the owner of any railroad or tramroad constructed under the provisions of the said Act XVII of 1863, for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any special contract but the owner of such railroad or tramroad shall be liable for the loss of or damage to property delivered to him to be carried, only when such loss or damage shall have been caused by negligence or a criminal act on his part or on that of his agents or servants.'

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On the 10th of September 1867 it was decided in the case of *East Indian Railway Company v Jordan*(1) by a Division Bench of this Court (PRACOCK, C J, and MACNEERON, J) that Railway Companies in India were common carriers, and liable as such, that is to say, as insurers of goods delivered to them. Sections 151, 152 and 161 of the Contract Act, 1872, limit the liability of bailees of goods to a liability for negligence, but a Full Bench of this Court on September 13th, 1883, in the case of *Mothoura Kant Slat v India General Steam Navigation Company*(2) decided that the liability of common carriers was not affected by these sections, and as this Court had before, in the case first cited, decided that Railway Companies in India were common carriers, these sections do not affect the present questions.

We now come to the Railway Act of 1879. Section 2 of that Act contains the following provision "Nothing in the Carriers Act, 1865, shall apply to carriers by railway." I cannot read

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these words in any other sense than as reperting all the provisions of the Carriers' Act which relate exclusively to carriers by railway, and continuing the operation of the remaining provisions to carriers other than carriers by railway, so that by the repeal of so much of the Carriers' Act of 1865 is related to railways and that of the whole of the Railway Act of 1854, the liability of carriers by railway as it stood before the Acts of 1854 and 1865 was restored. The case of the *East Indian Railway Company v Jordan* decided that carriers by railway are common carriers and the case of *Moolooru Kant Shai v India General Steam Navigation Company* decides that the liability of common carriers was not affected by the Contract Act, so that, unless there is something in the Act of 1879 itself which limits it, their liability after the passing of that Act was that of common carriers according to English law, that is to say, of insurers. On behalf of the defendants Section 10 is relied on. That section is in the following words —“ Every agreement purporting to limit the obligation or responsibility imposed on a carrier by railway by the Indian Contract Act, 1872, Sections 151 and 161, in the case of loss, destruction or deterioration of or damage to property shall, in so far as it purports to limit such obligation or responsibility, be void unless

- (a) it is in writing signed by it on behalf of the person sending or delivering such property, and
- (b) is otherwise in a form approved by the Governor General in Council

And it is said that by it Sections 151 and 161 of the Contract Act are declared to be the law relating to carriers by railway, but even if that were so, it would not avail the defendants, as those sections merely impose liability for negligence, and Section 162 which is the section which limits the liability of the bailee, is not mentioned in Section 10 of the Act of 1879. It follows that after the passing of the Act of 1879 the liability of carriers in India, including carriers by railway, was not limited to a liability for negligence, but was a liability as insurers of the goods delivered to them.

This being my opinion, it is necessary to decide whether or not the loss in this case was caused by what is known as the act of God, and as to this I am clearly of opinion that it was not. The legal meaning of the phrase is clearly defined in *Nugent v*

Smith, (1) and there can be no doubt that the present case does not come within that definition. So far from the loss having been caused by any convulsion of nature, it appears that for these steamers and flats to get ashore is quite a usual occurrence and that the loss was occasioned by a variety of causes, which happened after this steamer with the flats attached to it had got aground and during the many hours which elapsed before the flat sunk, no one of which was occasioned by any tremendous or even unusual disturbance of the elements. For these reasons I would reply that, upon the facts of the case as they have been found and stated, the judgment is correct in law.

Attorney for Plaintiffs—*Mr E O Moses*

Attorney for Defendants—*Mr R L Upton*

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In the Court of the Judicial Commissioner of Oudh.

CIVIL APPEAL.

Before H P Wells, Esq.,

(1) HAFIZ ABDUL RAHIM AND

(2) HAFIZ ABDUL RAHMAN

(PLAINTIFFS), APPELLANTS

1.

(1) SECRETARY OF STATE FOR INDIA IN COUNCIL

THROUGH SUPERINTENDENT, E B S RAILWAY

(2) MANAGER, E I RAILWAY AND

(3) SECRETARY OF STATE FOR INDIA IN COUNCIL,

THROUGH SUPERINTENDENT, OUDH AND ROHILKHAND

RAILWAY (DEFENDANTS), RESPONDENTS

CIVIL APPEAL REGISTER NO 60 OF 1904.

Railway Company Tribunal of—Special Contract—Accident—Sale of damaged goods

1904
December,
22

The plaintiffs had consigned 810 Canisters of Kerosine oil from Bidge Budge to their address at Fyzabad. The consignment which was in the same van with another consignment was damaged in transit owing to an accident. The fragments that remained were picked up by the Station

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these words in any other sense than as repealing all the provisions of the Carriers' Act which relate exclusively to carriers by railway, and confining the operation of the remaining provisions to carriers other than carriers by railway, so that by the repeal of so much of the Carriers' Act of 1865 is related to railways and that of the whole of the Railway Act of 1854, the liability of carriers by railway as it stood before the Acts of 1854 and 1865 was restored. The case of the *East Indian Railway Company v Jordan* decided that carriers by railway are common carriers and the case of *Moolooru Kant Shai v India General Steam Navigation Company* decides that the liability of common carriers was not affected by the Contract Act, so that, unless there is something in the Act of 1879 itself which limits it, their liability after the passing of that Act was that of common carriers according to English law, that is to say, of insurers. On behalf of the defendants Section 10 is relied on. That section is in the following words—"Every agreement purporting to limit the obligation or responsibility imposed on a carrier by railway by the Indian Contract Act, 1872, Sections 151 and 161, in the case of loss, destruction or deterioration of or damage to property shall, in so far as it purports to limit such obligation or responsibility, be void unless

- (a) it is in writing signed by or on behalf of the person sending or delivering such property, and
- (b) is otherwise in a form approved by the Governor General in Council "

And it is said that by it Sections 151 and 161 of the Contract Act are declared to be the law relating to carriers by railway, but even if that were so, it would not avail the defendants, as those sections merely impose a liability for negligence, and Section 162 which is the section which limits the liability of the bailee, is not mentioned in Section 10 of the Act of 1879. It follows that after the passing of the Act of 1879 the liability of carriers in India, including carriers by railway, was not limited to a liability for negligence, but was a liability as insurers of the goods delivered to them.

This being my opinion, it is necessary to decide whether or not the loss in this case was caused by what is known as the act of God, and as to this I am clearly of opinion that it was not. The legal meaning of the phrase is clearly defined in *Nugent v*

Smith, (1) and there can be no doubt that the present case does not come within that definition. So far from the loss having been caused by any convulsion of nature, it appears that for these steamers and flats to get ashore is quite a usual occurrence and that the loss was occasioned by a variety of causes, which happened after this steamer with the flats attached to it had got aground and during the many hours which elapsed before the flat sunk, no one of which was occasioned by any tremendous or even unusual disturbance of the elements. For these reasons I would reply that, upon the facts of the case as they have been found and stated, the judgment is correct in law.

Attorney for Plaintiffs—*Mr E O Moses*

Attorney for Defendants—*Mr R L Upton*

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In the Court of the Judicial Commissioner of Oudh.

CIVIL APPEAL.

Before W P. Wells, Esq.,

(1) HAFIZ ABDUL RAHIM AND

(2) HAFIZ ABDUL RAHMAN

(Plaintiffs), Appellants

1.

(1) SECRETARY OF STATE FOR INDIA IN COUNCIL

THROUGH SUPERINTENDENT, E B S RAILWAY.

(2) MANAGER, E I RAILWAY AND

(3) SECRETARY OF STATE FOR INDIA IN COUNCIL,

THROUGH SUPERINTENDENT, OUDH AND BOKILKHAND

RAILWAY (Defendants), Respondents

CIVIL APPEAL RE ISSUE No 60 of 1904.

Railway Company Liability of—Special Contract—Accident—Sale of damaged goods

The plaintiffs had consigned 810 Canisters of Kerosine oil from Budge Budge to their address at Ljzabad. The consignment which was in the same van with another consignment was damaged in transit owing to an accident. The fragments that remained were picked up by the Station

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Haji Abdul Master of the station where the accident occurred and sent on to Patna where they were sold without notice to the plaintiffs for Rs 214 one half of which was tendered to the plaintiffs. They refused the offer and claimed as damages the whole value of the consignment.

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of State for
India

(2) E I Ry

It was contended that the Railway Company made no attempt to bring the remnants of the consignment even if they consisted of only empty tins to Fyzabad and they had no right to sell these remnants.

Held—That the plaintiffs, not having proved that they could have got more money by selling the remnants at Fyzabad the Court could not award as damages the amount claimed and the risk note prevented the plaintiffs from claiming the whole of the value of the consignment.

CLAIM for recovery of Rs 1563 9 9, damages (Valuation Rs 1,456 9 9) plus Rs 115-10 0 costs = Rs 1,602-3-9

Appeal against order of C H Roberts, Esq, District Judge of Fyzabad, dated 3rd December 1903 confirming order of Pandi Suraj Narain Sub Judge Fyzabad, dated 27th September 1902.

For Appellant—*Mr F O O'Neill*

For Respondents—*Mr Narendro Nath Ghoshal*

JUDGMENT—The appellants in July 1897 had consigned to them at Fyzabad from Budge Budge 810 Canisters of Kerosine oil. There was an accident on the East Indian Railway and this consignment together with another consignment which was in the same van, was damaged. The Station Master at Niwada where the accident occurred picked up the fragments that remained and sent them on to Patna, where they were sold without notice to the plaintiff, for Rs 214, half of which Rs 107, was tendered to the plaintiff as owner of one consignment.

The amount and value of the other consignment do not appear. They refused the offer of Rs 107, and claimed as damages the whole value of the consignment.

The defendant pleaded that the claim was barred by the terms of the Risk Note under which the goods were conveyed which protected the Railway Companies from having to pay on account of any loss, destruction or deterioration of goods.

The Courts below have dismissed the plaintiff's suit.

In appeal it is contended that the Railway Companies were not entitled under the Risk Note to make any attempt to bring on the remnants of the consignment, even if they consisted only of empty tins, to Fyzabad, and had no right to sell off these remnants as if they were their own property.

It was argued that this case might therefore be differentiated from the cases reported in *Gopal Das v The Agent of B N W Railway*, 5 OCP 153, *F I Railway v Bunyad Ali*, I L R, XVIII All, p 42 *Tippanna v Southern Maratha Railway Company*, I L R, XVII Bom, p 417, and *Toonya Ram v E I Railway Co*, I L R, XXX Cal, p 257, on which the Lower Courts relied

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(2) E I Ry

The contention is not entirely without force. The terms of the Risk Note free the Railway Company from all responsibility for any loss, destruction, deterioration or damage.

There is no doubt that if the consignment or any part of it had been lost the plaintiff would have had no case.

They would also have had no claim in respect of any part of it that had been destroyed, damaged or deteriorated.

But the consignment had admittedly not been lost. It has been partly destroyed and partly damaged. Some of the canisters of oil seem to have been intact, some leaky and some empty and battered.

It is argued therefore that the Railway Company was bound to send the intact tins and the battered remnants of the leaky ones to the consignee at the place of consignment and let him get what he could for them, thus at any rate giving him an opportunity of selling them.

If the action of the Railway authorities in the present case is justifiable then, upon any consignment of goods being damaged in transit, the local Railway officials might sell off the goods by auction at some depot, get them bought in by any one cheaply and instead of giving the consignee his goods offer him whatever price they may choose to say the goods have fetched. Thus there would be a considerable opening for fraud.

If the consignees could prove that they could have obtained more for the remnants of the consignment than the Railway authorities obtained and offered them, they would have been entitled to at least the difference between the amounts as damages.

The plaintiffs have not been able to prove that they could have by selling the remnants at Fyzabad got more for them than the Rs 107 which the Railway authorities offered them and which the Courts below have decreed. It would indeed

Hafiz
Abdul Rahim

(1) Secretary
of State for
India,
(2) E. I. Ry

have been impossible for them to produce proof of this, the remnants having disappeared. In the absence of such proof I cannot award any amount as damages resulting from the proceedings on the East Indian Railway and I think that the Risk Note presents the plaintiff's claiming the whole value of the consignment

The appeal must therefore fail. I had some doubts whether under the circumstances of the case the defendants should not be made to pay all his costs for having disposed of the property and made no attempt to deliver it at Fyzabad. But I think there was some justification for the act of the Railway authorities as it would probably have been dangerous to the public and to the consignees of other goods to convey a lot of leaking and broken tins of oil from Niwada to Fyzabad.

I therefore maintain the order of the Lower Appellate Court except as to plader's fees

I do not consider that the fees of 3 pladers should have been allowed when there was only one single defence

I allow the appeal to the extent of Rs 144, and for the rest I dismiss it. Costs will be allowed according to the amount decreed and dismissed

In the High Court of Judicature at Fort
William in Bengal.

APPELLATE CIVIL JURISDICTION.

*Before the Hon'ble Robert Fulton Rampini and the
Hon'ble Herbert Holmwood*

HANUMAN SHAH, RAMGATI SHAH

(PLAINTIFFS), APPELLANTS,

v.

B & N W RAILWAY COMPANY

(DEFENDANT), RESPONDENT

Non-delivery of goods—Proof of delivery for despatch

1905
March, '0

In suits against Railways for non delivery of goods, it must be proved that they received them for despatch

APPEAL from Appellate Decree No 710 of 1902* Appeal against the decree of the Subordinate Judge of Zillah Tirhut, dated the 11th of October 1901, reversing the decree of the Munsiff of Hajipur, dated the 13th of May 1901

Hanuman
Shah
v
D & N W
Ry
—

For Appellants—*Babu Hara Prosad Chatterji,*
Babu Chunder Siskar Banerji

For Respondents—*Babu Lall Mohan Dass,*
Babu Mohendra Nath Roy, and
Babu Brij Mohan Morumdar

There is no ground for this appeal. The finding of fact at which the learned Subordinate Judge has arrived, namely that the goods for the value of which the plaintiffs sued, were never actually received by the servants of the Railway Company concludes us. That is evidently what he meant to find, and that is a finding of fact which binds us.

The appeal is accordingly dismissed with costs.

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Series, Page 819.**

CIVIL RULE

Before Mr Justice Stephen and Mr. Justice Vincent
VELAYAT HOSSEIN (PLAINTIFF), PETITIONER

BENGAL AND NORTH-WESTERN RAILWAY COMPANY
(DEFENDANTS), RESPONDENTS †

*Railway Company Liability of—Passengers Luggage—Merchandise lost
as Luggage Loss of—Railways Act (IX of 1890) Sections 46 and—
General Rules of Railway Companies—Damages Suit for*

A passenger took a journey on a Railway and booked as his luggage a package containing merchandise. The package was lost and consequently not delivered at the end of his journey. He, thereupon, sued the Railway Company for damages caused by its loss.

Held—That the case was governed by Sec 72 of the Indian Railways Act (IX of 1890) and the sections of the Contract Act referred to therein, and that the Railway Company was liable for the loss of the package.

*See appendix A, Case No 20

† Civil Rule No 1271 of 1909 against the decree of UMESH CHANDRA SEN Subordinate Judge of Patna, dated January 1909

Velayat
Hossein

B & N W
Ry
—

RULE granted to the Plaintiff, Velayat Hossein, the Petitioner

On the 15th June 1908, the plaintiff, a trader in *durrie* or carpets purchased two third class tickets for a journey on the Bengal and North Western Railway and booked as his "luggage" a package containing 96 pieces of *durries* or carpets, for which he obtained a certain free allowance under his said two tickets and paid a certain sum of money for excess weight not covered by the free allowance. At his destination the said package was found missing and delivery of the same was not consequently made to the plaintiff who instituted a suit in the Court of Small Causes at Patna, against the Bengal and North-Western Railway Company for the sum of Rs 382, being the price of the said *durries*.

The defence was, that the plaintiff sent the goods at his own risk, and that the Railway Company was not liable for the loss of the same under Rule No 76 of the Company's General Rules (Rule No 76 will be found in their Lordships' Judgment)

The Subordinate Judge, exercising Small Cause Court's Jurisdiction, dismissed the suit concluding as follows —

"Rule 76 (of the Railway Company), I think, applies to this case, and that these articles were despatched at his (plaintiff's) own risk. The defendants cannot, therefore, be held liable. I dismiss the case, but won't grant the defendant's costs."

The plaintiff, thereupon, moved the High Court and obtained this Rule on the defendant Company to show cause why the judgment and decree of the Subordinate Judge should not be set aside.

Babu Nares Chandra Sinha, for the Petitioner. The responsibility of Railway Companies in carrying goods is that of a bailee, and they cannot vary or limit this responsibility without complying with the provisions of Section 72 of the Railways Act (IX of 1890) wherein responsibility of Railway Companies is clearly set out. *Sesham Patter v Miss (1) Willinon v The Lancashire and Yorkshire Railway Company* (2) affirmed on Appeal (3). Any rule made by a Railway Company must be consistent with the Act and reasonable. *Jalimangh Kotary v Secretary of State for India* (4). I submit that Rule No 76 of the Company's General Rules is inconsistent with the Act, and the Bengal and North-Western Railway Company cannot shirk

(1) 1894 I L R 17 Mad 445

(2) 1906 2 K B 619

(3) 1907 — K B 292

(4) 1904 I L R 31 Cal, 901

their responsibility under the Railways Act by taking advantage of their own Rules. Railway Companies, as bailees have the *onus* on them to show that they have taken reasonable and ordinary care. *Trustees of the Harbour, Madras, v Best and Company*,⁽¹⁾ and *Russell Chandmull Hamirmull v Great Indian Peninsula Railway Company*⁽²⁾

Babu Joy Gopal Ghose (Mr McNair with him), for the Railway Company. The question is whether the petitioner is entitled to consider the package of *durrus* or carpets as "luggage". I submit he is not so entitled. The term "luggage" is distinguishable from the term "merchandise" and he cannot treat merchandise as luggage. *Hudston v Midland Railway Company*,⁽³⁾ *Cahill v The London and North-Western Railway Company*,⁽⁴⁾ *Great Northern Railway Company, v Shepherd*⁽⁵⁾ *Belfast and Ballymena, &c, Railway Companies v Keys*⁽⁶⁾ The plaintiff has taken advantage of his own wrong in claiming damages for loss of articles other than "luggage," *i.e.*, merchandise. If he books merchandise as "luggage," he has to suffer the loss. If any, of his merchandise. Section 72 of the Railways Act contains the words "subject to the other provisions of this Act, and includes Sec 47 and Rules framed thereunder and all provisions as to "risk notes." The Rules framed by the Bengal and North-Western Railway Company under Section 47 are not inconsistent with the Act, and, therefore, not *ultra vires*, and the Railway Company is not liable in damages for the loss of the package. There is no authority on this point, and the cases cited on behalf of the petitioner do not bear on the present case.

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what was allowed free of charge the package contained merchandise which it is not suggested could be considered as luggage. It was not delivered to the petitioner at the end of his journey, and he sued before the Subordinate Judge acting in his Small Cause Court Jurisdiction, for damages caused by its loss. The Judge dismissed the suit holding that the case was governed by Rule No 76 of the Company's General Rules. This is as follows — "The term 'luggage' will include only wearing apparel and effects required for the personal use of passengers. Persons tendering amongst their luggage articles not properly classifiable as such do so at their own risk." The petitioner contends that this rule does not absolve the Railway Company from their liabilities under the Indian Railways Act of 1890. Section 72 of that Act provides that "(1) the responsibility of a Railway Administration for the loss of goods delivered to the Administration to be carried by Railway shall subject to the other provisions of this Act, be that of a bailee under ss 151, 152 and 161 of the Contract Act." The second sub section provides that an agreement purporting to limit that responsibility is void, unless it is in writing signed by the person sending or delivering the goods and is in a form approved by the Government of India. The third sub section enacts that "nothing in the common law of England or in the Carriers' Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility, as in this section defined, of a Railway Administration."

If by force of the above enactment the abovementioned provisions of the Contract Act apply to this case, the liability of the defendants in the suit cannot be questioned. But Section 72 of the Railways Act is "subject to the other provisions of this Act" and it is contended on behalf of the Railway Company that the section is accordingly subject to a rule duly made under Sec 47 of the Railways Act, as it is not denied that rule No 76 was made. By para (2) of this section the Company can make a rule "consistent with this Act" for the purpose of "regulating the carriage of passenger's luggage." Does this rule absolve the Company from liability under Section 72? The question seems to us to admit of no answer but an unhesitating negative. A very definite enactment would be necessary to give the Company power to repeal a provision of the Act, particularly so general a one as that contained in Section 72, by a rule made in this case the rule

has to be "consistent" with the Act, an expression which is singularly inapplicable to a rule that repeals a part of it. Then it does not appear that the words in Section 72, whereby its operation is made "subject to the other provisions of this Act", apply at all to rules under Section 47. A rule made under the Act is not a provision of the Act, and the words have an obvious reference to Section 73 relating to the carriage of animals and Section 75 relating to the carriage of articles of special value, which are expressly framed to place certain restrictions on the full operation of Section 74. Moreover, the provisions of sub-section 2) of Section 72 have not been complied with in this case.

A variety of English cases have been referred to, according to which it is contended that the defendants cannot be fixed with liability in this case, but all such cases have been decided on a consideration of the position of the Railways as carriers or under Acts that do not apply here. The law here has been carefully simplified by the exclusion of the operation of the common law as to carriers and the Carriers Act, 1865, from cases of loss of goods, and this case is consequently governed by Section 72 of the Railways Act and the section of the Contract Act there referred to, and by them alone.

This rule is accordingly made absolute the decree of the lower Court is set aside. We have no evidence before us on which to assess the damage caused to the petitioner by the loss of his goods. We, therefore, remit this case to the Subordinate Judge to be re-tried by him in accordance with the law that we have laid down.

The petitioner is entitled to his costs on this rule.

Rule absolute

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what was allowed free of charge. The package contained merchandise which it is not suggested could be considered as luggage. It was not delivered to the petitioner at the end of his journey, and he sued before the Subordinate Judge acting in his Small Cause Court Jurisdiction, for damages caused by its loss. The Judge dismissed the suit holding that the case was governed by Rule No 76 of the Company's General Rules. This is as follows — "The term 'luggage' will include only wearing apparel and effects required for the personal use of passengers. Persons tendering amongst their luggage articles not properly classable as such do so at their own risk." The petitioner contends that this rule does not absolve the Railway Company from their liabilities under the Indian Railways Act of 1890. Section 72 of that Act, provides that "(1) the responsibility of a Railway administration for the loss of goods delivered to the Administration to be carried by Railway shall subject to the other provisions of this Act be that of a bailee under ss 151, 152 and 161 of the Contract Act." The second sub section provides that an agreement purporting to limit that responsibility is void, unless it is in writing signed by the person sending or delivering the goods, and is in a form approved by the Government of India. The third sub section enacts that "nothing in the common law of England or in the Carriers' Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility, in this section defined, of a Railway Administration."

If by force of the above enactment the abovementioned provisions of the Contract Act apply to this case, the liability of the defendants in the suit cannot be questioned. But Section 72 of the Railways Act is "subject to the other provisions of this Act" and it is contended on behalf of the Railway Company that the section is accordingly subject to a rule duly made under Sec 47 of the Railways Act, as it is not denied that rule No 76 was made. By para (2) of this section the Company can make a rule "consistent with this Act" for the purpose of "regulating the carriage of passenger's luggage." Does this rule absolve the Company from liability under Section 72? The question seems to us to admit of no answer but an unhesitating negative. A very definite enactment would be necessary to give the Company power to repeal a provision of the Act, particularly so general a one as that contained in Section 72, by a rule and in this case the rule

has to be "consistent" with the Act, an expression which is singularly inapplicable to a rule that repeals a part of it. Then it does not appear that the words in Section 72, whereby its operation is made "subject to the other provisions of this Act", apply at all to rules under Section 47. A rule made under the Act is not a provision of the Act, and the words have an obvious reference to Section 73 relating to the carriage of animals and Section 75, relating to the carriage of articles of special value, which are expressly framed to place certain restrictions on the full operation of Section 74. Moreover, the provisions of subsection (2) of Section 72 have not been complied with in this case.

A variety of English cases have been referred to, according to which it is contended that the defendant cannot be fixed with liability in this case but all such cases have been decided on a consideration of the position of the Railways as carriers or under Acts that do not apply here. The law here has been carefully simplified by the exclusion of the operation of the common law as to carriers and the Carriers Act 1860, from cases of loss of goods, and this case is consequently governed by Section 72 of the Railways Act and the section of the Contract Act there referred to, and by them alone.

This rule is accordingly made absolute the decree of the lower Court is set aside. We have no evidence before us on which to assess the damage caused to the petitioner by the loss of his goods. We, therefore, remit this case to the Subordinate Judge to be re-tried by him in accordance with the law that we have laid down.

The petitioner is entitled to his costs on this rule.

Rule absolute

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The Bengal Law Reports, Vol. VIII. Page 581.

ORIGINAL CIVIL.

*Before Sir Richard Couch, Kt., Chief Justice, and
Mr Justice Macpherson.*

MAGLETON (PLAINTIFF)

v.

THE EAST INDIAN RAILWAY COMPANY (DEFENDANTS)

Contract—Railway Receipt—Carrier—Jus tertii.

1872
April, 16

In March 1871, T and Co, brokers in Calcutta, sold to S & Co, on account of C an up country seed merchant, 200 tons of poppy seed, and allowed C to draw upon them to the extent of the value of 50 tons before despatch on the terms of a previous contract by which they had allowed C to draw against cotton to arrive in Calcutta before the drafts matured C authorizing them to receive payment on his account on goods sold and delivered through them Towards the end of March, C entered into an arrangement with E, a merchant in Calcutta under which E accepted bills to a large amount for C, upon C's promise to cover the bills before maturity In June C ordered the defendant Railway Company to consign all goods despatched from Fyzabad to E's address and empowered E to take delivery of, and give receipts for all such goods In the same month C despatched from Patna, in bags supplied by S. and Co, 55 tons of poppy seed to Calcutta, and sent the railway receipt to E, who was therein named as the consignee One of the terms printed on the receipt stated that goods would only be delivered to the consignee named in the receipt or to his order In advising E. of the despatch of the poppy seed, C informed him that it had been sold to S and Co and that delivery was to be made through T and Co and E had also seen letters which passed between C and his agents in which the following passages occurred "Our Calcutta firm will deliver the poppy to T and Co, and "Do your best and hurry off despatches of 50 tons of poppy The rest of the poppy and linseed can go to E" E endorsed the railway receipt to S and Co, who paid the freight, and sircars of E and S. and Co, together went to the Railway Station and demanded delivery which the Railway Company at first promised to give, but afterwards, under an order from C to "deliver 50 tons to T and Co, and to no other party, the rest of the seed to be delivered according to documents," they at T. and Co's request delivered the whole 55 tons to them In an action by E against the Railway Company for non delivery of the seed to him

Held (per MARKBY, J) F was a mere agent of the vendor for the delivery of the goods, T and Co had a superior title to the goods, of which F had notice

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Held (per COUCH, C.J., and MACPHERSON J on appeal), the Railway Company was bound to deliver to F The property in the goods and right of possession was in him, he had an authority coupled with an interest which C could not revoke he had no notice of the title of T and Co, which was an equitable right only

THIS was an appeal from a decision of MARKBY, J, dated 23rd January 1872 The suit was brought by the plaintiff, a merchant in Calcutta, against the East India Railway Company, for wrongfully delivering to Messrs Toulmin and Co, brokers, 747 bags of poppy-seed which had been placed in the defendants' possession as carriers for delivery to the plaintiff The facts of the case are fully set out in the Judgment of MARKBY, J, and were accepted by the Court of Appeal

MARKBY, J —In this suit the plaintiff claims to recover from the defendants the value of 747 bags of poppy seed, which were in the possession of the defendants, and which, the plaintiff says, ought to have been delivered to him, but were not

The plaintiff does not claim to be the owner of the goods, the short history of which is as follows —A person trading as Cohen Brothers had, through a firm of brokers known as Toulmin and Co, entered into a contract with Messrs Schlitzzi and Co of Calcutta for the delivery to them of 200 tons of poppy-seed, to be delivered at Howrah during May and June in lots of 50 tons at a time or more In part performance of this contract the 747 bags of poppy-seed containing 1,494 moods, or 55 tons, were despatched by the plaintiff's agent at Patna to be sent by the defendants' railway to Howrah, and in the Railway receipt which the defendants then gave, and which was in the usual form, the plaintiff was named as the consignee, and when the goods arrived at Howrah, the defendants notified their arrival to the plaintiff, who directed that the goods should be delivered to Schlitzzi and Co, but the defendants notwithstanding delivered them to Toulmin and Co

Upon these bare facts, which were admitted, the plaintiff claimed a decree without going into evidence, unless the defendants could make some answer, but I declined to call upon the defendants to go into their case upon these admissions, the plaintiff being only consignee, and not having, so far as yet appeared, any contract with the defendants, or any property in the goods whatsoever

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The plaintiff then opened his whole case, which was that the goods were despatched by Cohen Brothers to him for the specific purpose of meeting a bill for Rs 10,000, drawn by Cohen Brothers and accepted by himself, which bill would fall due on the 26th of June, and the plaintiff alleged that the goods were so despatched in fulfilment of a promise by Cohen Brothers that this acceptance should be covered before maturity. On the part of the plaintiff I was asked to raise the following issues

1 Whether the plaintiff had any such interest in the goods as would entitle him to the possession of them?

2 Whether the plaintiff had not obtained constructive possession of the goods before the conversion of them by the defendants?

The defendants asked to raise the following issues —

3 In whom was the property in these goods at the date of the alleged conversion?

4 Whether or not the plaintiff had any right of possession, and if so whether the defendants had any notice of such right?

5 Whether, if the plaintiff had at any time any right in or over these goods, or the proceeds, that right was not itself subject to the prior right of Toulmin and Co?

6 Whether, if the plaintiff had at any time any right, that right was not determined, and if so when?

7. Whether there was any conversion?

Both the plaintiff and defendants, whilst each insisting on their own right to establish a special claim to these goods, objected to the other side doing so, but I considered that the best course was to raise all the issues

The facts of the case, as I find them to be, are that a certain Mr Cohen, under the name of Cohen Brothers, had been doing an up country trade in cotton seed and other produce, evidently on a very limited capital and as is usual in such cases, was constantly pressing his correspondents in Calcutta to the utmost for advances. He had been in correspondence with Toulmin and Co upon this subject, and in December 1870 Toulmin and Co agreed to allow him to draw Rs 25,000 against cotton to arrive in Calcutta, before the drafts matured. Mr Cohen thereupon authorized Toulmin and Co to receive payment on account of

Cohen Brothers on goods sold and delivered through Toulmin and Co. In February Mr Cohen was contemplating an extension of his operations to the purchase of oil seeds, and a good deal of correspondence ensued as to the terms on which he was to get advances. In his letter of February 20th he asks permission "to draw upon Toulmin and Co, in the usual way, and to meet the bill which would fall due before the time of delivery we would (he says) draw upon the buyers and place you in funds." On the 2nd March Toulmin and Co informed Mr Cohen that they had sold on his account to Messrs Schulizzi and Co, 200 tons of poppy-seed, on the terms which I have already stated, but added that this firm would not allow itself to be drawn upon. In order to meet this difficulty and to enable Cohen Brothers to make a beginning, Toulmin and Co said, "We will allow you to draw on ourselves to the extent of the value of 50 tons *hore* despatch." To this letter Mr Cohen sent rather a vague reply, hinting at his intention to seek accommodation elsewhere. On the 14th April Mr Cohen asked permission to draw on Toulmin and Co at sixty-one days for Rs 10,000, saying that poppy-seed and cotton would be sent soon. Toulmin and Co declined however to go beyond their permission to draw in advance to the extent of 50 tons of seed. Accordingly, Mr Cohen on the 18th April enquired of his agent at Fyzabad Mr W. Landeshut, what amount he could draw against 50 tons of poppy seed, to which the answer given was Rs 5,000. Cohen Brothers on the following day drew for that sum on Toulmin and Co, at sixty-one days, and in the letter which advised the draft they said, "Our agent at Fyzabad has purchased the poppy-seed and will shortly make the first despatch,—in fact we expect he will be able to make the despatch 100 tons." No further communication of any importance took place between Toulmin and Co and Mr Cohen until the 14th June when Mr Cohen telegraphed to say that the "poppy has just reached Patna, sending Howrah by rail," and asking to draw for Rs 10,000 more. This request Toulmin and Co refused, and reminded Mr Cohen of his promise to deliver 50 tons of poppy seed on the following day. The 747 bags of poppy seed in question were despatched from Patna on the 20th of June and arrived at Howrah on the 22nd, where they were claimed by Toulmin and Co, as specially appropriated to the draft for Rs 5,000 accepted by them as above stated, which fell due on the 19th of June and which they paid on the 22nd.

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I will now state the transactions between Mr Cohen and the plaintiff. It will be recollected that in March Mr Cohen had hinted to Loumin and Co his intention of seeking elsewhere the accommodation which they had refused and in fact, towards the end of that month Mr Cohen entered into a general arrangement with the plaintiff that he should look to Cohen Brothers' interest receiving two annas per cent on all business done and that the plaintiff should allow Mr Cohen to draw at the rate of Rs 50,000 a month upon so arrangement that all drafts would be covered before they matured. In pursuance of this arrangement Mr Cohen drew upon the plaintiff at sixty one days for Rs 10,000, on the 26th April, and again for Rs 10,000 at fifty one days on the 13th May. Besides these there were other bills for the amount of Rs 12,500, drawn by Mr Cohen on the plaintiff, falling due on the 16th of June, and consequently towards the end of May the plaintiff was anxiously enquiring after the arrival of seeds. On the 25th of May he was informed by Mr Landeshut, the agent of Mr Cohen in Calcutta, that it was impossible to give with accuracy the dates when they would receive any seeds, but as they were bound to deliver 200 tons of poppy in May and June and 100 tons of linseed in June, the goods would be down in ample time to cover the plaintiff's acceptances due on the 16th of June. On the 5th of June Mr Cohen writes to advise the departure of consignments by water to Patna, which it was and ought to reach Howrah by rail on the 13th, and it is added that, should they not arrive by that date, they trust that the Railway receipt will enable the plaintiff to finance, so as to take up the drafts on himself at maturity. This letter no doubt refers to a portion of the 747 bags of poppy seed now in question, and to the bills which fell due on the 16th of June. On the 8th June the plaintiff writes to Cohen Brothers pressing for cash to meet these bills, and on the 12th June Mr Landeshut writes from Lyzabad that he has ordered the station master at Patna to consign all goods despatched from Lyzabad to the plaintiff's address, and on the 14th June Cohen Brothers write to the plaintiff empowering him to take delivery, and give receipt for all despatches of linseed and poppy seed consigned by their Lyzabad agent, or through the Patna station master, to Cohen Brothers' care at the Howrah Railway Station. Notwithstanding these efforts, however, neither goods nor Railway receipt arrived in Calcutta in time to meet the acceptance falling due on the 16th, but Mr Cohen in some way or other found the cash to meet them, and they were retired.

No sooner, however, were these bills got rid of, than it became necessary to consider how others were to be met. Besides the drafts on the plaintiff which fell due on the 29th of June, and the 6th of July respectively, there was the still earlier draft on Toulmin and Co. which fell due on the 19th, and which was therefore the next to be provided for. Of course, the plaintiff was still pressing for goods, and got the two following letters —

Eagleton
E I Ry

'Lyabul 16th June 1871

Messrs Eagleton and Co.,

Calcutta

Dear Sirs

We have your favors of the 9th and 10th

We enclose memo of goods despatched and about to be so. I have sent you per pattern post three samples of linseed of different marks and one of poppy.

The poppy was sold to Messrs Schulz and Co through Messrs Toulmin and Co., and delivery has to be made to Schulz and Co through Toulmin and Co.

100 tons linseed according to sample ^{L^s}₈ were sold to James Leicester and Co for delivery in June @ 426 and 50 tons were sold to some gentlemen *not on sample* for delivery by 20th July @ Rs 436

^{L^s}₈ is best quality

L^s is 2nd do

L^s is 3rd do

Yours faithfully,

(Sd) Cohen Brothers and Co

J or W Landeshut

The letter enclosed is list of consignments showing that the 747 bags now in question should reach Howrah by the 22nd of June. The second is from Mr S M Landeshut from Meerut and is as follows —

'Meerut 17th June 1871

My dear Eagleton

We have telegraphed you that I start to day for Lahore. Of course if you care to come up there, do so by all means but I scarcely think it will be necessary.

Eagleton
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E. I. Ry.

I am going to send you down all consignments as they come to hand, so that there shall be no further difficulty in covering drafts as they fall due.

With kind regards to Mrs. Eagleton and yourself,

Believe me,
Yours sincerely,

(Sd) S. M. Landeshut."

The plaintiff replied to the letter of the 16th June as follows —

"Calcutta, 19th June 1871.

Messrs Cohen Brothers and Co.,

Meerut

Dear Sirs,

We have to acknowledge receipt of your favours of the 15th and 16th instant advising having drawn on us at 21 d d in favour of the Bank of Upper India for Rs 12,500, by two drafts for Rs 10,000 and 2,500 each, the drafts to be presented by the Oriental Bank. These drafts have as yet not been presented, we shall, however, accept the same on presentation, but we must ask you not again to draw on us.

We have received advice of goods from Fyzabad as per enclosed statement, from which we note that not quite 100 tons of poppy-seed will be in Calcutta this month for Schilizzi and Co. Prices for poppy seed here are now 1-8 with very little in the market, and we think it not improbable that, should Schilizzi and Co go into the market to buy 100 tons, that prices would immediately still further advance. Small grain linseed is to day worth 1-3 to 1-4 per mrand, and stocks are light

Awaiting your advices concerning deliveries of Linseed

We remain, Dear Sirs,
Yours faithfully,
(Sd) Eagleton and Co

P.S.—We return you Mr McLeary's letter to Mr Cohen

(Sd) E and Co.

P.P.S.—The drafts have just been presented by the Oriental Bank and accepted by the writer we perceive you have drawn on him not on "Eagleton and Co"

(Sd) E and Co"

On the 20th June Mr. S. M Landeshut wrote from Patna as follows:—

"Patna, 20th June 1871.

My dear Eagleton,

The mail leaves this at 1 o'clock in the day. as I have but just returned from the Railway Station, I have but little time to write a long letter.

We are despatching from here to day, to your address, 747 bags=1,494 maunds poppy, and 255 bags=510 maunds linseed, which will reach Howrah the day after Railway receipt. The value of this will not be sufficient to cover your acceptance due on the 29th. I would therefore recommend you, if possible, to draw upon Cohen for what you require. I have not time to write more fully, but will do so later in the day.

Engleton
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E I Ry
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Yours sincerely,
(Sd) S M Landeshut

P S—I hope you have paid my premium, as Grace expires to-morrow.
And again on the 21st as follows —

Bankipore, 21st June 1871

My dear Engleton,

Under a separate cover registered I have sent you Railway receipt for 1,002 bags of seed, 747 poppy and 255 linseed, bearing freight Rupees 1,021-2-9. On receipt of the poppy I would advise you to give notice of arrival to Schulizzi and Co and take payment from them at the rate of Rs 4 4 per maund as per contract, they taking delivery from Howrah.

With regard to the linseed you had better wait until further supplies come to hand which I expect in a few days, and in the meantime use your judgment as to the best way of raising money on the stuff to meet the draft due on the 29th. Cohen, I hope, has sent you general instructions since I left Meerut, according to my brother's programme, you ought to have receipts for 978 more bags of seeds between this and the 30th of which 512 are poppy. Cohen is, I believe writing to Toulmin to finish up Schulizzi's contract by buying and supplying in Calcutta.

Your sincerely,
(Sd) S M Landeshut

To the first of these letters the plaintiff replied by writing to Meerut as follows —

'104 Canning Street,

Calcutta, 21st June 1871

Messrs Cohen Brothers and Co

Meerut

Dear Sirs,

Mr S M. Landeshut writes us from Patna that Railway receipts for 1,494 maunds poppy, 510 maunds linseed, will arrive in Calcutta before your draft for Rs 10,000 matures on 29th instant the value of these seeds is

| | |
|-------------------------------|-----------------|
| | Rs 8,469 3-0 |
| Less freight | , 1,002 0-0 |
| | <hr/> 7,467 3-0 |
| Less margin of 2 1/2 per cent | 1,866-15-7 |
| | <hr/> 5,600-3-9 |

Eagleton
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We must, therefore ask you immediately on receipt of this to remit us say £,000 and telegraphing us that you have done so

We regret that so much anxiety is caused by our acceptances not being covered in the usual course, we had hoped after the last matter was settled that the business would proceed in order At Mr Landeshut's request we have again accepted your drafts to the extent of 12500 but had we for an instant anticipated that sufficient seeds would not have been down in time to cover our acceptance falling due, we most certainly should not have done so

We are Dear Sirs,

Yours faithfully

(Sd) Eagleton and Co

I have set out these six letters at length, because it is on them that the plaintiff must rely to establish his claim I do not, of course, mean that the prior dealings between the parties are to be put entirely out of sight, but it is clear that up to the 14th of June the parties were corroborating upon a different matter, namely, how the bills were to be met which fell due on the 16th

What happened when the goods arrived at Howrah was this — The plaintiff got the railway receipt on the 22nd, on that day an assistant of Toulmin and Co demanded it from the plaintiff on his employer's behalf, with which demand the plaintiff refused to comply, but telegraphed at once to Cohen Brothers for instructions. Mr Cohen replied on the 23rd, directing the plaintiff to deliver to Toulmin and Co., and at the same time telegraphed to Toulmin and Co, that they were to demand the poppy seed from the plaintiff The plaintiff replied by telegraph refusing to deliver the poppy-seed to Toulmin and Co until his draft due on the 29th was covered Whereupon Mr Cohen telegraphed to the station master at Howrah to deliver the poppy seed to Toulmin and Co and to no one else

The plaintiff, when he got the Railway receipt, indorsed it to Schulz and Co, and sent to Howrah, on the 24th, his own sircar, accompanied by a sircar of Schulz and Co, to demand that the poppy-seed should be delivered to Schulz and Co, who on that day paid the freight, but the goods were not delivered There is some dispute as to whether the delivery was refused by the Railway Company on the 24th or not, but it does not appear to me to be of much importance Anyhow the same evening the plaintiff wrote the defendants expressing his surprise at their having refused to deliver to Schulz and Co, and

giving them notice not to deliver to any one on the present endorsements of the receipt. This notice he withdrew on the 26th, on which date he again made some demand, I suppose the same as before, that the goods should be delivered to Schulz and Co. This was not done, and the goods were afterwards delivered to Toulmin and Co. under a guarantee. The plaintiff had not up to that time given to the defendants any notice of the true nature of his claim to these goods. Messrs Schulz and Co. remained quite passive.

These being the facts of the case, I think they do not support the plaintiff's claim. All that the defendants knew about the matter was that the plaintiff was the bare consignee of the goods who did not claim that the goods should be delivered to himself but to another person who had paid the freight. Under these circumstances I think that the defendants would naturally assume that the plaintiff was a mere agent of the vendor for delivery, and very properly, I think, referred the matter to the consignee for instructions and obeyed those instructions.

Not upon the facts and correspondence does it appear to me that the plaintiff had in any respect better claim to the possession of these goods than the defendants. I am not now called upon to decide whether or no possession of these goods could or could not, have been demanded by Toulmin and Co. as against the instructions of the consignor. What I am called upon to decide is, whether under the circumstances it could be demanded by the plaintiff as against the defendants who had the consignor's express orders to deliver to Toulmin and Co., and in my opinion, even if all the circumstances had been made known to the defendants, they would still have been bound to deliver to Toulmin and Co. If we look to the correspondence, on and after the 16th of June, which more nearly concerns this case we find that the plaintiff was expressly told in the letter of the 16th of June (the most important of all) that the poppy seed was sold to Schulz and Co., and delivery was to be made through Toulmin and Company. If we look to the earlier correspondence we find that, by letters written by W. Landeshut to Cohen Brothers at Calcutta, and to Cohen Brothers at Meerut which letters the plaintiff was authorized to read, and did read he was informed that "our Calcutta firm" (i.e. Cohen Brothers) "will deliver the poppy to Toulmin and Company," and again "do your best and hurry off despatches of 50 tons of poppy

Eagleton
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The rest of the poppy and linseed can go to Eagleton " Surely this was a notice to any man of business that Toulmin and Co had some claim against this poppy-seed to the extent of 50 tons, and when the order to deliver to Toulmin and Co was repeated in the letter of the 16th June, it was obvious that this had reference to that claim. If as the plaintiff says, this had only reference to Toulmin and Co's possession as brokers, the direction would have been general as to the whole 200 tons, and would not have been limited to 50 tons only. Nor do I think that the letters of Mr Landeshut of the 20th and 21st can have the effect of displacing the previous order to deliver to Toulmin and Co, and substituting a right on the part of the plaintiff to have those goods delivered to himself. They are rather in the character of friendly advice to the plaintiff how to act so as to extricate himself from his difficult position. But even assuming that they are more still they do not, in my opinion, give the plaintiff a right to claim delivery of these goods, superior to the undoubtedly prior claim of Toulmin and Co, backed as it was by the orders of the consignor, for though Mr Cohen was greatly pressed for money, I do not think he was guilty of any deliberate dishonesty, and it would have been deliberately dishonest if he had diverted those 50 tons of poppy seed, which had been clearly promised to Toulmin and Co into any other direction, just when Toulmin and Co's bill was falling due, and when it was impossible that any other goods could arrive to meet it.

Apart, therefore, from the question of notice on a comparison of the situation of the two claimants to the property, I think the plaintiff has failed to make out his case.

Failing however this, his main contention, the plaintiff says he is entitled to something in respect of the surplus over 50 tons. It appears that only 50 tons of poppy seed, out of nearly 55 which Toulmin and Co received, were delivered to Schlizzi and Co, that firm refusing to recognize Toulmin and Co's authority to receive payment for any larger quantity. Accordingly Toulmin and Co applied to Mr Cohen to know what he was to do with the surplus. Mr Cohen therefore authorized Toulmin and Co to tender this quantity (65 bags) to Schlizzi and Co and if they refused it, then to dispose of the seed to the best advantage. Schlizzi and Co did refuse it and Toulmin and Co sold the seed in the market. The plaintiff contends that these 65 bags ought, at any

rate, to have been delivered to him, and he relies on a letter written on the 23rd of June, by Mr Cohen to the defendants which is as follows —

Bagleton
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Meerut 23rd June 1871

To

The Station Master

East Indian Railway

Howrah

Dear Sir,

We leg to confirm the following telegram sent 30 : 11 15 day

Deliver our poppy seed to Toulmin and Co and to no other party who may apply for it

We mean a quantity equal to 50 tons

Yours faithfully,

(Sd) Cohen Brothers and Co

The rest can be delivered according to documents

(Sd) C B and Co

That letter arrived in Calcutta on the 26th (*see* Mr Conroy's evidence), but whether before or after the seed was delivered to Toulmin and Co is not certain. Mr Conroy thinks the seed was delivered on that day. I do not, however, think I can give plaintiff a decree for anything on this account. I cannot find that any demand was ever made by the plaintiff that this surplus quantity should be delivered to him, though he knew the exact quantity which had arrived, and the extent of Toulmin and Co's claim for it was stated in the letter of the 2nd June which the plaintiff saw. Throughout he claimed the whole, and it seems to me that the claim to this surplus is entirely an after thought. Had it been made earlier, the defendants would no doubt have referred the plaintiff to Toulmin and Co, who would doubtless have taken Mr Cohen's instructions, and the result might have been different. It would, in my opinion, be most unjust towards the defendants to allow this claim now to be sprung upon them, of which no one, as far as I can discover, had thought until this plaint was filed. I therefore think that the suit must be dismissed with costs on scale No 2.

From this decision the plaintiff appealed

Mr Evans and Mr Macrae for the Appellants

Mr Maundin and Mr Marsden for the Respondents.

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The rest of the poppy and linseed can go to Eagleton" Surely this was a notice to any man of business that Toulmin and Co had some claim against this poppy seed to the extent of 50 tons and when the order to deliver to Toulmin and Co was repeated in the letter of the 16th June, it was obvious that this had reference to that claim. If as the plaintiff says, this had only reference to Toulmin and Co's possession as brokers, the direction would have been general as to the whole 200 tons and would not have been limited to 50 tons only. Nor do I think that the letters of Mr Landeshut of the 20th and 21st can have the effect of displacing the previous order to deliver to Toulmin and Co, and substituting a right on the part of the plaintiff to have those goods delivered to himself. They are rather in the character of friendly advice to the plaintiff how to act so as to extricate himself from his difficult position. But even assuming that they are more, still they do not in my opinion, give the plaintiff a right to claim delivery of these goods, superior to the undoubtedly prior claim of Toulmin and Co, backed as it was by the orders of the consignor, for, though Mr Cohen was greatly pressed for money, I do not think he was guilty of any deliberate dishonesty, and it would have been deliberately dishonest if he had diverted these 50 tons of poppy seed, which had been clearly promised to Toulmin and Co, into any other direction, just when Toulmin and Co's bill was falling due, and when it was impossible that any other goods could arrive to meet it.

Apart, therefore, from the question of notice, on a comparison of the situation of the two claimants to the property, I think the plaintiff has failed to make out his case.

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rate, to have been delivered to him, and he relies on a letter written on the 23rd of June, by Mr Cohen to the defendants which is as follows —

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Received 23rd June 1871

To

The Station Master

East Indian Railway

Howrah

Dear Sir,

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That letter arrived in Calcutta on the 26th (*see* Mr Conroy's evidence), but whether before or after the seed was delivered to Toulmin and Co is not certain. Mr Conroy thinks the seed was delivered on that day. I do not, however, think I can give plaintiff a decree for anything on this account. I cannot find that any demand was ever made by the plaintiff that this surplus quantity should be delivered to him, though he knew the exact quantity which had arrived, and the extent of Toulmin and Co's claim, for it was stated in the letter of the 2nd June which the plaintiff saw. Throughout he claimed the whole, and it seems to me that the claim to this surplus is entirely an after thought. *Had it been made earlier, the defendants would no doubt have referred the plaintiff to Toulmin and Co, who would doubtless have taken Mr Cohen's instructions, and the result might have been different.* It would, in my opinion, be most unjust towards the defendants to allow this claim now to be sprung upon them, of which no one, as far as I can discover, had thought until this plaint was filed. I therefore think that the suit must be dismissed with costs on scale No 2.

From this decision the plaintiff appealed

Mr Evans and Mr Macrae for the Appellants

Mr Marindin and Mr Marsden for the Respondents

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Mr Evans contended that the plaintiff had such an interest in the goods as entitled him to bring the action—*Anderson v Clark* (1) There was an authority coupled with an interest in the plaintiff There was a distinct stipulation to cover the drafts, and it must be taken that they were to be covered by the goods in suit, as no other goods could have arrived in time to cover the drafts when due The railway receipt is the customary evidence of title, and it was so treated, and by giving it the liability of the defendants was acknowledged—*Holl v Griffin* (2)

Mr Macrae, on the same side, contended that although a Railway receipt may not have the full force of a bill of lading, it is an instrument the holder of which has a right to deal with the goods, it can be dealt with in a certain way as a bill of lading, the consignee may attend to receive the goods mentioned in it, or he may endorse it to a third party. If this document had the full power of a bill of lading, cases like *Haville v Smith* (3) would be applicable As it is, *Evans v Nicholl* (4) is in point, the document there was of an inferior kind to a Railway receipt, and it was there held that the plaintiffs were entitled to bring trover, therefore *a fortiori* the plaintiff in this suit could maintain an action

Mr Marindin for the Respondents —Whatever title the plaintiff may have proved against Cohen and Co, and through them against the defendants, the title of Toulmin and Co. is paramount to the title of the plaintiff, the defendants, therefore, were justified in delivering to Toulmin and Co—*Biddle v Bond*, (5) *Thorne v Tilbury* (6) *Holl v Griffin* (2) is distinguishable, because in that case there was an express promise of the wharfinger to hold the goods for the person who held the wharfinger's receipt here there was no such promise Has the plaintiff shown such a title as would prevent the alteration in the destination of the goods from being operative? There had been a sale of these goods, and a specific appropriation of the proceeds, when the plaintiff came into the transactions Toulmin and Co had a right to hold the goods until their lien was satisfied, the result of the transactions was an equitable assignment to them, *Barlow v. Cochrane* (7) (Couch, C J—Here you have to show that the plaintiff was bound by any equity

(1) 2 Bing, 20

(2) 10 B & C, 216.

(3) 1 Bos & P, 563

(4) 3 Man & Gr, 614

(5) 6 B & S, 225

(6) 3 H & N, 534

(7) 2 B L R O C, 50.

which may have existed in respect to the goods, that is that he had notice of Toulmin and Co's lien on the goods) The only interest the plaintiff had in the goods was to receive the proceeds the property had actually passed to the purchasers Schluszi and Co—*The Calcutta and Burma Steam Navigation Company v De Matto* (1) On that decision, when the goods were put into the bags of the purchasers, they became the property of the purchasers, and that even though the documents were not handed over (Couch C J—Cohen and Co had a special property in the goods until the price was paid, though the general property might have been in the purchasers) If the general property in the goods had passed to the purchasers the only right Cohen and Co could give was the right to receive the price from the purchasers and to retain the goods until it was paid That right was transferred to Toulmin and Co by assignment prior to that to the plaintiff and the plaintiff cannot be in a better position than Toulmin and Co If the price of the goods had been paid by the purchasers and the goods had been sent to the plaintiff without his being informed that the price had been paid he would have been bound to deliver them to the purchasers he would have taken them subject to their rights (Couch, C J—If the price had been paid Cohen and Co's lien would have been gone and they could not have handed them over to the plaintiff) The authority given by the letters of the 4th and 26th of February amounts to an authority to Toulmin and Co to receive payments and where there is an authority coupled with an interest, it is irrevocable (Couch C J—Unless it would bind the goods the plaintiff would not be affected) The goods were so far bound that the plaintiff took them subject to the right of Schluszi and Co in them when they paid the price.

Mr Evans in reply —The goods had come into the constructive possession of the plaintiff. No such title has been shown on the part of Toulmin and Co as would overcome such constructive possession of the plaintiff

Couch, C J (after briefly stating the facts) —The first question which I think it is necessary to consider is what was the effect of the handing over by Cohen Brothers and Co to the plaintiff of the railway receipt in connection with the transaction

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which had taken place between them, and the agreement which is derived from the correspondence. Now as to the effect of the delivery of the Railway receipt, there is a very decided authority that would pass the property from Cohen Brothers and Co to the plaintiff, and that is the first question which we have to determine.

Upon that matter there is first the judgment of BOSANQUET, J., in the case of *Holl v Griffin*(1) which was referred to in the course of the argument on the appeal. The facts there were that a person named Wilson who was possessed of a wharfinger's receipt at Stockton upon Tees handed it over together with the invoice to the plaintiff upon an advance of money made to him by the plaintiff, and at the same time addressed an order to the defendants who were wharfingers in London, to deliver the goods upon their arrival to the plaintiff. The plaintiff called at the defendants' wharf, apprized them of his claim, and left the wharfinger's receipt with them. The defendants' clerk said that the vessel by which the goods were to be conveyed had not arrived, but they would be delivered to the plaintiff on arrival. BOSANQUET, J., said with regard to the handing over of the receipt — "The original owner of the goods was Wilson. The goods were lying on a wharf at Stockton-upon Tees. The wharfinger there gave Wilson a receipt for them, and Wilson, having that receipt and the invoice, handed both over to the plaintiff upon obtaining an advance of money." Here Cohen Brothers and Co., having the Railway receipt, sent it by post to the plaintiff who had put himself by an agreement with Cohen Brothers and Co., under obligations to meet bills which bills it was intended by Cohen Brothers and Co. (as appears from the correspondence) he should have the means of meeting by making use of the Railway receipt. What BOSANQUET, J., then says applies precisely to the present case. "As between Wilson and the plaintiff this was a symbolic transfer of the property to the plaintiff, and may be considered the same as if the goods had passed from hand to hand. It is objected that the wharfinger's receipt by virtue of which the plaintiff claims a property in the goods is not the receipt of the defendants but of the wharfinger at Stockton upon Tees." Then the learned Judge meets that by showing that the defendants had recognised the receipt by promising to hold the goods by virtue of it. That question does not arise in

this case, because the receipt here was given by the defendants' servants and was therefore the receipt of the defendants. This judgment then is an authority that, by that transaction between Coheo Brothers and Co. and the plaintiff, the property in these bags of poppy seed passed to the latter. To the same effect is the judgment of MAULE, J., in *Eians v Nicholl* (1). There the case was that the plaintiffs were chemists and dry salters, and also factors and brokers carrying on trade in London. The defendants were the London agents of Nicholl, Ludlow and Co., who carried on business at Newcastle as ship owners and wharfingers. The plaintiffs acted as factors and brokers for Anthony Clapham, an alkali manufacturer at Newcastle, who was in the habit of consigning alkali to the plaintiffs in London for sale on his account, he being allowed to draw upon them to the extent of two-thirds of the supposed value, but sometimes drawing, in fact, for the full amount. On the 2nd of May 1840, the plaintiffs were under acceptance for Clapham beyond the amount for which Clapham was entitled to draw in respect of goods in their hands belonging to him, if not to the full value of those goods. On that day Clapham wrote to the plaintiffs that he had drawn on them at four months' date for £500, adding "I hope to be able to ship twenty tons of soda the beginning of the ensuing week." The goods were shipped and no bill of lading was given, but the receipt signed by the mate of the vessel for the goods was sent to the plaintiff. MAULE, J., said "upon the shipment of the goods on board the *London*" (the vessel) "Upon the terms of being delivered to the plaintiffs, and the acceptance of the goods by the ship owners upon those terms, the property vested in the plaintiffs to the extent of their interest, which was the interest of persons with whom goods are pledged—*Bryans v Nix* (2). It is admitted that, if the plaintiffs had been vendees instead of pawnees of these goods, their right to recover could not have been disputed. The goods having been shipped by Clapham for the purpose of meeting the plaintiffs' acceptance of the £500 bill, and the ship owners having accepted those goods for the purpose of delivering them to the plaintiffs, it appears to me that the plaintiffs acquired such a property and right of possession as to entitle them to maintain trover against the defendants." So in this case these goods were delivered to the Railway Company for the purpose of being sent to the plaintiff

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(1) 3 M. and G. 614

(2) 4 M. and W., 775

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to enable him to meet the acceptances which he had given for the accommodation of Cohen Brothers and Co. They were accepted by the defendants for the purpose of delivering them to the plaintiff and therefore the property and the right of possession in them passed to the plaintiff. I have dwelt upon this because, as will be seen hereafter, it is necessary to show that the existence of a bill of lading, makes no difference with regard to the rights of the parties in the present case, as was argued before us. So long as the property and the right of possession passed, it is immaterial whether it was by the delivery of a bill of lading or the delivery of a receipt when we come to consider the rights of the parties with reference to the subsequent transactions.

It was argued that the property in these seeds vested in Schilizzi and Co. at Patna, and the circumstance relied upon to show this was, that, in accordance with the contract between Cohen Brothers and Co., and Schilizzi and Co., the purchasers were to provide the bags. I think the answer to that argument will be found clearly stated in the judgment of the Court in *Wait v. Baker* (1). There the contract was for a quantity of barley which was to be delivered at Kingsbridge or some neighbouring port for a certain sum for cash, and a vessel was loaded with barley, the bill of lading was taken, and that was subsequently left undorsed at the counting house of the defendant. Some dispute then appears to have arisen and the bill of lading was taken away. The only matter for which it is necessary to quote this judgment is to show that the property did not pass merely by putting it aside, or by despatching it to Howrah for the purpose of being delivered to Schilizzi and Co. Parke, B., says: "It is perfectly clear that the original contract between the parties was not for a specific chattel. The contract would be satisfied by the delivery of any 500 quarters of corn, provided the corn answered the character of that which was agreed to be delivered," (which was the case here with regard to the contract with Schilizzi and Co., for poppy-seed) "By the original contract, therefore, no property passed, and that matter admits of no doubt whatever. In order, therefore, to deprive the original owner of the property, it must be shown in this form of action—the action being for the recovery of the property—that, at some

subsequent time, the property passed. It may be admitted that, if goods are ordered by a person, although they are to be selected by the vendor, and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods, which have been selected, in pursuance of the contract, are delivered to the carrier, the carrier becomes the agent of the vendee and such a delivery amounts to a delivery to the vendee, and, if there is a binding contract between the vendor and vendee, either by note in writing, or by part payment, or subsequently by part acceptance, then there is no doubt that the property passes by such delivery to the carrier. It is necessary, of course, that the goods should agree with the contract. In this case it is said that the delivery of the goods on board the ship is equivalent to the delivery I have mentioned, because the ship was engaged on the part of Lethbridge as agent for the defendant. But assuming that it was so, the delivery of the goods on board the ship was not a delivery of them to the defendant, but a delivery to the captain of the vessel, to be carried under a bill of lading, and that bill of lading indicated the person for whom they were to be carried. By that bill of lading the goods were to be carried by the master of the vessel for and on account of Lethbridge, to be delivered to him in case the bill of lading should not be assigned, and if it should then to the assignee. The goods, therefore, still continued in the possession of the master of the vessel, not as in the case of a common carrier, but as a person carrying them on behalf of Lethbridge. There is no breach of duty on the part of Lethbridge as he stipulates under the original contract that the price is to be paid on the delivery of the bill of lading. It is clearly contemplated by the original contract that, by the bill of lading, Lethbridge should retain control over the property.

Now here these goods were delivered by Cohen Brothers and Co., it is true, in the bags which had been sent by Schirazi and Co., but they were made over to the defendants in order to be delivered by them to Eagleton and Co. who were intended by Cohen Brothers and Co. to retain control over the property. It is a question of intention really. With what intention were the poppy-seeds put into the bags at Patna and delivered to the Railway Company? Not with the intention certainly that the property should pass at once to Schirazi and Co., because the parties did not intend to part with the property till the price was paid. What they intended was, either that the goods should re-

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main their property, or that (as they had arranged) they should be the property of the plaintiff, Eagleton, until he received the price from Schulizzi and Co, and delivered over the goods. Therefore, the objection which was taken, that the matter was decided by the putting of the seeds into the bags of Schulizzi and Co at Patna and that the property passed to them thereby, I think fails.

The defendants rest their defence upon two grounds. They say that, when the goods had arrived at Howrah, and the claim was made by Toulmin and Co, they telegraphed to Cohen Brothers and Co who were the principals and who had delivered the goods to them, and they received instructions from Cohen Brothers and Co not to deliver to the plaintiff, and were directed to deliver as they did to Toulmin and Co. Now, if Cohen Brothers and Co had no power to revoke their authority, or to recede from what they had agreed to with Eagleton, the defendants, the Railway Company could not be in a better position: they could not derive from Cohen Brothers and Co, any greater authority than Cohen Brothers and Co had.

There is a circumstance in the case which looks as if the plaintiff was not then aware of his precise position, and thought that Cohen Brothers and Co still retained some power over the goods because he said he would telegraph to them for instructions. But his doing that would not alter his legal position. He was in the position of a person who was an agent having what is commonly called an authority coupled with an interest. In reality it was this. An agreement had been entered into between Cohen Brothers and Co and the plaintiff upon a sufficient consideration by virtue of which the plaintiff had accepted bills and put himself under pecuniary liabilities, and Cohen Brothers and Co had given to the plaintiff the right to receive these goods to meet the liabilities. It was an authority given for the purpose of securing a benefit to Eagleton upon a good consideration proceeding from him. That could not be revoked. It was an authority coupled with an interest and Cohen Brothers and Co had no right to revoke it. If they could do that, they would be receding from an agreement which was binding on them and resuming property which had passed to Eagleton and Co for a good consideration. They had no power to say to Eagleton "we won't allow you to get the goods, you are bound to pay the bills you have accepted for us, but the goods must go to some one else."

The defendants rested their case also upon another ground. They said Toulmin and Co. were the persons entitled to receive these goods, we have delivered them to the proper persons, and are therefore not liable to the plaintiff. That they might set up such a case as that is shown by a decision which was not referred to in the course of the argument before us, though several other cases nearly to the same effect were cited. In *Sloridan v. The New Quay Company*,⁽¹⁾ it was held by the Court that a carrier is not estopped from disputing the title of the sender of the goods and may deliver to the true owner. According to that doctrine, if the defendants could show that Toulmin and Co. were the true owners of the poppy seed, I think they might have had a good answer to the plaintiff's suit. It therefore becomes necessary to see precisely what was the nature of the title of Toulmin and Co. It is set out by MARKBY, J., in his judgment thus, reads the portion of the judgment of MARKBY, J., relating to the transactions between Cohen and Toulmin) —Now the learned Judge came to the conclusion that the property was in Toulmin and Co., and that the Railway Company had a right to deliver the goods to them, but the principles which are applicable to the present case are laid down in the judgment of the House of Lords in the case of *Hoare v. Dresser* (2). It is necessary to state the facts in that case to show how the law as there laid down is applicable to this case. The facts there were these. 'N, a timber merchant in Sweden, had dealings with D, a merchant in London, and sent him cargoes of timber, which D disposed of on a *del credere* commission, and in respect of which N drew bills on D. In September 1853 the accounts between them were unsettled but D claimed a considerable balance is due to himself. On the 29th September N wrote to say that he expected bills of lading from two captains (whom he named), and that he had drawn for a certain amount on D. On the 24th October H and Co., merchants in London received through K, their agent, and the manager of their business in Sweden, a letter from N in which he enclosed a letter to D whereby he drew on D for £1,312 which he claimed is due to himself from D. In the letter to H and Co., N desired that this enclosure might be handed to D and on his accepting the draft, and acknowledging the correctness of an accompanying account, and the fact that N had duly delivered all the cargoes of timber contracted for between them, except one, particularly named,

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that then H and Co were to hand to D the three bills of lading of three ships, also named but if he would not accept the draft, nor give the required acknowledgment, then H and Co were to insure the cargoes and sell them and N drew on H and Co drafts to the amount of £1 300 This letter was read to D, who hesitated to accept the draft for £1,312, declaring that he was largely in advance to N It was left in his bill box for acceptance on the morning of the 21th October, and a formal letter, demanding compliance with the conditions of N, was written to him by H and Co In the course of the same day D wrote to H and Co, requesting the loan of the bills of lading, saying, 'We will return them to you, if from any cause we do not accept the bill for £1,312' they were sent to him On the same day, but after D's request had been complied with H and Co accepted the first of N's drafts and wrote to him that they would 'give protection' to all On the morning of the 25th October, a clerk of H and Co learned at D's counting house that the draft for £1,312 had not been accepted but in the middle of that day it was sent to H and Co accepted D, however, refused to give up the bills of lading, and, on the advice of a solicitor (obtained before he had accepted the draft for £1 312), attached the goods in the hands of H and Co They brought in action against him to recover the bills of lading, and he filed a bill to stay the action It was held by the House of Lords that D (Dresser) had not such an equitable right on account of anything that occurred on the 21th of October, as would prevail against the legal rights which the plaintiffs had acquired by receiving the bill of lading The then Solicitor-General, Lord Cairns, in arguing the case for Dresser, raised three questions showing clearly the view which was taken of the nature of the case and the title which would be given by such a transaction as this He said 'The questions here are three First whether as between Norbom and Dresser' (in this case between Cohen Brothers and Co and Toulmin and Co) "there was an equity, a right on the part of Dresser to require that the particular cargoes mentioned in Norbom's letters should be sent to him" Secondly, whether H and Co having been originally the agents, and nothing more of Norbom acquired a higher title to the timber by reason of the engagements which they came under in respect of these cargoes" Here the question is whether Fagleton, having been an agent of Cohen Brothers and Co, would acquire a higher title by reason of the engagements he came under in respect of the seeds which were sent "Third, whether at the

time Hoare and Co came under these engagements, they had notice of the rights of Dresser as against Norbom with respect to the equity already mentioned." The whole case was put as the case of an equitable title as against a legal title, and the necessity of there being notice of the equitable title in order that it should prevail. Lord Cranworth said (and this remark applies to the nature of the title of Toulmin and Co) "The difference between law and equity I take to be this that if there has been an engagement to appropriate a particular cargo, or an engagement to satisfy a contract out of a particular thing such as to appropriate a part of a larger cargo, in either of those cases equity will interfere, in the one case to decree what in truth is a specific performance, or something very like a specific performance, of the contract to appropriate a particular cargo and in the other, to give the purchaser a lien upon the larger cargo, in order to enable him to satisfy himself of the smaller demand." He then gave an illustration and said "But I apprehend that neither in equity nor in law can there be any jurisdiction to say, that because there is property of the person who ought to have fulfilled his contract, therefore you can make that property available for the specific performance of the engagement." His Lordship said he thought it necessary to say that much, although the question did not properly arise in that case and then he made a remark which is applicable to the content on in this case, that there was sufficient in the correspondence to fix Eagleton and Co with notice of the nature of the title of Toulmin and Co. He said, speaking of what took place with the clerk in the counting house "But when that is looked at strictly and critically, I quite agree with an observation that was made in the course of argument, that mercantile transactions would be altogether unsafe if that is to be taken as notice." So here I think it may be said that if the expressions in the letters, that these seeds were to be delivered to Schulz and Co through Toulmin and Co, were to be treated as notice to the plaintiff, Eagleton, of the rights which Toulmin and Co had under the contract with Cohen Brothers and Co mercantile transactions would be altogether unsafe. There was nothing in that correspondence which could lead Eagleton to suppose that there was any special arrangement between Cohen Brothers and Co and Toulmin and Co. I think that we ought not to hold that the plaintiff had notice by the letters or the title of Toulmin and Co. There is another remark in the course of that case which is

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applicable to the present, with respect to what passed when the clerks met in the counting house, and one said to the other that the proceeding was a strange one, and, on Noribom's part, a regular swindle. Lord Wensleydale also gave judgment to the same effect as the Lord Chancellor and Lord Cranworth. He spoke of there being a bill of lading. But I have already shown that the bill of lading makes no difference, because the real question is whether the property passed to the plaintiff, and whether it passed by the endorsement of a bill of lading, or by delivery of the Railway receipt does not matter.

Therefore the result is this that the title of Toulmin and Co was at most only an equitable one. It did not even amount to an equitable lien on these particular goods. It was a right which Toulmin and Co could have enforced against Cohen Brothers and Co, but, being only a right, it could not prevail against a person who had had transferred to him the property in the goods, and who had the right of possession, unless at the time of the transfer he had notice of it. If it were clear that Eagleton had notice of these transactions between Toulmin and Co and Cohen and Co the right of Toulmin and Co would have prevailed against him. I do not think it can be said that he had noticed. He had acquired property in the seeds by the delivery of the Railway receipt. The defendants had engaged to deliver them to him, and unless they could shew that Toulmin and Co had a superior title to his, a title which would have enabled them to recover the goods from him, the defendants were not justified in delivering the goods to them and are liable for the wrongful delivery.

In my opinion the decision to which the learned Judge came that Eagleton's title was to be treated merely as the right of an agent and not as that of a person who had a property and right of possession in these goods is not correct.

The decree in favour of the defendants must be reversed and a decree made in favour of the plaintiff for Rs 5588 4 with interest at the ordinary rate of 6 per cent from the 26th June 1871, and costs of suit to be taxed on scale No 2.

MACPHERSON J.—I am of the same opinion. The plaintiff accepted bills to a large amount for Cohen Brothers and Co upon their promise that seeds would be sent down to him at once to place him in funds to meet those bills and there was an express understanding (as appears from the letters which passed

between Cohen Brothers and the plaintiff) that, when goods were despatched to Calcutta, they should be consigned to Eagleton and Co., who were to use the Railway receipts for such goods for the purpose of what is called financing. The bags of seed, the subject of this suit, were consigned to Eagleton and Co. under that agreement, and the Railway receipt was made out in Eagleton and Co.'s name and was sent to the plaintiff, and I have no doubt whatever that the intention of Cohen Brothers and Co. in so consigning the goods and giving the Railway receipt to Eagleton and Co., was that it should pass as in law I think it did pass, the right of possession and property in these bags of seed to Eagleton and Co., so as to enable the plaintiff to receive the price payable for them. The plaintiff, then, had a substantial interest in the consignment and was not a mere agent of Cohen Brothers. Under these circumstances, the Railway Company, having in the first instance granted a receipt for the goods in which they named Eagleton and Co. as consignees, and stated that the goods would not be given up except upon the order of the consignees received from Eagleton and Co. the freight which had to be paid for this consignment before delivery. I say that they received the freight from Eagleton and Co., because although it was received from the hands of Schluski and Co. as sugar, it was so received upon the order of Eagleton and Co., and on their indicating, by their written order on the Railway receipt, the person to whom actual delivery was to be made and by whom the freight was to be paid. The Railway Company, having received the freight from the plaintiff, further, promised to deliver the bags of seed as directed by him. Looking at all these circumstances, it appears to me that the Railway Company were not entitled eventually to refuse delivery of the Goods to Eagleton and Co., and that they were not justified in delivering to Toulmin and Co. under the telegram from Cohen Brothers. It may be Cohen Brothers have broken the agreement which they made with Toulmin and Co. and that, as against Cohen Brothers, Toulmin and Co. would have been entitled to recover the price of these goods. But the plaintiff had no notice of any rights existing in these specific bags of seed on the part of Toulmin and Co. and he had a substantial interest in the goods, and was not the mere agent of Cohen Brothers, and I think that he was entitled to hold them as against Cohen Brothers, and therefore as against Toulmin and Co.

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The Indian Law Reports, Vol. XXI. (Madras) Series,
Page 172.

APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar, and
Mr. Justice Benson.*

MADRAS RAILWAY COMPANY
(DEFENDANT), PETITIONER,

v.

GOVINDA ROW (PLAINTIFF), RESPONDENT.*

1897
Dec. 10
1898
February, 1.

*Contract Act—Act IX of 1872, S 73—Railways Act—Act IX of 1891, S 72—
Condition under which goods despatched by railway—Deterioration—
Remoteness of damage*

The plaintiff who was a tailor delivered a sewing machine and some cloths to the Madras Railway Company (the defendant) to be sent to a place where he expected to carry on his business with special profit by reason of a forthcoming festival. Through the fault of the Company's servants the goods were delayed in transmission and were not delivered until some days after the conclusion of the festival. The plaintiff had given no notice to the Company that the goods were required to be delivered within a fixed time for any special purpose, and he had signed a forwarding note under a statement that he agreed to be bound by the conditions at the back and one of those conditions was to the effect that the Company is not liable "for any loss of or damage to any goods what ever by reason of accidental or unavoidable delays in transit or otherwise. The plaintiff now sued to recover from the Company a sum on account of his estimated profits and the travelling expenses of himself and his assistant at the place of delivery and their expenses for food and lodging while there.

Held (1), that as the plaintiff had not shown that the goods had undergone deterioration in value or otherwise the condition above cited was not void under Railways Act, 1890 Section 72 although it had not been approved by the Governor General in Council.

(2), that the plaintiff was bound by the condition even if he was in fact ignorant of its effect.

(3) that the damages claimed were too remote

* Civil Revision Petition No. 80 of 1897.

PETITION under Section 25 of the Provincial Small Cause Courts Act praying the High Court to revise the decree of P S Gurumurti Ayyar, District Munsif of Erode, in Small Cause Suit No 1490 of 1896

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v
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A suit for damages was brought by the plaintiff against the Madras Railway Company under the following circumstances. The plaintiff was a tailor. In view to make special profit at Karamadai during the car festival to be held at that place he delivered a sewing machine and a bundle of cloths to the defendant Company at the Erode Railway Station on the 29th February 1896 to despatch to that place. The plaintiff went to Karamadai and waited there till the 13th of March when the festival was over, but the goods were not delivered to him until the 26th of March. The plaintiff gave no notice of the purposes for which they were despatched and it appeared that he had placed his signature on the forwarding note under a statement that he was aware of the conditions on the back of the note and agreed to be bound thereby and on the back of the note there were certain conditions including that set out above. The damages claimed were the railway fare of the plaintiff and his assistant to Karamadai and their expenses there, including the rent paid for the shop and also the special profit expected to be earned at Karamadai at the time of the car festival and the ordinary profit expected to be earned during the subsequent days when the sewing machine and the cloths were in charge of the defendants.

The District Munsif passed a decree for Rs 16 4-0, being the amount of the railway fare of the plaintiff and his assistant to and from Karamadai and the sum actually spent by him when there.

The defendant preferred this petition.

Mr R. A. Nelson for Petitioner.

Respondent was not represented.

Mr R. A. Nelson — Railways Act, 1890, Section 72, does not apply here as there was no loss, destruction or deterioration. Consequently, the conditions on the forwarding note afford a complete answer to the suit. Moreover, the damages claimed are too remote and indirect. These damages did not arise naturally nor did the Company know that such would be the result of non delivery, not having been informed of the object or purpose with which the goods were sent. Contract Act, Section

73, *Great Western Railway Co v Redmayne*,⁽¹⁾ *Woodger v Great Western Railway Company*,⁽²⁾ *Simpson v. London and North-Western Railway Co*,⁽³⁾ *Mayne on Damages*, page 300.

SUBRAMANIA AYYAR J—The plaintiff, a tailor, with a view to make special profits during the car festival at a place called Karamadai in the Coimbatore District entrusted to the defendants, the Madras Railway Company, on the 29th February 1896, his sewing machine and a cloth bundle to be carried from Erode and to be delivered to him at Karamadai. The defendants were, however not told why the articles were sent 'through the fault of the defendants' servants the articles were not carried to Karamadai until long after the date by which they should in the usual course, have arrived at that station. Before they reached the place the festival had come to an end. The plaintiff who had waited at Karamadai for a number of days expecting the arrival of the articles, having returned to Erode, the articles were transmitted back and were delivered to him there on the 26th March 1896.

The plaintiff sued for damages said to have been sustained by him in consequence of the delay in the delivery of the articles. The District Munsif gave him a decree for Rs 16-4-0 being the Railway fare of the plaintiff and his assistant from Erode to Karamadai and back and their expenses for food and lodging while at Karamadai.

The first question that arises is, whether the plaintiff is precluded from maintaining this suit by one of the conditions printed on the back of the forwarding note, Exhibit I. That condition is to the effect that the defendants are not responsible for any loss of, or damage to, the goods by reason of accidental or unavoidable delay in transit or otherwise. It no doubt appears that Exhibit I was neither read nor explained to the plaintiff. But, assuming that he was in fact ignorant of the condition in question, that does not affect the binding character of the contract evidenced by Exhibit I, inasmuch as in the portion thereof which bears his mark it is expressly stated that he was aware of the conditions on the back and that he agreed to the articles being carried subject to such conditions. (*Per* MRUTUNJUN, J., in *Parler v South Eastern Railway Co* ⁽⁴⁾) He

(1) 1 F. 10 P. 329

(2) L.R., 1 Q.B.D. 274

(3) L.R., 2 C.P. 318

(4) 1 L., 2 C.P.D. 410 at p. 421

is therefore precluded from maintaining this suit, unless such a condition is void under Section 7. of the Indian Railways Act. The question then is whether the contract between the plaintiff and the defendants in so far as it purports to exonerate the latter from responsibility for delay is, as held by the District Munsif, void under Section 72 of the Railways Act IX of 1890. In discussing this point I shall proceed on the supposition that the condition covers a delay which, as found here, was neither accidental nor unavoidable. The section referred to in so far as it is material for our present purpose runs thus

"72 (1) The responsibility of a Railway Administration for the loss, destruction or deterioration of goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act 1872

"(2) An agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void unless it—

* * * *

"(b) is otherwise in a form approved by the Governor General in Council

* * * *

Now, in the present case, there was no loss or destruction of the articles consigned and the applicability of the section to the case depends upon the question whether there was, within the meaning of the enactment, a "deterioration," for which the contract purports to render the defendants not responsible since the words "damage to the goods" in the contract may be taken to comprehend deterioration. The word deterioration imports the becoming reduced either in quality or in value (see the Standard Dictionary). Having regard to the nature of the articles and to the very limited delay, it is not possible to suggest that any deterioration in quality could have taken place. As regards the value of the cloth, however, it might well have been shown to have been otherwise with reference to what was laid down in *Wilson v Lancashire and Yorkshire Railway Co* (1)

There the plaintiff, a cap manufacturer, sued the defendants for damages caused by the improper delay in delivering some cloth. The plaintiff had bought the article with a view to make it into caps for sale during the spring season of the year, but owing to the delay in transit the plaintiff was unable to sell or use any part of it or to manufacture any part of it into caps for sale in that season. Referring to the fall in the value of the cloth that could be shown to have taken place in consequence of the same arriving at a time when it was less in demand and less capable of being applied to an immediate use, WILLIAMS, WILLIS and KEATING, JJ, spoke of it as "deterioration," and those learned Judges as well as Byles, J, held that in respect of such fall, the same being the direct and natural result of the delay, the carrier was liable even in the absence of notice of the purpose for which the article was sent. Clearly, therefore, in the case before us if the plaintiff had alleged and proved that, owing to the loss of the special opportunity for sale of which he wished to take advantage the cloth had fallen in value compared to what he could have got for it had he been able to dispose of it at Karamadai as he intended, the plaintiff would have been entitled to a finding that there was a "deterioration" within the meaning of Section 72, and that the condition rolled on as operating to limit the responsibility of the defendants in respect of such deterioration is void, inasmuch as the contract is not shown to have complied with the provision contained in clause (b) of the section. But the plaintiff did not allege and prove that there was any deterioration as just explained. Section 72 does not, therefore, apply to the case, and it follows that the condition in question precludes the plaintiff from claiming the damages awarded to him by the District Munsif, since they are not due to any deterioration of the articles consigned. I should add that there was another objection, which the District Munsif overlooked, to those damages being allowed. They consist as will be seen from what has already been stated, of the carriage for the plaintiff and his assistant from Erode to Karamadai and back, rent paid at Karamadai for the shop engaged by the plaintiff for doing his work as a tailor and food expenses for the plaintiff and his assistant during the time they were waiting at Karamadai for the arrival of the articles. It is scarcely necessary to point out that none of these expenses was the proximate and direct consequence of the delay in the delivery of the articles and were therefore not awardable as natural damages—see *Woodger v.*

Great Western Railway Company (1) and *Gee v Lancashire and Yorkshire Ry Co (-)*—as the difference between the price which could have been obtained at the festival and that on the date when the cloth was returned to the plaintiff would have been—*Hilson v Lancashire and Yorkshire Ry Co (3)*—already cited. No doubt had the plaintiff caused intimation to be given to the defendants when the articles were entrusted to them that he wanted them for sale or use at the festival, it may be that the items allowed by the District Munsif would be awardable as damages within the contemplation of the parties. But, as already stated the defendants were not informed, when they undertook to carry the goods, that these were required by the plaintiff at the specific time at which and for the specific purpose for which he wanted them at Karamadai. The items allowed by the District Munsif were therefore too remote and ought not to have been decreed.

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For all the reasons stated above I would set aside the decree of the District Munsif and dismiss the suit but in the circumstances, without costs.

BENSON J.—The question for our decision is how far the Railway Company is liable for damages said to have been caused to the plaintiff by the Company's failure to deliver certain goods to the plaintiff within a reasonable time after they were entrusted to the Company to be carried from Erode to Karamadai. It is admitted that the Railway Company had no notice that the goods were required to be delivered within a fixed time for any special reason. Apart from any special contract, the responsibility of a Railway Company for the loss, destruction or deterioration of goods is declared by Section 72 of the Railways Act (IX of 1890) to be that of a bailee as defined in Sections 151, 152 and 153 of the Indian Contract Act and the last section enacts that "if, by the fault of the bailee, the goods are not returned, delivered or tendered at the proper time he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time." In the present case there was no loss or destruction of the goods—nor was there any change in the absolute condition of the goods, but the word 'deterioration' is wide enough to cover a falling off in the value of the goods due to their not having been delivered in time to enable the plaintiff to take advantage of the special market which would have been available during the festival at Karamadai if they had been delivered in

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due time. In other words, 'the plaintiff might have claimed as damages the difference between the ordinary value of the goods at Karamadai and the special value which they would have had if they had been delivered to him at the time contemplated so as to be available for the special market then existing at Karamadai (*Wilson v Lancashire and Yorkshire Ry Co* (1) and illustration (g) to Section 73 of the Indian Contract Act, which illustration appears to be based on the English case). The plaintiff, however, did not allege or prove any such "deterioration," though there was a vague claim and vague evidence as to "loss of profit" owing to delay in delivery. It was, however, distinctly held in the above case, and illustration (g) to Section 73 of the Contract Act distinctly shows that the plaintiff could not in such a case recover any damages for loss of profit. If 'deterioration' in the sense above stated had been proved, the Railway Company would not have been protected by the special contract on the bill or the forwarding note to the effect that the Company is not liable for any loss of or damage to, any goods whatever by reason of accidental or unavoidable delays in transit or otherwise, since the contract does not exclude "deterioration" in the above sense, but only loss of, or damage to, the goods unless indeed the words 'damage to the goods' can be held to include 'deterioration' due to extrinsic causes. Even if they could be so held (and I think it would be a strain on the language to do so), there is still the objection that it is not shown that the contract was in a form approved by the Governor-General in Council as required by Section 72 of the Railways Act, and it may well be doubted whether sanction would have been given for so unreasonable a contract. For all these reasons the District Munsif was, I think, right in disallowing the plaintiff's claim for loss of profits, but I think he was wrong in allowing the plaintiff the rail fare of himself and his assistant from Erode to Karamadai and back, and the cost of their food and lodging at Karamadai. Such damages could not have been in the contemplation of the parties when they made the contract nor could they be said to have naturally arisen in the usual course of things from the breach, since the Railway Company had no notice of the reason why the things were being sent to Karamadai, or of the arrangements which the plaintiff was making to utilise them there. In other words, these damages are too remote and do not

fall within the purview of Section 73 of the Contract Act I agree, therefore, in holding that the decree must be set aside and the suit dismissed, but in all the circumstances without cost.

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The Indian Law Reports, Vol. XXVII (Bombay) Series,
Page 126

APPELLATE CIVIL

Before Mr. Justice Crane and Mr. Justice Aston.

MALKARJUN SHIDAPA (ORIGINAL PLAINTIFF), APPELLANT,

v

THE SOUTHERN MAHRATTA RAILWAY COMPANY

(ORIGINAL DEFENDANTS), RESPONDENTS *

*Railway Company—Carriage of goods—Contract—Formation of contract—
Rules of Company for consignment of goods—Re-booking of goods after
arrival at original destination—Instructions to Station Master to re-book*

1902
Nov. 12

The rules of a Railway Company prescribed certain procedure for the booking of goods. In accordance with those rules certain goods were booked from Trichinopoly to Bagalkot. The plaintiff requested A, the goods clerk and Station Master at Hotgi (on defendant's Railway), to have the goods re-booked from Bagalkot to Hotgi, and for this purpose handed him the Railway receipt with a written application, which, however, was not in the form of consignment note used by the Company. A accordingly sent a service telegram to the Station Master at Bagalkot asking him to re-book the goods. The Station Master there did not re-book the goods and they were delivered at Bagalkot. The plaintiff sued the Railway Company for damages for non-delivery at Hotgi.

Held, that the defendant Company had not contracted with the plaintiff to carry the goods from Bagalkot to Hotgi. The mere fact that the plaintiff got A, the Station Master at Hotgi, to send a service telegram to Bagalkot did not constitute a contract to bind the Company.

APPEAL from D. M. PRARI, District Judge of Sholapur, confirming the decree passed by Rao Saheb Mahadev Shrinidhar, First Class Subordinate Judge of Sholapur.

Suit to recover damages for non-delivery of goods.

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The plaintiff sued the defendant Company to recover as damages for non-delivery the sum of Rs 818-12-0, being the price of 15,500 cocoanuts which his agent at Trichinopoly consigned to him at Bagalkot on the Southern Mahratta Railway on the 26th February, 1898. The Railway receipt was of that date

On the 1st or 2nd March, 1898, the plaintiff requested the goods clerk, who was also acting as Station Master at Hotgi (on the defendants' Railway,) to have the consignment re-booked from Bagalkot to Hotgi, and for that purpose handed him a written application to that effect, which was not in the form of consignment note in use by the Company. On the 2nd March the goods clerk at Hotgi sent a service telegram to the Station Master at Bagalkot, asking him to re-book the consignment. On the 6th March the Station Master at Bagalkot in reply stated that the goods had been delivered to one Bhimapa.

The plaintiff complained that the Station Master at Bagalkot did not forward the goods to Hotgi, and that, therefore, the plaintiff did not receive them. He gave notice of his claim to the Company on the 22nd March and 23rd April, 1898, and now sued to recover the above sum as damages, being the market rate of the goods at the date at which the goods ought to have been received.

The defendants pleaded that the original contract for carriage of the goods from Trichinopoly to Bagalkot had been duly performed, and that there was no valid contract for their further conveyance from Bagalkot to Hotgi; that the Hotgi goods clerk had no authority to contract for the re-booking, &c.

The Court of first instance dismissed the suit, holding that there had been no contract effected between the plaintiff and the defendants for the re-booking of the goods. In his judgment the Subordinate Judge said —

The question now is whether the telegram of the Hotgi goods clerk of the 21st March 1898 was sufficient to render the contract complete and binding on the defendants to carry the goods from Bagalkot when they arrived to Hotgi and deliver them to the plaintiff there. The Company's rule requires that the sender of goods when delivering them for despatch must sign a consignment note in the prescribed form containing a declaration of the weight, description and place of destination of the goods consigned. On delivering the goods to the Company with the consignment note duly signed and filled in he receives a receipt and then the contract to convey the goods to the place of destination mentioned in

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—

complete. There is no separate provision for re booking, because it appears to me that such a provision is thought unnecessary. Goods once booked and despatched must arrive at their place of destination. If the consignee desires to have them carried further on to another station, there must be a fresh contract, a fresh consignment note given to the Company, and a fresh receipt obtained from them. There may not be a formal and actual delivery to the consignee there may not be unloading and re loading at least where there is no objection to send the goods in the same wagon or vehicle but there must be a contract duly made for the further conveyance of the goods and such a contract can under the Company's rules only be effected by a consignment note signed by the original consignor or consignee. There is thus no difference between booking and re booking and that seems to me to account for the absence of any specific rule in connection with re booking of goods.

It may be asked why goods are not booked through. The question was once raised by the Hotgi Goods Clerk who pointed out in his reference to the Traffic Manager that the charges from Trichinopoly for booking goods direct to Hotgi are greater than the charges from Trichinopoly for booking to Bijapur and thence to Hotgi (vide Exhibit 12c). The charges for through booking are still greater than the charges for booking first to Bagalkot and thence to Hotgi. The Traffic Manager did not allow through charges but only charges from Bijapur to Hotgi but he directed that the goods must be unloaded and re loaded at the Bijapur Station (Exhibit 12b). Goods booked from Trichinopoly must come in a wagon of the S I R Company and the wagon cannot be sent on but must be returned within a specified time such a wagon must be emptied and hence the Traffic Manager's direction to the Bijapur Station for unloading and re loading.

Thus the plaintiff's motive in desiring the goods to be re-booked from Bagalkot and brought to Hotgi is easily seen. But in order to secure that object it was his duty to hand over to the Bagalkot Station Master the goods receipt and then apply to him to book the goods to Hotgi under a new consignment note. The handing over of the goods receipt which he had received from Trichinopoly would have nominally amounted to a delivery, and the contract to carry the goods from Trichinopoly to Bagalkot would have been completely performed on both sides before a new contract to carry the goods further on from Bagalkot to Hotgi was entered into. There are witnesses Nos 36, 62, 79, 110, 111, and 112 examined on behalf of the defendant on this point. All these witnesses, who are Goods Clerks, Station Masters and Traffic Inspectors of long standing in the employ of the defendant Company, state that there is virtually no difference between booking and re-booking of goods, and that the Company's rule which governs the booking must govern the re booking. Even the Hotgi Goods Clerk (Exhibit 63) admits that a consignee wanting

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goods to be re booked must, as a rule, produce the railway receipt and apply to the Station Master of the Station where the goods have arrived or are destined to arrive

The appeal of the Lower Court's decision is confirmed. In his judgment the Judge said —

The Company's contract with the plaintiff was to carry his goods to Bagalkot and deliver them there. The contract is not the subject of this suit. Plaintiff does not allege that he was refused delivery of the goods at Bagalkot. His complaint is that he wished them to be re booked to Hotgi and that they were not so re booked. In his plaint he alleged that the Station Master and Goods Clerk at Hotgi agreed to deliver the goods to him at Hotgi and that the goods were not delivered in pursuance of this agreement by reason of a neglect of duty on the part of the Station Master at Bagalkot. This suit therefore is for breach of a subsequent contract entered into by the Company through their servant the Station Master at Hotgi to carry the goods from Bagalkot to Hotgi. It is clear however from the evidence of the Hotgi Station Master that he could not and did not enter into any such agreement. Mr Kirlskar admits that he cannot contend that any contract was entered into between the plaintiff and the Hotgi Station Master. The plaintiff has, therefore, no cause of action. The obligation to carry the goods to Hotgi can only arise *ex contractu*. If the Company did not contract or did not agree to re-book them it cannot be liable.

The plaintiff appealed to the High Court.

G S Mulgionkar for the Appellant (plaintiff)

Kirlskar (with *Crawford, Brown & Co*) for Respondents (defendants)

Shim v Great Northern Railway Company⁽¹⁾ was referred to

Crowe, J. — It seems quite clear to us that the mere fact, that the plaintiff got the Hotgi Station Master to send a service telegram to Bagalkot to re-book the goods from Bagalkot to Hotgi, cannot possibly constitute a valid contract which would bind the Company, and the decision of the Lower Appellate Court is perfectly correct.

We must therefore, confirm the decree and reject the appeal with costs.

Decree confirmed

The Bombay Law Reporter, Vol. V., Page 953.

Before Mr Justice Chandamalak and
Mr Justice Aston

G I P RAILWAY COMPANY, LIMITED
(DEFENDANT), APPELLANT

2

SAHEBRAM TIMAPPA AND OTHERS (PLAINTIFFS), RESPONDENTS

Railway Company—Consignment—Consignor's Agent changing the condition, in which the consignment was originally agreed to be sent—Consignee, ignorant of the changed condition refusing to take delivery of the consignment as his—Right of suit

1903
Sept, 16.

Plaintiffs' Agent A handed in a consignment of 250 bags of cocoanuts at Delta Gannavaram to be forwarded to the plaintiffs at Sholapur. When the cocoanuts were loaded in the Railway wagon, N the Agent of A removed the gunny bags and loaded the cocoanuts loose in one wagon. The railway receipt as well as the label on wagon described the consignment as 250 bags of cocoanuts. When the consignment reached its destination plaintiffs declined to take its delivery on the ground that the consignment was not theirs since it was not contained in 250 bags as described in the receipt. The Railway Company then sold the cocoanuts to meet wharfage freight &c. Plaintiffs thereupon sued the Railway Company for recovering the damages sustained by them on account of the non delivery of the consignment—

Held (1) that the contract was between N and the Company, and assuming that it was a term of it that the goods should be carried in bags and delivered to the plaintiffs N himself by his action modified the term, and as between him and the Company, he cannot hold the latter liable for a breach of it

(2) that so far as the plaintiffs were concerned the Company never entered into any contract with them, and the plaintiffs could not sue them, whatever cause of action they might have against their Agent

THE plaintiffs sued to recover Rs 987-10-1 from the defendant Company, being the amount of damages consequent upon the non-delivery of a consignment handed in by plaintiffs' agent, Appaya. Appaya consigned 250 bags full of cocoanuts from Delta Gannavaram on the 25th February 1900, a station on the East Coast Railway. The Railway Company contended that Appaya's Agent Nanyaya having signed the Risk Note they

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Srihebram
Timappa

were freed from their liability to the plaintiffs' claim; that the gunny bags were emptied at the instructions of Nagayya to whom the empty bags were returned; and that the plaintiffs having declined to accept the consignment when brought to its destination, the defendant sold away the goods to meet wharfage, freight, &c.

The Subordinate Judge held that the Risk Note was signed by the authorised agent of the consignor, but it did not absolve the Railway Company from their liability; that the plaintiffs were entitled to the claim although he refused to take delivery on the ground that the cocoanuts were loose and not in bags.

On appeal the District Judge modified this decision by awarding to plaintiffs Rs 803 10 0 as damages. The following were his reasons —

"It seems to me difficult to believe that the wagon containing cocoanuts which arrived at Sholapur did not contain the cocoanuts which were despatched on a cart of plaintiff. They were despatched from the same station from which plaintiff's cocoanuts were despatched. They arrived at the Station to which these were consigned. They were identical in number and quality. No one appeared to claim them. The only reason to doubt as to their identity is that plaintiff's consignment was in bags whereas these were loose but according to defendant's story plaintiff's cocoanuts were removed from their bags before despatch. The delay is explained by the eccentricities of the mails in the Godavari Delta.

There is nothing that I can see to lead to any suspicion that the plaintiff was unwilling to take delivery of these cocoanuts for any other reasons than that he did not think they belonged to him which is of course, an exceptional ground of refusal.

"The mistake arises as I have said owing to the fact that plaintiff expected his consignment to arrive in bags whereas the consignment of which he was asked to take delivery arrived loose. Taking defendant's story as it stands it appears that the carting agent at the Station of delivery wishing to economise by only sending one wagon reduced the bulk of his consignment by taking it out of the bags and sending it loose. This may or may not have been within the carting agent's powers as virtual agent of the plaintiff and plaintiff might or might not have had any cause of action against that agent for damage or misdelivery caused by the agent's action but in this case all that is important is the defendant Company's action. Defendant company has of course nothing to do with the alleged excess of powers and I do not see any reason to doubt that the carting agent did arrange for the despatch of the goods without bags. I cannot see that it would be any one person's advantage to so despatch them.

Now no doubt, it was the agent's duty to inform the plaintiff that the goods were despatched loose. But it seems to me that there was also an inquiry on the part of the defendant Company in all their invoices &c connected with this consignment. They describe the articles as being 200 bags of coconuts. Even in the label on the waggon containing the loose coconuts the articles are so described. It was clearly their duty so to describe the articles that they could be recognised by the consignee. As it happened by a process of elimination the Station Master at Sholapur arrived at the conclusion that the coconuts were plaintiff's consignments; but the plaintiff was not bound to accept this conclusion. Suppose there had been several consignments from Amalapuram to Sholapur to various merchants in the latter city some of the consignments being in bags and some loose would the Station Master have delivered these loose coconuts to plaintiff who was expecting coconuts in bags? Certainly not. But the plaintiff had no means of knowing that this hypothetical case was not the actual state of affairs and that if he took delivery he might not get into serious troubles with the real consignee. I think then he was quite justified in not taking delivery. Therefore there is a wrong on the part of the Railway Company, misdescription of consignment and a resultant loss to defendant. Defendant is accordingly liable to damages. The measure of the damages is the difference between the price realised at the Company's sale and the price realisable on the date when plaintiff would nominally have taken delivery. In view of my finding defendants are not liable for the estimated value of the gunny bags which have apparently been retained by the carting agent at Amalapuram.

The defendant appealed to the High Court.

Mr. Rames, with *Messrs. Little and Co.*, for the Appellant.

Mr. N. M. Samarath, for the Respondent.

CHANDRAVARKAR J.—The District Judge has awarded the plaintiffs' claim against the Railway Company, on the ground that it was the Company's action which led the plaintiff not to take delivery "owing to a *bona fide* mistake as to the identity of the goods." But that finding must be considered along with the other finding of the District Judge that the goods were all put in a wagon by the plaintiff's agent and that it was the duty of the agent to inform the plaintiffs of the fact that though the invoices described the goods as sent in bags, he had sent them in one wagon. This finding is conclusive in law to show that the plaintiffs' agent was the person who caused the mistake, and that the plaintiff cannot hold the Company responsible for what his agent did in the course of his authority. It is not the case of the plaintiffs' here nor was it in the Courts below that their agent had no authority to transfer the goods from the bags into one wagon, and further there is neither allegation nor proof that the Railway Company dealt with the plaintiffs' agent with

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notice of the agency. In this state of the pleadings we must treat the case as one where Nagayya, now found to be plaintiffs' agent, consigned the goods for delivery to the plaintiffs, the contract was between Nagayya and the Company, and assuming that it was a term of it that the goods should be carried in bags and delivered to the plaintiffs, Nagayya himself by his action modified that term and as between him and the Railway Company, he cannot hold the latter liable for a breach of it. So far as the plaintiffs are concerned the Company never entered into any contract with them and the plaintiffs cannot sue them, whatever cause of action they may have against their agent.

We must, therefore, reverse the decree and reject the claim with costs throughout on the respondents.

Decree reversed

The Indian Law Reports, Vol. I. (Allahabad) Series,
 Page 60.

BEFORE A FULL BENCH.

(Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson,
 Mr. Justice Turner, Mr. Justice Spinkie
 and Mr. Justice Oldfield).

LYELL (DEFENDANT)

v.

GANGA DAI (PLAINTIFF) *

1875
 June, 1

Carrier - Duty of persons sending goods of a dangerous nature—Notice—Act XVIII of 1854 s. 15—Act XIII of 1875—Negligence—Action for compensation for destruction of life

Held (PEARSON, J., dissenting), that a person who sends an article of a dangerous and explosive nature to a Railway Company to be carried by such Company, without notifying to the servants of the Company the dangerous nature of the article is liable, for the consequences of an explosion whether it occurs in a manner which he could not have foreseen as probable or not.

Held, also (PEARSON, J., dissenting), that such a person is liable for the consequences of an explosion occurring in a manner which he could not have foreseen, if he omits to take reasonable precaution to preclude the risk of explosion.

Mode of estimating damages under Act XIII of 1875 discussed

* Appeal under Cl. 10 of the Letters Patent No. 2 of 1875

The plaintiff sued under Act XIII of 1855, to recover Rs 9,360 damages for the loss of her husband, Bahu Gurnat Rai deceased. The plaintiff stated that the plaintiff's husband was in the service of the East Indian Railway Company at Allahabad, and entrusted with the duty of despatching goods. On the 29th November, 1872, the defendant through his servant William Henry Pollard, sent to the Allahabad Railway Station a box containing combustible and dangerous substances for despatch to Gwalior, without notifying the contents as he was bound to do by law, and the said box was placed as usual in the Railway Station near the very place where the plaintiff's husband was performing his duty. Suddenly the said box, owing to its having been filled with explosive materials, exploded, and thereby the plaintiff's husband was wounded in so serious a manner, that he died from the effects of the injury he had received, and thus, independently of the comfort, happiness, prospects, and security, which a wife enjoys during the lifetime of her husband, the plaintiff has been deprived of the advantages derivable from his salary. At the time of the fatal occurrence the plaintiff's husband was 31 years, old, and assuming the natural term of human life to be 70 years, the plaintiff has, independently of his prospects of promotion, sustained a loss to the extent claimed, calculated on the salary of the place he held on the date of his death. Hence the suit.

The defendant alleged in his written statement (1) that the box in question did not contain any combustible or dangerous substance as alleged by the plaintiff, and that the occurrence of the explosion was still a mystery to all experts in chemistry, (2) that there was no reason to suppose that the plaintiff's husband lost his life through the omission to declare the contents of the box in question, for even if it had been marked "dangerous," there would be evidence to show that the railway authorities would have placed the box precisely where it was located before despatch, and the deceased would have presumably dealt with it in no different manner than he did when the explosion unaccountably took place, (3) that the amount of damages laid was grossly excessive.

It appeared at the trial that on the 19th of November, 1872, the defendant who carried on the business of a chemist in Allahabad, received from a customer at Gwalior an order for certain chemicals, and among others for a detonating powder. He delivered this order to an assistant, Mr Pollard, a qualified

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chemist, directing him to execute it and to despatch the articles. The defendant had previously supplied his customers with detonating powder composed of equal parts of black sulphuret of antimony and chlorate of potash. These ingredients were not compounded in the shop but sent to customers in separate bottles. On this occasion, however, Mr Pollard, without having received any express orders, prepared a detonating powder composed of one part sulphur and three parts of chlorate of potash, and these ingredients he compounded and placed in one bottle. Having delivered the articles ordered to the packer, Mr Pollard went to the defendant and consulted him about it. The defendant inquired of Mr Pollard how he had prepared the detonating powder and Mr Pollard informed him. The defendant observed that he supposed the ingredients had been placed in separate bottles. Mr Pollard replied that they had been placed in one bottle. The defendant enquired if that was quite safe. Mr Pollard said that he had frequently made it in England and kept it so. He added that the bottles were being packed and he would mark the box "*dangerous*," as a precautionary measure, to be taken care of by the Railway Company. The bottle containing in all 1 lb of detonating powder was wrapped in paper and tow and placed with seven other bottles (similarly prepared) in a box, which was sent by a coolie to the Railway Station to be despatched by passenger train. The forwarding note which was sent with the box contained no description of the character of the contents. The box was not marked dangerous nor was any notice given, nor did anything exist which could suggest to the servants of the Company that the box contained any explosive substance or required care in manipulation. The box was weighed and placed in the parcel room. Outside the door of the parcel room was a semi circular counter, boarded to the floor, with an opening in the centre affording passage to the parcel room. The space enclosed by it was of limited extent. After attending to his duties in connection with a train which was leaving the station, the deceased whose duty it was to receive parcels, directed the coolie to bring the box from the parcel room. He did so, and placed it inside the counter and near the passage. The deceased, standing at the counter, commenced to write the usual receipt, and while he was engaged in so doing, the contents of the box exploded. The front of the counter was blown out the deceased was severely wounded and died from the effects of the injuries sustained.

There was no direct evidence as to the cause of the explosion. A clerk in the station master's office, Ganpat Rai by name, was standing outside the counter speaking to the deceased when the explosion occurred. He stated that the box was not visible to him, the counter being so constructed that it was impossible to see from the outside what was lying inside. The coolie who carried the box from the defendant's premises to the Railway Station deposed as follows — 'I had placed the box just at the passage of the counter. The Babu was writing the receipt when the box exploded. I ran off towards the west. I carried the box on my head to the railway. It did not tumble down on the way, nor did it tumble down when it was weighed nor when I took it to the office, nor when I brought it from the office and placed it inside the counter. It received no shock. No one kicked at the box, for nobody went that way.' The witness was standing outside the counter at the time of the explosion and about a yard from it.

The station master at Allahabad who was called by the plaintiff, stated in cross examination as follows — 'I don't know what the clerk (deceased) would have done with the box, if it had been marked 'dangerous,' but if it had been so marked, it was his duty to report it to me. In the meanwhile, of course he would have allowed the box to remain on the platform. There is no separate place in our Allahabad station for keeping such parcels. There is nothing in the rules of the Railway Company to compel Mr. Lyell to declare the contents of such a parcel unless he knew that it was dangerous.' In re-examination the witness deposed that, in the case of dangerous articles except gunpowder and kerosine oil he thought the consignor was bound to notify the dangerous character of the articles to the Railway authorities, so that they might consider whether to receive the article or not, and to make special charges as to rate, and special arrangements to insure safe transit.

In the opinion of the experts examined the explosion might have been due to the application to the detonating powder of some external agency, such as friction or percussion. Two of these experts stated that the spontaneous explosion of a detonating powder so composed was a thing unknown. The third, assuming the box suffered no violence of any sort was of opinion that the explosion might have taken place owing to chemical action having arisen between the ingredients constituting the detonating powder.

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S 15 of Act XVIII of 1854 (an Act relating to Railways in India) enacts that "no person shall carry upon any such Railway any dangerous goods, or be entitled to require any such Railway Company to carry upon such railway any baggage or goods which in the judgment of the company, or any of their servants shall be of a dangerous nature, and if any person shall carry upon such Railway any dangerous goods, or shall deliver to such Railway Company any such goods for the purpose of being carried upon such Railway without distinctly marking their nature on the outside of the package containing the same, or otherwise giving notice in writing of the nature thereof to the book keeper or other servant of the Company to whom the same shall be delivered for the purpose of being so carried, he shall be liable to a fine not exceeding two hundred rupees for every such offence, and it shall be lawful for any such Company or any of their servants to refuse to carry any luggage or parcel that they may suspect to contain goods of a dangerous nature, and to require the same to be opened to ascertain the fact previously to carrying the same and in case any such luggage or parcel shall be received by the company for the purpose of being carried on the Railway, it shall be lawful for the Company, or any of their servants, to stop the transit thereof until they shall be satisfied as to the nature of the contents of the luggage or parcel"

The Court of first instance, holding it proved that the box contained some dangerous chemical preparation, that its dangerous character was fully known to the defendant and his servant, that the omission of the defendant to mark the box "dangerous" amounted to a wrongful neglect or default which entitled the plaintiff to maintain the suit, and that the death of the deceased was caused by such wrongful neglect or default, gave the plaintiff a decree for Rs 5,253

On appeal by the defendant to the High Court, the learned Judges of the Division Court (STUART, C J and PEARSON, J), before which the appeal came on for hearing, differed in opinion

The Judgments of the learned Judges were as follows —

STUART, C J —It has been with no little difficulty and hesitation that I have arrived at the conclusion that we ought to dismiss this appeal, at least substantially, for I must propose a modification of the Subordinate Judge's decision and order

Mr Lyell, the defendant, is no doubt, under the circumstances entitled to much consideration, and even to a certain sympathy, and, if the nature of the case had admitted of it, I would have been glad to have determined his liability to be merely nominal. His manifest good faith in the whole transaction, the absence of any motive or idea on his part inconsistent with conduct entirely innocent, nay, the fact that by the manipulation of the dangerous materials which caused the explosion the filling and picking of the hottles, and the careful preparation of the box for transit by railway, Mr Lyell and Mr Pollard exposed themselves to the greatest possible risk—a risk that might have cost them their lives, are all surely sufficient to absolve Mr Lyell from liability in any grossly culpable sense. But notwithstanding these just claims to consideration and sympathy, he cannot be relieved of liability, and a liability proportionate in some degree to the nature of the plaintiff's claim, and to the extent to the loss she has suffered. Of the serious nature of that loss there can be no doubt, and it is not disputed that her husband's death was occasioned by the explosion of the box at the Railway Station.

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On the evidence, it is not easy to satisfactorily determine what it was that occasioned the fatal explosion. The weight of it is, I think, against the suggestion that it was occasioned by friction. The more reasonable conclusion is that the explosion was spontaneous while the box was lying on the railway platform, owing in all probability to some unexplained chemical action among the contents of the hottles, and such is the theory suggested by the plaint itself, for, in claiming damages, that pleading alleges that Mr Lyell "sent to the Allahabad Railway Station a box containing combustible and dangerous substances, for despatch to Gwalior, without notifying the nature of its contents, as he was bound to do by law, and the said box was placed as usual in the Railway Station near the place where the plaintiff's husband was performing his duty. Suddenly the said box, owing to its having been filled with explosive materials, exploded, and thereby the plaintiff's husband was wounded in so serious a manner, that, despite of his being placed and treated in the Government hospital, he did not recover, but died from the effects of the injury he had received," and such, as well as we can see and understand, was the truth of the matter. But with reference to Mr Lyell's liability, it is, in my view, immaterial how the explosion took place. It may be that Mr Lyell's professional knowledge

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and experience were not such as to have led him to anticipate such an accident, especially by spontaneous explosion, and any want of such knowledge and experience on his part is, on the evidence, not to be wondered at. That circumstance of itself however, does not relieve him of liability. As a skilled and professed chemist he was bound to protect the public, whether railway clerks or others to the utmost of his power, and with the use of every precaution against any possible consequences of his dealing with and sending by railway, or by other means of carriage, chemical substances which, it appears from the evidence, both he and Mr Pollard knew to be explosive and therefore dangerous, and even if they did not know as much, they must be assumed and taken to have known, at least Mr Lyell, as a professed and skilled chemist, must be taken to have known the real and dangerous character of the contents of the box, and he cannot be excused for not having notified that fact to the Railway Company and the public by a distinct inscription on the box of the word 'dangerous,' or some other equally suitable term, or in some other way, or by some other means. Indeed, it appears from the record that he was aware of the importance of such a precaution and as to § 15, Act XVIII of 1854, no doubt that enactment is penal and contemplates a criminal prosecution but such a law does not interfere with, much less take away, the civil remedy. On the contrary I consider it resists a civil suit for damages by the warning it has placed on the statute book to all persons in the position of the defendant to be careful to use all proper precautions against accidents of this kind.

However, therefore Mr Lyell's conduct may be explained and in a sense palliated. His legal liability to the plaintiff is, in my opinion, undoubted and he must pay damages. The only question, therefore, that remains is how, and to what amount, these damages ought to be assessed.

The impression made upon me at the hearing of this appeal was that, if there was a case for damages at all, these should be merely nominal and that the lowest possible figures would, under all the circumstances, have satisfied the justice of the case. But the anxious consideration I have since given to it has convinced me that such a result would neither be consistent with the nature of the suit, nor with fairness to the plaintiff. Her loss is extreme, and, the defendant's liability to her being once reached, her claim for compensation must, in principle as well as in substance, be ad-

mitted The law in force in India on this subject is regulated by Act XIII of 1855, which, on the preamble that 'it is often times right and expedient that the wrong doer in such cases should be answerable in damages for the injury so caused by him,' proceeds to enact that the party injured may maintain an action and that "every such action shall be for the benefit of the wife, husband, &c," and that in every such action the Court may give such damages as it may think proportioned to the loss resulting from such death " There are no children in the present case, so that the loss is that of the plaintiff herself exclusively The Subordinate Judge, in considering the question of damages, very properly takes into account the deceased's age which he estimates was from 30 to 35 years adding that, by all accounts the deceased was a strong, healthy robust man, and that it is not improbable that he might have lived to the age of 70 years, and he decides upon an allowance of Rs 200 a year, or Rs 17 per month, which required an investment of Rs 5,253 It appears to me, however, that the Subordinate Judge has conceived an undue estimate of native life The proportion of natives who attain the age of 70 is, I believe, very small, and the atmosphere, work, and attendance at an office connected with a Railway Station, such as that in Allahabad, is, in my opinion, not favourable to longevity, and all things considered, it appears to me that the offer suggested by Mr Howard (on the assumption of his client's liability) is a fair one That suggested offer was a monthly allowance of Rs 15 secured by the investment of Rs 3,000 Whether the investment of such a sum would produce a monthly allowance of Rs 15, or whether it is necessary that the plaintiff should have such a monthly allowance I do not determine, but I consider that I sufficiently meet the legal conditions of the suit and the just claims of the plaintiff by awarding to her as damages the sum of Rs 3,000 To that extent, therefore, I would modify the decree of the Subordinate Judge, and *quoad ultra* dismiss the appeal, with costs in both Courts

I have not thought it necessary to say anything respecting the position of Mr Pollard in the case He, no doubt, was also a skilled chemist and was stated to have been, and I presume still is, a member of the Pharmaceutical Society, and if he had acted on his own responsibility, without reference to his connection with Mr Lyell, his separate liability would have been undoubted But he was at the time the servant of Mr Lyell, was, so to speak, Mr Lyell's hand in the matter, and, as

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the Subordinate Judge puts it, his omission or neglect was the omission or neglect of his master. But I need not enlarge further on this subject, as Mr Pollard's immunity from liability I believe, not disputed by the plaintiff's counsel.

PEARSON, J.—The real cause of the explosion by which the plaintiff's husband lost his life does not appear to me to have been ascertained beyond all doubt. There is no evidence whatever to show and I think that there is no reason to suppose that the box which exploded contained either potassium or fulminating powder and I must, therefore, proceed upon the assumption that the explosion is attributable to the detonating powder. The learned witnesses are agreed that such an explosion might be occasioned by heat percussion or friction and are inclined to surmise that in this instance, the explosion must have been occasioned by friction, which might have resulted from the breaking of the bottle containing the detonating powder, or from the other bottles coming into contact with it, or from such an accident as a fall. But there is no evidence to show that anything occurred which could cause friction. On the contrary, the evidence goes to show that the explosion took place when the box was lying upon the ground, without any application of force to it, and, so to speak spontaneously, and yet most of the learned witnesses seem to be of opinion that such spontaneous explosion is impossible. Dr Waldie indeed, in answer to the question 'supposing it were proved that the box suffered no violence of any sort prior to explosion, what would you be disposed to attribute the explosion to' answered, 'I should now suppose that under the circumstances the explosion, might have taken place owing to chemical action having arisen between the ingredients constituting the detonating powder.' He does not, therefore, reject the hypothesis of a spontaneous explosion as wholly out of the question and this hypothesis is, as I have already remarked, most in accordance with the evidence of what actually occurred. The detonating powder was composed of one part sulphur and three parts chlorate of potash. Whether or not it is the case, as the learned advocate for the appellant informs us, that such a composition, when the potash has been pounded too finely or the sulphur is not quite pure, is liable to spontaneous explosion, I cannot determine. The learned witnesses were not examined on the point. They all seem to intimate that they would not have anticipated the explosion of the powder in transit in a well secured bottle properly packed. That Mr Pollard, who

prepared the powder, did not know it to be liable to spontaneous explosion may be assumed as certain, for, had he known it to be so, he would never have exposed himself to the risk involved in mixing it. But I must conclude that he did know or ought to have known, that its explosion might be caused by friction and that, in its transit by railway it was not exempt from the risk of friction, and that he was therefore legally bound to mark distinctly its dangerous nature on the outside of the package or to give notice thereof in writing to the book-keeper or other servant of the Company to whom it was delivered for the purpose of being forwarded. This duty he neglected to perform and for that neglect he may have been punishable but it is contended that although he would have been liable to an action like the present had the death of any person ensued upon an explosion of the detonating powder caused by friction in the transit of the box containing it, he cannot be held liable for the consequence of its spontaneous explosion which he could not be expected to have foreseen as probable at a time when the box was lying untouched on the railway platform, and which could not have been prevented by any precautions which the Railway Company could have taken, even had they been made aware of what he knew, or should have known, that there was a danger arising from the possibility of friction in the event of the bottles containing the powder being broken or the other bottles being brought into contact with it by a violent shaking of the box. This contention, which is founded on the presumption that it cannot be the intention of the law to hold a man answerable for an event which he could not reasonably be expected to have foreseen, appears to me to be sound and cogent, on the assumption that the explosion was spontaneous, and I prefer to adopt the hypothesis that it was spontaneous supported as it is by the evidence of what really occurred, and Dr. Waddie's opinion that, under the circumstances evidenced, it might have been spontaneous, rather than the opinion of the other learned witnesses who believe that it could not have occurred spontaneously, and that it must have been due to friction, although there is no proof of friction having taken place. On this view of the case, I would decree the appeal and dismiss the suit, but order the parties to bear their own costs in both Courts.

The defendant appealed to the Full Court, under the provisions of Cl 10 of the Letters Patent, against the judgment of the learned Chief Justice

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Mr Howard, for the appellant, contended that, inasmuch as the explosion was spontaneous and the appellant could not have anticipated it he could not be held liable for it. The learned Chief Justice overlooked the evidence of the station master respecting the rules of the Railway Company relating to the despatch of parcels by passenger train. The appellant could not have anticipated the explosion and was consequently not bound to notify the character of the contents of the box. The respondent has failed to prove that the death of her husband was occasioned by the omission of the appellant to give notice of the character of the contents of the box and the sum awarded to the respondent is excessive.

The Junior Government Pleader (*Babu Duarka Nath Banarji*), for the respondent contended that the case was governed by the principle of law laid down in *Farrant v Barnes*,⁽¹⁾ viz., that a person who sends an article of a dangerous nature, to be carried by a carrier is bound to take reasonable care that its dangerous nature should be communicated to the carrier and his servants who have to carry it and if he does not do so he is responsible for the probable consequences of such omission. The learned pleader also contended that Act XVIII of 1854 imposed an obligation on the defendant to communicate the dangerous nature of the detonating powder to the Railway Company, the breach of which rendered him liable for the probable consequences of such breach. The evidence shows that it was the duty of the deceased to communicate the receipt of dangerous articles to the station master who, in the exercise of the discretion vested in him might refuse to carry them. It is highly probable that had the appellant communicated the contents of the box, the station master would have refused to receive it. The accident could have therefore been prevented and the life of the deceased saved.

STUART C J—I listened with great attention to the able argument of *Mr Howard* the counsel for *Mr Lyell*, in support of the reasons of appeal but after carefully and anxiously considering all that he urged with reference to the facts, the evidence and the authorities which he cited, I see no ground for altering the opinion I originally formed on the question of *Mr Lyell's* liability to the plaintiff, and the amount to be assessed as

damages to her for the loss of her husband I would therefore affirm the judgment of the Divisional Bench, and dismiss the appeal with additional costs

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PEARSON, J.—After hearing the case re-argued in appeal before the Full Court I find no reason to alter the opinion expressed by me after hearing it argued in appeal before the Divisional Bench, and will add only a few remarks which will proceed as did my former judgment, on the hypothesis that the explosion of the detonating powder was spontaneous. On that hypothesis I still consider it to be most material to determine whether the death of the plaintiff's husband was the result of the defendant appellant's illegal omission to comply with the requirement of S 15, Act XVIII of 1854. My opinion on that point is that the misfortune cannot be held to have been due to that illegal omission. Had the appellant informed the book keeper or other servant of the Railway Company to whom the package containing the detonating powder was delivered, that it contained detonating powder which was liable to explosion by friction or percussion, I cannot suppose that any other step would have been deemed necessary than to take care that the package should be secured from the risk of explosion by friction or percussion for detonating powder is shown by the evidence not to have been regarded as being of so dangerous a nature as to require other precautions than are needed to obviate that particular risk, the risk of spontaneous explosion being one which has never heretofore been apprehended. No precautions that could have been used to avoid the risk of explosion by friction or percussion would have avoided the risk of spontaneous explosion. Under the circumstances, it seems to me now as before that although the illegal omission of which the appellant was guilty may have been punishable under the Railway Act the present suit for damages on the ground that Ganpat Rai's death was caused by that illegal omission cannot be sustained the defendant not being justly liable on account of his illegal omission for what was not directly or presumably a consequence thereof. Putting out of sight the illegal omission on which the plaintiff's claim is based there might have been a question whether the defendant could be justly held liable for what was certainly a consequence of his having prepared the detonating powder and having sent it to the railway premises for despatch by passenger train and in deciding such a question it would, in my opinion be necessary to consider whether the result which occurred was a natural

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and probable consequence which should have been foreseen by him, and upon the hypothesis, which I have adopted, that the explosion of the detonating powder was spontaneous, and upon the evidence which shows that such a spontaneous explosion is a thing altogether new to scientific experience, I should conclude that he ought to be exonerated from liability. Nor can I conceive that the illegal omission of which he was guilty can render him responsible for an event which was not a consequence of that omission, and which he could not reasonably have been expected to foresee and provide against. If A were to throw upon B some dirty water, of which the natural and probable effect would be to soil and spoil his clothes, and the dirty water by an unexpected and extraordinary action were to ignite the clothes and cause him to be burnt to death, I should be loth to maintain that A was responsible for the effect which, contrary to all expectation and previous experience had been actually produced, notwithstanding that his conduct in doing what was likely to cause injury to B's clothes was wrong and unjustifiable.

It was not contended in the pleading before the Full Court that the explosion was proved to have been caused by friction or that it could not have been spontaneous. What was contended was that whether it was caused by friction or was spontaneous was a matter of no importance, the appellant being equally liable for what happened in either case, by reason of his illegal omission. His contention for the reasons above mentioned, I am unable to admit.

TURNER, SPANISH, and O'DRISCOLL, JJ, concurred in the following judgment —

There is, it must be admitted, no direct evidence to show the immediate cause of the explosion. Two out of three gentlemen examined as experts deposed that the powder could not have exploded spontaneously the third, while admitting that in his experience he had never known the compound explode without friction or percussion deposed that, assuming it proved that prior to the explosion the box had not suffered violence of any sort, he should attribute the explosion to "chemical action having arisen between the ingredients constituting the detonating powder." This answer is not elucidated by any further explanation. The coolie who had brought the box to the station deposed that it had not fallen or received a shock from the time he received it up to the time he placed it inside the counter, and that "no one

kicked at the box, for nobody went that way," by which we understand him to mean that no one entered the passage in or near which he had placed the box. This answer does not exclude the possibility that the clerk while writing the receipt may have struck the box with his foot. The coolie was standing outside the counter at the distance of a yard from it. It does not appear that from the place in which he stood he could see the box. Another witness, Ganpat Rai, who spoke to the deceased just before the explosion, stated the counter was so constructed that a person outside could not see what was placed inside it. If the coolie could have seen the box from the place at which he stood, it is not likely that he would have kept his eyes on it, and if a blow was given to the box the explosion which would have immediately followed it would have rendered the sound of the blow inaudible. Even then if the compound be capable of spontaneous explosion, the evidence would fail to satisfy us that in the present instance it had so occurred.

We regard this point, however, as immaterial. That the appellant had reason to believe the compound was explosive is shown by the conversation which took place between him and Mr Pollard, and it was incumbent on him, both on the general principles of law, and by the special provisions of the Railway Companies Act, XVIII of 1854, to give notice of its contents to the Company's servants. Had such notice been given, looking to the evidence of the station master, it is possible the box would never have been received for despatch, and it is in the highest degree improbable that, had the deceased received notice of the dangerous nature of its contents, he would have permitted it to be placed in immediate contiguity to him. The case appears to fall within the principle of *Farrant v Barns*,⁽¹⁾ cited in the Court of first instance. *Lynch v Nurdin*⁽²⁾ establishes the principle that a person may be liable for the consequences of an accident resulting from his own negligence in combination with other causes which he did not contemplate. In that case the defendant left his cart and horse unattended in the street, the plaintiff, a child seven years old, got upon the cart in play another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt, it was held the defendant was liable to make compensation for the injury sustained by the plaintiff.

(1) 31 L. J., C. P. 137; 11 C. B. N. S. 553 8 Jur. N. S. 565

(2) 4 F. and D. 672, 1 Q. B., -9; 5 Jur. 797

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Furthermore, assuming that the explosion was spontaneous, it could not have occurred had the appellant followed the practice he had hitherto pursued of sending the ingredients of the powder in separate bottles. With a knowledge of the highly explosive character of the preparation, he omitted a precaution which his own practice proves he considered reasonable to preclude the risk of accident.

The sum awarded to the respondent appears to us by no means incommensurate with the pecuniary injury sustained by her. We would, therefore, affirm the decree and dismiss the appeal with costs.

In the Chief Court of the Punjab.

Before Bailley and Burney, J.J.

CHET RAM (PLAINTIFF), APPELLANT,

v.

THE AGENT, S. P. AND D RAILWAY COMPANY FOR
THE AGENT E I RAILWAY COMPANY (DEFENDANT),

RESPONDENT.

CASE No 1163 of 1881

1883
February, 8

*Damage to Goods, Suit for—Railway Company Liability of—Carriers—
Warehousemen—Part delivery of goods—Demurrage*

The plaintiff delivered to the defendant Company a consignment of 21 gunny bales for conveyance—23 bales arrived on the 16th June, while the remaining three arrived on the morning of the 17th. The plaintiff refused to accept delivery of the goods, on the ground that they had been damaged owing to the negligence on the part of the defendant. The Court of first instance held that the damage was sustained after the arrival of the goods when the liability of the defendant Company as carriers had terminated and that there was no negligence on their part. A decree was passed only for the surplus amount realised by the sale of the goods after paying the defendant Company's charges and demurrage for three months.

On appeal, the Judgment of the lower Court was confirmed and a Second appeal was preferred to the Chief Court.

Held—That the goods were ready for delivery within 24 hours after arrival and that a reasonable time having elapsed the responsibility of the Company as carriers ceased.

As regards the responsibility of the Company as warehousemen it was found that the Company took as much care of the goods entrusted to them as required by S 151 of the Contract Act and that as there was no room in the sheds they were protected from rains by being covered with tarpaulins

Chief Ram
S P & D Ry
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Held also that there was no rule of law that when a large quantity of goods of the same description was delivered to a carrier the carrier's responsibility as such should continue until the whole consignment was ready for delivery. Although the whole consignment in question had not arrived and the plaintiff was not bound to remove the 23 bales yet having failed to remove them within a reasonable time the liability of the defendant Company as carriers ceased and their liability as warehousemen and right to collect demurrage arose.

Held further that if there had been final refusal by the plaintiff to accept the goods before the expiration of the three months for which demurrage was charged probably the Company would have ceased to be warehousemen entitled to sell the goods as soon as possible and the Courts below were therefore right in allowing demurrage for three months.

SECOND appeal from the order of the Additional Commissioner, Amritsar Division, dated 24th February 1881

Higgins for Appellant

Sputta for Respondent

The facts of this case appear from the Judgment of the Chief Court delivered by

BARKLEY, J.—The plaintiff sued the Railway Company for damages for injury to gunny bags consigned to him from Serampur, he having refused to accept delivery on the ground that they had been damaged owing to want of proper care on the part of the Company. The effect of the decision of the Court of first instance was that, when the damage was sustained, the Company had ceased to be liable as carriers, and that there was no want of due care on their part. It accordingly gave the plaintiff a decree, not for damages, but for the surplus realized by the sale of the goods after paying the Railway Company's charges including three months demurrage.

On the plaintiff's appeal, the Additional Commissioner held that the liability of the defendants as carriers ceased at 10 A.M. on the morning of the 17th June, twenty-four hours after the arrival of the last three bales of bags, that after that time the liability of the Company was even less than that of a bailee under Section 151 of the Indian Contract Act, and that quite as much care was taken, as, under the circumstances, the plaintiff was

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There remains the question of demurrage. If there had been a final refusal by the plaintiff to accept the goods before the expiration of the three months for which demurrage is charged, probably the Company would have ceased to be warehousemen, and have been entitled to sell the goods as soon as they conveniently could arrange to do so. But what is found is that the plaintiff's servant refused to take delivery, and that the Company sent notices to the plaintiff to remove the goods more than once, but nothing was done, and they consequently sold them after six months had elapsed. We do not think that the Company was bound to treat a refusal by the plaintiff's servant to take delivery as a final disclaimer of the goods by the plaintiff himself, and as it is not alleged that he answered the communications made to him by the Company, we think they were entitled to regard themselves as holding the goods on the plaintiff's behalf and at his disposal. Only three months' demurrage has been allowed by the Courts below, and we cannot hold that they were wrong in law in allowing this. We, therefore, dismiss the appeal and decree the defendants costs in this Court against the plaintiff.

In the Chief Court of the Punjab.

APPELLATE CIVIL

As regards the responsibility of the Company as warehousemen it was found that the Company took as much care of the goods entrusted to them as required by S 151 of the Contract Act and that as there was no room in the sheds they were protected from rains by being covered with tarpaulins.

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Held, also, that there was no rule of law that when a large quantity of goods of the same description was delivered to a carrier, the carrier's responsibility as such should continue until the whole consignment was ready for delivery. Although the whole consignment in question had not arrived, and the plaintiff was not bound to remove the 23 bales, yet having failed to remove them within a reasonable time, the liability of the defendant Company as carriers ceased and their liability as warehousemen and right to collect demurrage arose.

Held, further, that, if there had been final refusal by the plaintiff to accept the goods before the expiration of the three months for which demurrage was charged, probably the Company would have ceased to be warehousemen entitled to sell the goods as soon as possible, and the Courts below were therefore right in allowing demurrage for three months.

SECOND appeal from the order of the Additional Commissioner, Amritsar Division, dated 24th February 1881.

Higgins for Appellant

Spitta for Respondent

The facts of this case appear from the Judgment of the Chief Court delivered by

BARKLEY, J—The plaintiff sued the Railway Company for damages for injury to gunny bags consigned to him from Serampur, he having refused to accept delivery on the ground that they had been damaged owing to want of proper care on the part of the Company. The effect of the decision of the Court of first instance was that, when the damage was sustained, the Company had ceased to be liable as carriers, and that there was no want of due care on their part. It accordingly gave the plaintiff a decree, not for damages, but for the surplus realized by the sale of the goods after paying the Railway Company's charges including three months demurrage.

On the plaintiff's appeal, the Additional Commissioner held that the liability of the defendants as carriers ceased at 10 A.M. on the morning of the 17th June, twenty-four hours after the arrival of the last three bales of bags, that after that time the liability of the Company was even less than that of a bailee under Section 151 of the Indian Contract Act, and that quite as much care was taken, as, under the circumstances, the plaintiff was

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entitled to demand The injury, it was admitted, took place on the night of the 17th It was contended that the defendants ought to have put the bags in a warehouse, but he considered that it was clear that they did not do so because their sheds were full There had also been negligence on the plaintiff's part, as he was aware on the morning of the 16th that the greater part of the consignment, 23 out of 26 bales, had arrived, and he made no arrangement to take delivery As the length of time for which demurrage had been allowed was not objected to, he therefore dismissed the appeal

The case now comes before us on second appeal It is contended that the Company did not take even ordinary care of the goods, and are therefore liable to the plaintiff, and that no charge for demurrage is admissible after the goods had been damaged by their neglect It is also urged that the plaintiff was under no obligation to take delivery until the entire consignment had arrived

The principle that the liability of the Railway Company as carriers continues for a reasonable time after the arrival of the goods at the Railway Station, and that it lies on the Company to show that they had the goods ready for delivery for a reasonable time, was admitted on both sides, and on this point it is sufficient to refer to I L R 3 Bom 96, at p 107, and to *Cochburn v The Great Western Railway Company*, the judgment in which is set forth at length in Macpherson's Law of Indian Railways, pp 260 268 It was also admitted that it is not necessary in this country for the Railway Company to prove delivery of a notice of the arrival of the goods Now the lower Courts have found that the bulk of the consignment was ready for delivery on the morning of the 16th June, and had the plaintiff made arrangements to take delivery then, there is no reason to suppose that he would not have got the other 3 bales which arrived at 10 A M on that day He made no further enquiry until the morning of the 18th June, though when he learnt that 23 bales had been received, he had reason to expect that the remaining 3 bales would arrive soon after Under these circumstances we see no reason to think that the Additional Commissioner was wrong in holding that the goods were ready for 24 hours before 10 A M on the 17th, and that a reasonable time having then elapsed, the responsibility of the Company as carriers ceased

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But when that responsibility came to an end, they became responsible as warehousemen, and their responsibility in that capacity must, as their counsel rightly admits, be regulated by Section 151 of the Indian Contract Act. It is on this principle that their right to charge demurrage depends. See the Queen's Bench decision already referred to, and Macpherson's Law of Indian Railways, p 271.

But the question whether the Company took such care as a man of ordinary prudence would, under similar circumstances, take of goods of his own of the same bulk, quantity and value is in the main a question of fact depending as it does upon the circumstances and upon the nature of the goods. It is found that there was not room for the goods in the sheds, but that they were protected from rain by being covered over with tarpaulins, and that the injury was done by damp from below. It has not been found that they were placed in such a situation that there was any special liability to damage in this way, that, for instance, they were placed on low ground liable to flooding. Though the Additional Commissioner did not consider it necessary that the defendants should take as much care as Section 151 of the Indian Contract Act requires, his finding appears to amount to a finding that they did in fact take all the care that was reasonably practicable under the circumstances and this is sufficient to discharge them of their liability under that section. In second appeal we are bound by this finding.

As regards the 23 bales which the plaintiff knew had arrived on the morning of the 16th, while he was not under any obligation to remove them, we think that, on his failure to remove them within reasonable time, the liability of the Company as carriers ceased, and their liability as warehousemen and right to charge demurrage, arose. Though the whole consignment had not arrived, there was no reason but the plaintiff's own convenience for not taking delivery of part and the nature of the goods was not such as to make a part of less value than the proportion borne by it to the whole. We know of no rule of law that when a large quantity of goods of the same description are delivered to a carrier, the carrier's responsibility as such must continue until the whole were ready for delivery. If this were so a consignee of a lakh of maunds of grain might refuse to take delivery because 50 maunds had not arrived.

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There remains the question of demurrage. If there had been a final refusal by the plaintiff to accept the goods before the expiration of the three months for which demurrage is charged, probably the Company would have ceased to be warehousemen, and have been entitled to sell the goods as soon as they conveniently could arrange to do so. But what is found is that the plaintiff's servant refused to take delivery, and that the Company sent notices to the plaintiff to remove the goods more than once, but nothing was done, and they consequently sold them after six months had elapsed. We do not think that the Company was bound to treat a refusal by the plaintiff's servant to take delivery as a final disclaimer of the goods by the plaintiff himself, and as it is not alleged that he answered the communications made to him by the Company, we think they were entitled to regard themselves as holding the goods on the plaintiff's behalf and at his disposal. Only three months' demurrage has been allowed by the Courts below, and we cannot hold that they were wrong in law in allowing this. We, therefore, dismiss the appeal and decree the defendants costs in this Court against the plaintiff.

In the Chief Court of the Punjab.

APPELLATE CIVIL

Before Plouden and Smyth, J.J.

LADHU (PLAINTIFF), APPELLANT

v.

THE S P & D RAILWAY COMPANY

(DEFENDANTS), RESPONDENTS

CASE No. 745 OF 1885

1886
April, 16

*Carriers by Railway—Railways Act IV of 1879, Section 10—Common Law liability—Carriers Act III of 1865—Contract Act IX of 1872
Ss 151 and 161*

Under S 10 of the Railway Act IV of 1879, the liability of a carrier by Railway is now limited by Ss 151 and 161 of the Indian Contract Act, IX of 1872 to that of a bailee and he is not subject to the common law liability of a common carrier.

SECOND appeal from the order of Colonels E P Gurdon and H V. Riddell, Divisional Judges, Lahore Division, dated 6th June 1885

Ladhu
SP & D Ry

Piari Lal for Appellant

Rattigan for Respondents

The facts of this case appear from the Judgment of the Chief Court delivered by

FLOWDEN, J.—The contention in this appeal is that, notwithstanding the enactment contained in Section 10 of Act IV of 1879, the Indian Railway Act, a carrier by Railway is subject to the common law liability of common carriers. In support of this proposition the case of *Mothoora Kant Shau and others v The Indian General Steam Navigation Company*, (1) was relied upon.

It is plain that Section 10 of the Act of 1879 affirms by necessary implication that some obligation or responsibility is imposed on a carrier by Railway by Sections 151 and 161 of the Indian Contract Act 1872. It is further not denied that the obligation or responsibility imposed by the common law upon a common carrier is more extensive than the obligation or responsibility imposed on bailees generally by these sections of the Contract Act.

Now, if it be assumed that carriers by Railway were carriers with common law liability subject to the provisions of Act III of 1865, and of Sections 8, 9, and 10 of the former Railway Act XVIII of 1854, up to the date of the passing of the Contract Act in 1872, or even up to the date of the passing of the Railway Act of 1879, it is impossible, since the latter Act was enacted, to reconcile the proposition that carriers by Railway are subject to the common law liabilities of common carriers with the language employed in Section 10 of the Act. If that more extensive liability assumed to have existed up to the passing of Act IV of 1879 continues, then there is no case to which Section 10 can apply. By Section 2 of the Act, Act III of 1865 ceased to apply to carriers by Railway, and Act XVIII of 1854 was repealed and the power of a carrier by Railway to limit his liability as a carrier, which is conferred in Section 10 of the Act, is expressly limited to the obligations or responsibility imposed by the Contract Act, and does not extend to any obligations or responsibility arising from other sources.

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It follows that, subject to the other provisions of Chapter III, a carrier by Railway cannot restrict his common law liability in any manner, if the contention before us is sound, for every attempt of a carrier by Railway to get the benefit of Section 10 would be met by saying that his responsibility was that of a carrier at common law, and as such incapable of restriction, since Act IV of 1879 came into force.

The truth appears to be, as urged for the defendants in the Courts below, that the Legislature in enacting Section 10 intended to give effect to the view of the former law taken by the Bombay High Court in the case of *Kunerya Tulsi Das v G I P Railway Company*, (1) and to define the liability of carriers by Railway as identical with that of bailees in Sections 151 and 161 of the Contract Act.

The foregoing view is not inconsistent with the decision of the Calcutta High Court in case relied upon by the plaintiff for that decision does not turn upon the effect of Section 10 of the Railway Act upon the liability of a carrier by Railway. In that case the Court holding that inland carriers by water were common carriers with a common law liability subject to the provisions of Act III of 1865, declined to adopt the view of the Bombay High Court in the case cited, that the liabilities of common carriers were governed since 1872 by the provisions of the Contract Act as to bailment or to infer from the express provisions of Section 10 of the Railway Act, that the Contract Act in Sections 151 and 161 governed the liabilities of all common carriers. That is a very different thing from deciding that Section 10 of the Railway Act does not define the liability of a carrier by Railway to be that imposed by Sections 151 and 161 of the Contract Act.

Therefore on the legal point, the appeal fails. As to the negligence alleged by the plaintiff the Lower Courts are agreed, and no sufficient cause is shown for reopening this question.

- The appeal is accordingly dismissed with costs.

**The Indian Law Reports, Vol. XXII. (Allahabad)
Series, Page 361.**

Before Mr. Justice Banerji and Mr. Justice Aikman

NANKU RAM (PLAINTIFF)

v

THE INDIAN MIDLAND RAILWAY COMPANY

(DEPENDANTS) *

Act No IX of 1890 (Indian Railways Act) Sections 72, 76—Act No IX of 1872 (Indian Contract Act) Sections 151 152 161—Contract—Bailment—Liability of bailee—Burden of proof—Railway Company

1900
MAY 5
— —

Where goods are delivered to a Railway Company for carriage not at owner's risk and such goods are lost or destroyed while in the custody of the Company it is not for the owner's benefit to compensate for such loss or destruction to prove negligence on the part of the Company but, when the owner has proved delivery to the Company it is for the Company to prove that they have exercised the care required by the Indian Contract Act 1872 of bailees for hire.

Pandit Sundar Lal for the Appellant

The Respondent was not represented

THE facts of this case sufficiently appear from the judgment of the Court

BANERJI and AIKMAN, J J —The facts which gave rise to the suit were these. The plaintiff's agent consigned to the defendant Company 30 bales of cotton for conveyance to Bakhtiarpur, a station on the East Indian Railway. Twenty-eight of these bales were loaded in a wagon on the 3rd January 1896, and the wagon was attached to a mixed train which left the Kiri Station on the same day a little after 4 p.m. After the train had been in motion about 40 minutes, it was discovered that the wagon containing

* Second Appeal No 857 of 1897 from a decree of Mr. Forbes Esq. District Judge of Banda dated the 16th August 1897 confirming a decree of Baba Sanwal Singh, Subordinate Judge of Banda, dated the 12th May 1897.

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the cotton bales was on fire. It is admitted that all the cotton loaded in that wagon was destroyed. In the present suit the plaintiff claims damages for the loss sustained by him in consequence of the destruction of the cotton. The defendant company did not dispute the amount claimed, but they claimed exemption from liability on three grounds: (1) that the plaintiff at the time of despatch elected to pay the owner's risk rate; (2) that the fire was the result of spontaneous combustion, and (3) that the fire was not the result of any negligence on the part of the company or its servants. On the first point the Court of first instance found against the defendant Company, and that finding was never questioned. It must therefore be taken that the goods—so far as they were to be conveyed over the line of the defendant Company—were not at the risk of the owner. The Courts below have, however, dismissed the claim, holding that the defendant Company was not liable. The lower appellate Court was of opinion that it was for the plaintiff to prove that the defendant Company was guilty of negligence in respect of the bales of cotton consigned to it. The learned Judge says:—'The party damaged has no cause of action unless he alleges negligence: such an allegation must not be a general sweeping one, but must be such as to give notice to the defendants of the case they will have to meet. The learned Judge further adds:—'Clearly a plaintiff must affirm some specific act of negligence, or suggest some such act: thus it was open to the plaintiff appellant in the present case to assert in his plaint that he believed the fire to have been caused either by sparks from the engine or to have been caused by some fire left carelessly in the wagon before the bales were loaded into it, or by some person smoking while engaged in loading.' Being of that opinion the learned Judge held that the plaintiff had not proved that the defendant Company were guilty of any act of negligence, and affirmed the decree dismissing the suit. We are unable to agree with the view of the law taken by the learned Judge. By Section 72 of Act No. 14 of 1890 the responsibility of a Railway Administration for the loss or destruction of goods delivered to it to be carried by railway is, subject to the other provision of the Act, that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act. Section 76 of the Act provides that in any suit against a Railway Administration for compensation for loss or destruction of goods delivered to it for carriage, it shall not be necessary for the plaintiff to prove how the loss or

destruction was caused. The passages quoted from the learned Judge's judgment show that he overlooked the important provisions of Section 76, which cast, not on the plaintiff but on the Railway Company, the burden of establishing the circumstances which, under Sections 151 and 152 of the Indian Contract Act, would exonerate the bailee from liability. It was sufficient for the plaintiff to prove delivery of the goods to the Railway Company and the fact that the goods were destroyed whilst in the custody of the Company. Those facts being admitted in this case, it was for the Company to establish the circumstances which would entitle them to be relieved from liability. This the defendant Company in this case failed to do. The Court of first instance says in its judgment that the fire must have been the result of spontaneous combustion. There is not a particle of evidence to show that this was so, and no such conclusion can be drawn from the evidence on the record. We may accept the evidence that the fire did not originate from a spark from the engine, but that alone does not lead to the conclusion that there was no other cause for the bales catching fire except the theory of spontaneous combustion. It appears from the note which the locomotive foreman recorded on the driver's report of the 20th January 1896, that in his opinion, the wagon was on fire before it left Kirwa Station. We may mention that the locomotive foreman happened to be travelling by the train to which the wagon was attached. If this was so, it was for the Company to prove that the possibilities indicated by the learned Judge in his judgment as to the origin of the fire, namely, that of some fire having been left carelessly in the wagon before the bales were loaded into it, or of some person smoking whilst loading, did not exist, or that precautions were taken to prevent the originating of the fire in any of the ways indicated. It is true that the learned Judge in his judgment says that "upon the evidence on the record the lower Court's finding that the fire was due to spontaneous combustion and that the Company's servants had not been guilty of negligence, was sound and proper. We may observe that this opinion as to the absence of negligence on the part of the defendant Company and their servants is based on the erroneous view which the learned Judge entertained as to the burden of proof. We may further observe that the finding, to which we have referred above, is based on no evidence whatever on the record. The learned advocate for the appellant asked our leave to contend that there was no evidence

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the cotton bales was on fire. It is admitted that all the cotton loaded in that wagon was destroyed. In the present suit the plaintiff claims damages for the loss sustained by him in consequence of the destruction of the cotton. The defendant company did not dispute the amount claimed, but they claimed exemption from liability on three grounds: (1) that the plaintiff at the time of despatch elected to pay the owner's risk rate, (2) that the fire was the result of spontaneous combustion, and (3) that the fire was not the result of any negligence on the part of the company or its servants. On the first point the Court of first instance found against the defendant Company, and that finding was never questioned. It must therefore be taken that the goods—so far as they were to be conveyed over the line of the defendant Company—were not at the risk of the owner. The Courts below have however, dismissed the claim, holding that the defendant Company was not liable. The lower appellate Court is of opinion that it was for the plaintiff to prove that the defendant Company was guilty of negligence in respect of the bales of cotton consigned to it. The learned Judge says—"The party damaged has no cause of action unless he alleges negligence: such an allegation must not be a general sweeping one, but must be such as to give notice to the defendants of the case they will have to meet." The learned Judge further adds—"Clearly a plaintiff must affirm some specific act of negligence, or suggest some such act: thus it was open to the plaintiff appellant in the present case to assert in his plaint that he believed the fire to have been caused either by sparks from the engine, or to have been caused by some fire left carelessly in the wagon before the bales were loaded into it, or by some person smoking while engaged in loading." Being of that opinion the learned Judge held that the plaintiff had not proved that the defendant Company were guilty of any act of negligence, and affirmed the decree dismissing the suit. We are unable to agree with the view of the law taken by the learned Judge. By Section 72 of Act No. IX of 1890 the responsibility of a Railway Administration for the loss or destruction of goods delivered to it to be carried by railway is, subject to the other provision of the Act, that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act. Section 76 of the Act provides that in any suit against a Railway Administration for compensation for loss or destruction of goods delivered to it for carriage, it shall not be necessary for the plaintiff to prove how the loss or

destruction was caused. The passages quoted from the learned Judge's judgment show that he overlooked the important provisions of Section 76, which cast, not on the plaintiff but on the Railway Company, the burden of establishing the circumstances which, under Sections 151 and 152 of the Indian Contract Act, would exonerate the bailee from liability. It was sufficient for the plaintiff to prove delivery of the goods to the Railway Company and the fact that the goods were destroyed whilst in the custody of the Company. Those facts being admitted in this case, it was for the Company to establish the circumstances which would entitle them to be relieved from liability. This the defendant Company in this case failed to do. The Court of first instance says in its judgment that the fire must have been the result of spontaneous combustion. There is not a particle of evidence to show that this was so, and no such conclusion can be drawn from the evidence on the record. We may accept the evidence that the fire did not originate from a spark from the engine, but that alone does not lead to the conclusion that there was no other cause for the bales catching fire except the theory of spontaneous combustion. It appears from the note which the locomotive foreman recorded on the driver's report of the 25th January 1896, that in his opinion, the wagon was on fire before it left Kirwi Station. We may mention that the locomotive foreman happened to be travelling by the train to which the wagon was attached. If this was so, it was for the Company to prove that the possibilities indicated by the learned Judge in his judgment as to the origin of the fire, namely, that of some fire having been left carelessly in the wagon before the bales were loaded into it, or of some person smoking whilst loading, did not exist, or that precautions were taken to prevent the originating of the fire in any of the ways indicated. It is true that the learned Judge in his judgment says that "upon the evidence on the record the lower Court's finding that the fire was due to spontaneous combustion and that the Company's servants had not been guilty of negligence, was sound and proper." We may observe that this opinion as to the absence of negligence on the part of the defendant Company and their servants is based on the erroneous view which the learned Judge entertained as to the burden of proof. We may further observe that the finding, to which we have referred above, is based on no evidence whatever on the record. The learned advocate for the appellant asked our leave to contend that there was no evidence

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whatever to justify the finding as to the fire being due to spontaneous combustion or as to the absence of negligence on the part of the defendants. We granted him the leave asked for, and we have gone carefully through the evidence. After having heard that evidence we can unhesitatingly say that there is no evidence to support the conclusion of the Courts below. The plaintiff was therefore entitled to a decree for the amount claimed, the correctness of which was not disputed. We may mention that the Railway Company was not represented in the appeal before us, and that consequently the appeal has been heard *ex parte*. The result is, that we allow the appeal, and, setting aside the decrees of the Courts below, decree the claim as laid in the plaint with costs in all Courts and future interest. We direct that the interest hereby awarded be calculated at the rate of 6 per cent per annum from the date of suit till the date of realization.

Appeal decreed

The Indian Law Reports, Vol. XXXIII. (Madras) Series,
Page 120.

APPELLATE CIVIL

*Before Sir R. S. Benson, Officiating Chief Justice
and Mr. Justice Sankaran Nair.*

A. L. A. R. ARUNACHELLAM CHETTIAR AND OTHERS
(PLAINTIFFS), APPELLANTS,

v

THE MADRAS RAILWAY COMPANY (DEFENDANT),
RESPONDENT.*

SECOND APPEAL NO. 1022 OF 1906

1909
Sept 17 22 Carrier, Liability of—Construction of Contract—Consignor bound by ordinary train arrangements made by Company

A consigned certain cotton by Railway from J. Station to K. Station. Under the terms of the risk note signed by the consignor the Company was exempted from liability for any loss before, during or after transit over the Railway. Under the train arrangements made by the Railway

Company, goods consigned from E to K were carried beyond K to C and then back from C to K. The goods were damaged while at C. In a suit to recover compensation for the loss so caused

Held, that the loss occurred during transit from E to K and that the Company was protected by the terms of the risk note

Every customer dealing with a Company is bound not only by the ordinary route but also by the ordinary train arrangements according to which it professes to carry. *Polin v London and North Western Railway Co.*, (2 Ir Rep 22 at p 34) referred to

SECOND APPEAL against the decree of Mundappa Bangora, Subordinate Judge of South Malabar at Calicut in Appeal Suit No 267 of 1906, presented against the decree of P S Seshu Iyer, Principal District Munsiff of Calicut in Original Suit No 618 of 1905

The facts necessary for this report are set out in the judgment

P R Sundara Iyer for Appellants

D M C Downing for Respondent

JUDGMENT.—In this case the defendants, the Madras Railway Company, contracted to carry a consignment of cotton for the plaintiffs from Erode Station to Kallai Station. The Company carried the cotton in an iron covered goods wagon. When the train reached Kallai Station the wagon was not detached but was carried on a couple of miles to the next Station (Calicut) where it was kept in the Station yard during the night to be sent back to Kallai by another train in the morning. Early in the morning smoke was seen to be issuing from the wagon and water had to be poured on it to quench the fire. When the cotton was delivered to the plaintiffs, part of it was damaged by the fire and water. The plaintiff's suit was for the compensation for this damage.

The defendants alleged that they were protected by the terms of the risk note, Exhibit I, which is signed by the plaintiff's consignor and formed part of the contract. The Courts below have found that there was no negligence on the part of the defendants. The argument urged by the plaintiff's Vakil before us is that the contract was to carry the goods from Erode to Kallai, and that as the defendants carried them further, viz to Calicut, for their own convenience, that was done at their own risk, and they were not protected by the terms of the risk note. Both Courts have found that the cotton was taken by the usual route adopted and publicly notified (Exhibit IV) by the

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defendants as that by which goods booked from Erode to Kallai are taken and that the defendants are protected by the terms of the risk note

We think that the decision of the Courts below is right. In the risk note the plaintiff's consignee says "I, the undersigned, do, in consideration of such lower charge agree and undertake to hold the said Railway administration and all other Railway administrations working in connection therewith, and also all other transport agents or carriers employed by them, respectively, over whose railways or by or through whose transport agency or agencies the said goods or animals may be carried in transit from Erode Station to Kallai Station harmless and free from all responsibility for any loss, destruction or deterioration of or damage to, the said consignment from any cause what ever before, during and after transit over the said Railway or other Railway lines working in connection therewith by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment." Under the risk note the defendants are protected from damages caused "before during and after transit"

Having regard to the finding that the cotton was carried by the usual route adopted by the Railway, we think that it must be held that the damage occurred 'during' transit from Erode to Kallai within the meaning of the risk note. Even if it could be held that, as the damage occurred after the wagon first reached Kallai and had been carried beyond the station to Calicut the damage did not occur "during" transit to Kallai, it would not be possible to hold that it did not in that view occur "after" transit to Kallai. The words "before, during and after transit" seem to cover the whole period from the time the goods were delivered to the defendants at Erode up to the time they were re delivered to the plaintiffs at Kallai.

The plaintiff's *vakil* has relied on the case of *Sleat v Fagg*⁽¹⁾ but we do not think that the case is on all fours with the present case.

With reference to the plaintiff's plea that they were not aware of the Railway Company's arrangements that goods should be sent to Kallai via Calicut, and that it was an unreasonable arrangement imposing an extra risk on them against which the risk note would not protect the defendants, we may refer to the

observations of Mr Justice Gibson in the case of *Tobin v London and North Western Railway Company*(1) where it was held that "The consignor is bound to enquire as to trains and hour of arrival, and cannot, by omitting to do so, enhance the obligation of the carrier, or submit the reasonableness of their ordinary traffic arrangements to the review of a jury. Juries would, of course, take different views, according to the train service of their locality, and, if the management of the goods traffic depended on their decision, it would become a chaos resulting in the ruin of the Company under an avalanche of litigation. Whether he inquire or not, every customer dealing with a Company is bound not only by the ordinary route *Hales v London North-Western Railway Company*(2), but also by the ordinary train arrangement and hours of arrival according to which they profess to carry. This is distinctly laid down in the judgments in *Balland's case*(3), and my own decision in *M'Nally's case*(4) is to the same effect." On the ground that the defendants are protected by the terms of the risk note we dismiss the second appeal with costs.

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Messrs David and Brightnell, Attorneys for the Respondent

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APPEAL FROM ORIGINAL CIVIL

*Before Sir Basil Scott, Kt, Chief Justice,
and Mr Justice Batchelor*

LAKHICHAND RAMCHAND (PLAINTIFF), APPELLANT

v

G I P RAILWAY COMPANY (DEFENDANTS), RESPONDENTS *

Railway Company—Negligence—Duty of the Company towards the goods consigned—Duty to take all care of the goods—Duty to protect goods when the risks occur—Railways Act (IX of 1890) Secs 72 76—Carriers Act (III of 1865) Sec 9—Contract Act (IX of 1879) Secs 151 151 151—Burden of proof

1911
Nov 13

The plaintiffs consigned 90 bales of cotton at Malkapur a station on the defendant Company's line of railway for carriage to Bombay. The bales were put by the defendant Company's men in a wagon which was attached to a goods train. At Varangaum an intermediate station the wagon

(1) Irish Rep 22 at p 32

(2) 4 B and S 66

(3) 15 Irish C L R 560

(4) 26 Irish L T F 139

* O C J Appeal No, 10 of 1911 See Appendix A Case No. 26.

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was found to be on fire. It was detached and put on a siding where the doors were opened, and 39 bales were extracted from it. The remaining 72 bales in the wagon continued burning for some hours till they were completely destroyed. The goods train proceeded on its onward journey to Bhusawal. In the meanwhile the Varangaum Station Master telegraphed to the Bhusawal Station Master (whose station was eight miles ahead) for a 'fire pipe' but he inquired in reply whether any water was available near the wagon. The Varangaum Station Master wired back saying that there was a well about 250 yards from the wagon and that the water was 30 or 40 feet deep. The Bhusawal Station Master replied that it was useless to send the fire engine as it would not draw water at that depth. It was proved that there were at Bhusawal at the time duplicate engines with steam up and a hose 250 feet in length. It also appeared that at Varangaum there was a well only 53 feet from the nearest Railway siding, so that if the engine and the hose had been sent from Bhusawal the fire would have been put out. The Bhusawal Station Master never considered the question of sending an engine for the burning wagon and did not consult the engine driver of the goods train about it. In a suit by the plaintiff to recover the value of the cotton bales —

Held, that the defendant Company was liable to pay damages which ensued owing to its negligence, for it failed to establish that it took the care a reasonable man would have taken in trying to save his own goods, inasmuch as (1) the Varangaum Station Master misled the Bhusawal Station Master as to the distance and so caused that officer to refuse his request for the appliances and (2) the Bhusawal Station Master was himself negligent and but for his negligence an engine and appliance might have been gone at Varangaum with the help of which much of the loss would have been avoided.

The obligation of a railway Company towards the consignor of goods includes not only the duty of taking all reasonable precautions to obviate risks but the duty of taking all proper measures for the protection of the goods when the risk has actually occurred.

Section 76 of the Indian Railways Act, 1890, does not increase the onus of proof laid upon the railway company by S 151 of the Indian Contract Act, 1872.

Strangman (Advocate-General) with *Datar*, for the Appellants

Burnin with *Shortt*, for the Respondents

JUDGMENT PER C J—The plaintiffs sue to recover from the defendants the sum of Rs 10,488-8 0 with interest at 9 per cent from the 17th April 1909 as the price of 90 bales of cotton consigned at Mulkapur on the 3rd of March 1909 by the 2nd defendant for delivery by the defendants to the 1st plaintiff in Bombay.

The cotton was not delivered and on the 17th of April 1909 the plaintiffs were informed by the defendants that it had been

burnt at Varangam Station 37 damaged bales were subsequently sold and realised Rs 3,210 which sum has been paid to the plaintiffs

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The undisputed facts are that the 90 bales were placed by the defendants in wagon No 15646 at Mulikapur together with 19 bales of cotton belonging to another Consignor between 5 and 7 P.M. on the 3rd of March. The doors of the wagon were then closed and sealed and the wagon was shunted to the dead end of a siding till next day. On the 4th March the wagon was attached to a train which left Mulikapur at 1.50 P.M. the wagon being then next to the Engine. It arrived at Bodwad Station at 2.33 P.M. where 5 other vehicles and an Incline Brake were introduced between the Engine and the wagon in question. At 3.40 P.M. on approaching Varangam Station, smoke was seen issuing from the wagon. At that station the wagon was detached and put on a siding, the doors were opened the cotton was found to be on fire, 39 bales were with difficulty extracted the Engine Driver tried unsuccessfully to extinguish the fire by water from his Engine and after 30 minutes detention having no more water to spare in his Engine went on with the train to Bhussawal 8 miles distant. The 72 bales remaining in the wagon continued burning for some hours till they were completely destroyed. At 4.10 P.M. the Station Master of Varangam telegraphed to the Station Master at Bhussawal to arrange to send a fire pipe to put out fire of wagon 15646 the bales in which were burning very badly. This message was received at Bhussawal at 4.30. Some hours later the Varangam Station Master wired to Bhussawal "Fire pump not sent yet half the bales burnt strong wind blowing fire in great force arrange ship. This message was received at Bhussawal at 8.30 P.M. No assistance of any kind was however sent from Bhussawal. The defendants admit that their responsibility for the loss destruction or deterioration of goods delivered to them to be carried by Railway is as provided by Section 72 of the Railways Act IX of 1890 that of a bailee under Sections 151, 152 and 161 of the Contract Act that is to say, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed, but in the absence of special contract is not responsible for the loss destruction or deterioration of the things bailed if he has taken the amount of care above described, if however by his fault the goods are not delivered at the proper

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time the balee is responsible for any loss, destruction or deterioration from that time

For the plaintiffs it was contended not only that the defendants must show that they took ordinary and reasonable care of the goods but that the loss occurred from a cause which could not be attributed to the negligence of their servants and it was argued that loss from an unknown cause of goods in the charge of the defendants was presumptive proof of their negligence. This argument was based upon the supposed similarity of Section 76 of the Railway Act to Section 9 of the Carriers Act 1865 the effect of which was said by Mr Justice MACPHERSON in the case of *Choutmull v Rivers Steam Navigation Company*,⁽¹⁾ to be to make the loss of the goods evidence of negligence which the carrier must displace.

I doubt whether it was intended by that Section to do more than give effect to the English Rule that where the declaration stated the breach of duty of the carrier to deliver it was not necessary to prove negligence also even though negligence was alleged, see *Richards v L B and S C Railway Company* ⁽²⁾ The reason being that the carrier was always liable for non-delivery unless he could bring the case within one of the exceptions recognised by the common law or established by special contract or within the limits permitted by the legislature. Section 76 of the Railways Act is not by any means the same in terms as Section 9 of the Carriers Act. It may have been enacted to make it clear that a suit against a Railway Company was to be regarded as an action for breach of contract and not an action in the case of a question which had been much discussed in England see *Tatlin v G W Railway Company*,⁽³⁾ *Morgan v Raley*,⁽⁴⁾ *Baylis v Lintott* ⁽⁵⁾

In my opinion this section does not increase the onus of proof laid upon the defendants by Section 151 of the Contract Act.

It is contended for the plaintiffs that the evidence establishes that the fire which destroyed the cotton originated in some preventible cause, that it could not have originated from spontaneous combustion and that the loss would have been much less but for the negligence of the defendants' servants.

(1) 1 L R 24 Cal at p. 819

(2) 29 L J, Q B 184

(2) 7 C B 879 18 L J C P 251

(4) 20 L J Ex 131

(5) L R 8 C P, 315

The suggestions of the defendants as to the possible cause of the fire are that it may have been due to careless bidi smoking by the defendants' coolies when loading the cotton or to the careless use of matches by the same coolies but that most probably it was due to spark from the Engine igniting the cotton while the tram was in motion. Evidence has also been given as to the possibility of the fire being caused by spark emitted by friction of the iron bands on the bales or by spontaneous combustion

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I will not discuss these questions in detail because I am satisfied that they have been fully and adequately dealt with in the Judgment of the Lower Court and I agree in the conclusion arrived at therein that the defendants have successfully shown that they took all reasonable precautions to obviate preventable risks. I do not think the possibility of sparks from friction of the bale bands could have been obviated by any reasonable precautions and I am not so convinced as the trying Judge of the remoteness of the possibility of spontaneous combustion. If the two last mentioned causes are so unlikely I fail to see how the frequent fires in closed iron wagons can be accounted for. These frequent fires are of great importance also in rebutting the suggestion that the plaintiffs' cotton must have been ignited by sparks entering through the apertures between the corrugations of the wagon roof.

The question remains whether the defendants discharged their duty as bailees after the fire had been discovered. Their 'obligation included not only the duty of taking all reasonable precautions to obviate risks, but the duty of taking all proper measures for the protection of the goods when the risks had actually occurred" see *Brabant and Company v King* (1)

Millard, the Driver, says that when the fire was discovered there was no other course but to run into Varanagam Station and detach the wagon. The danger of taking on the wagon to Bhimsawal has been explained to be the possibility of distortion of the shape of the iron wagon by the fire causing a derailment and on the evidence I think it was prudent to detach the wagon at Varanagam. It was also reasonable to shunt the wagon on to the nearest siding. It was reasonable to open the doors to try and turn the cotton out on to the platform. It was reasonable in the first instance to try and extinguish the fire by water from the

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Engine When no more of the Engine water was available and the Driver had only enough left to take his train into Bhusawal the Station Master tried to render the water of the nearest well available by wiring to Bhusawal for a fire pipe, which he says means a pump for taking out water. He sent this message at 4 10 : e, approximately at the time the train left Varangam for Bhusawal and it does not appear to me that the evidence establishes up to this point any negligence or breach of duty on the part of the defendants or their servants. It is from this point that the inaction of the defendants servants is open to criticism. Bhusawal is a large junction 8 miles distant from Varangam. The Bhusawal Station Master says that throughout the day there are duplicate Engines with steam up there and that he had a hose 250 feet in length which he could have sent to Varangam. The Traffic Manager Mr Rumboll says the defendants keep an efficient fire hose and hand power pump fire Engine at Bhusawal and that the assumption is that the pump is capable of sucking for the length of the hose taking into consideration the depth of the well. It may be assumed therefore that at 6 30 the time when the Varangam Station Master's message was received there was a duplicate engine under steam which could have at once conveyed the hand fire engine with 250 feet of hose to Varangam in 20 minutes. What did the Station Master do? He did nothing. His evidence is that the wire was brought to him by the Signaller on which he went to the Telegraph and called up the Varangam Station Master by what is known as a practice message and asked if there was any water at Varangam. A reply was received that there was a well about 250 yards from the wagon and that the water was 30 or 40 feet from the surface, he then wired that it was useless to send the fire engine down as it would not draw the water at that depth. The first time this practice message was mentioned in connection with the case was in the answer to interrogatories on the 27th January 1910 when the Deputy Traffic Manager deposed that he was informed by the Station Master, Bhusawal that he received the first telegram from Varangam about 17 : e, 5 P M o'clock and thereupon communicated by telegraph with the Station Master at Varangam and ascertained that the nearest well was about 200 yards from the wagon and that the water was 25 feet from the surface. It is to be noted that the distance of the well and the depth of the water had increased in the recollection of the Bhusawal Station Master by the time he gave his evidence. The

Varangaum Station Master was not asked in chief as to any such communication but in cross examination said that between telegrams Nos 34 and 35 which was sent 1 hour later the Bhusawal Station Master asked him by practice message whether he had water at his place. In re examination the point was left untouched but in answer to the Court the witness said "I sent practice messages on the day of the fire between 6 P.M. and 10 P.M. at night. First I sent a practice message to Bhusawal. I don't remember the time. I said are you making any arrangements about water?" I can't give any idea what time that was. Then Bhusawal asked me how far off the water was. That was about 8 or 9 P.M. I replied, saying that one well was at the distance of 200 yards and another at 250 or 300 yards." It will be seen that this story does not tally with that of the Bhusawal Station Master either as to the first sender of a practice message or the hour at which the Bhusawal message was sent. The Telegram No 35 is inconsistent with either story of the practice message. The Bhusawal Station Master admits that this telegram No 35 does convey to his mind that the Varangaum Station Master did not at that time know that the fire engine would be no good. I am unable to accept the story of the practice message. The trying Judge was not satisfied with the evidence of the Station Masters as to the messages actually sent but sees no reason to doubt the broad fact that the question of sending the pump from Bhusawal to Varangaum was considered and the conclusion came to that it would be useless to do so. I am however unable to reconcile this view with the telegram Ex 35 and the admission of the Varangaum Station Master that when he set it off he still thought there was time to save some of the cotton and therefore wired "arrange sharp. But even if the view of the trying Judge upon this point be accepted the Defendants have to meet the difficulty caused by the proof that the well referred to by the Varangaum Station Master was only 53 feet from the nearest Railway siding. He believed that with a hose and pump he could put out the fire by water from that well. If he mislead the Bhusawal Station Master as to the distance and so caused that officer to refuse his request for the appliances the defendants are responsible for they do not establish that they took the care a reasonable man would have taken in trying to save his own goods. If an engine had been sent with the pump and hose it could have been used to shunt the wagon with the burning cotton at the siding near the well and even if as is

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deposed to the Engine would then have been nearest to the dead end of the siding we are not told what harm could be done by leaving it there till the fire should be extinguished. The Bhusawal Station Master says he never considered the question of sending an engine for the wagon containing the burning cotton and did not consult the Varanganm Engine Driver (Millard) about it. It appears to me upon the evidence that the Bhusawal Station Master was negligent and but for his negligence an Engine and appliance might have been soon at Varanganm, with the help of which much of the loss would have been avoided. I am therefore of opinion that the Appeal should be allowed.

On the question of damages for not sending the pump and hose to Varanganm the Advocate General suggests that we may assume that the cotton would have been damaged by fire for which the defendants are not responsible to the same extent as the bales which were rescued and that all the rest of the plaintiffs' bales would but for the defendants' negligence have been saved with a selling value of Rs. 67 per bale. They have already received the proceeds of 37 bales on this basis. They are therefore entitled to the value of 53 more bales at Rs. 87 per bale with interest at 9 per cent from the 17th of April 1909 on the amount already received till payment and on the damages now decreed till judgment.

Plaintiffs to have three fourths of their costs throughout. Interest on judgment at 6 per cent.

BATCHELOR J.—I entirely agree, but should like to explain shortly in my own words why I am unable to accede to one of the main arguments addressed to us on behalf of the Appellant.

The facts have been narrated by the Chief Justice, and it is unnecessary to recapitulate them. It is enough to say that the Appellant's goods were destroyed by fire while they were in the exclusive possession and control of the Railway Company and that the Company have been unable to show from what causes the fire originated. Admittedly the Company have given all the evidence which it lay within their power to give on the point and that evidence is both voluminous and elaborate, but the result is that the actual cause of the fire remains unascertained and we are left to choose between various competing theories of greater or less probability. Different minds would prefer different theories. For my own part I am inclined to regard as the likeliest theory

that which ascribes the fire to the introduction of a spark from the engine into the narrow ventilating crevice left below the projecting roof of the wagon. But any such selection appears to me to be no more than conjecture more or less plausible, and as a matter of evidence I think we are bound to hold that the cause of the fire is unascertained.

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In this state of the facts it was contended for the Appellant that there is an end of the matter—that is that inasmuch as his goods were destroyed by fire while they were in the exclusive control of the Company, and the Company are unable to show from what cause the fire originated, unable consequently to show that the fire was not beyond prevention, therefore the Company must, without more, be held liable. On the other hand it was urged for the Company that, though they are unable to prove the cause of this particular fire and though the burden of proving due care admittedly rests upon them, it is competent to them to discharge that burden by satisfying the Court on the evidence that in regard to the Appellant's goods, they exercised all the care which is required of them as bailees for hire under the Contract Act. I am of opinion that the respondent Company's contention on this point should prevail. As I read Sec 72 of the Railways Act and Sections 151, 152 and 161 of the Contract Act the question whether the Company have or have not taken the care prescribed is to be answered by reference to the entire evidence on the record, that the fire occurred while the goods were in their sole possession may be, and in my Judgment is, *prima facie* evidence that due care was not taken but the inference thus suggested may be repelled and the contrary inference established on adequate evidence to this effect being given by the Company. It would, I venture to think, be a novel view to take that the bailee must inevitably be held liable for every accident of which he is unable to assign the precise cause and I see nothing in the Railways Act or in the cases which were cited to warrant so extreme a proposition. But I need not pursue this aspect of the subject for the argument on the Appellant's behalf was not sought to be based on any words of the Statute the sole foundation assigned for it was the decision of the Privy Council in *The Ruers Steam Navigation Co v Ghoutiull Dooqar* (1). That was a suit to recover the value of certain drums of jute which had been received by the Company on board their flat for delivery at Calcutta and which, together with the flat itself, had

(1) I L R 26 Cal 392

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Plaintiffs to have three fourths of their costs throughout. Interest on judgment at 6 per cent.

BATCHELOR, J.—I entirely agree, but should like to explain shortly in my own words why I am unable to accede to one of the main arguments addressed to us on behalf of the Appellant.

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that which ascribes the fire to the introduction of a spark from the engine into the narrow ventilating crevice left below the projecting roof of the wagon. But any such selection appears to me to be no more than conjecture more or less plausible, and as a matter of evidence I think we are bound to hold that the cause of the fire is unascertained.

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In this state of the facts it was contended for the Appellant that there is an end of the matter—that is that inasmuch as his goods were destroyed by fire while they were in the exclusive control of the Company, and the Company are unable to show from what cause the fire originated, unable consequently to show that the fire was not beyond prevention, therefore the Company must, without more, be held liable. On the other hand it was urged for the Company that, though they are unable to prove the cause of this particular fire and though the burden of proving due care admittedly rests upon them, it is competent to them to discharge that burden by satisfying the Court on the evidence that in regard to the Appellant's goods, they exercised all the care which is required of them as bailee for hire under the Contract Act. I am of opinion that the respondent Company's contention on this point should prevail. As I read Sec 72 of the Railways Act and Sections 151, 152 and 161 of the Contract Act, the question whether the Company have or have not taken the care prescribed is to be answered by reference to the entire evidence on the record, that the fire occurred while the goods were in their sole possession may be, and in my Judgment is, *prima facie* evidence that due care was not taken, but the inference thus suggested may be repelled and the contrary inference established on adequate evidence to this effect being given by the Company. It would, I venture to think, be a novel view to take that the bailee must inevitably be held liable for every accident of which he is unable to assign the precise cause, and I see nothing in the Railways Act or in the cases which were cited to warrant so extreme a proposition. But I need not pursue this aspect of the subject, for the argument on the Appellant's behalf was not sought to be based on any words of the Statute, the sole foundation assigned for it was the decision of the Privy Council in *T. & R. Rivers Steam Navigation Co v Choutmull Doogar* (1). That was a suit to recover the value of certain drums of jute, which had been received by the Company on board their flat for delivery at Calcutta and which, together with the flat itself, had

(1) I I R 26 Cal 398

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been destroyed by fire. The Judicial Committee affirmed the decree of the High Court, which held the Company liable. On behalf of the Appellant reliance is placed on certain passages in the judgment of Lord Morris, it being contended that the effect of these passages is to establish the proposition that the carrier is liable unless he can show affirmatively how the accident in this case, the fire arose, and by this means prove that it originated from a cause which involved no negligence on his part. It is not necessary to notice certain points of distinction between the case cited and the present case, for they would be important only if it were held that Lord Morris' judgment is authority for the proposition urged for the Appellant, and in my opinion that is not so. The judgment must be read as a whole and in the light of the facts which were then before the Judicial Committee, and so reading it, I think it does not support the view presented for the Appellant. On the contrary the judgment, as I understand it, enforces the Company's liability, not merely because the fire occurred on their line through an unascertained cause, but because, on a general review of all the evidence, it was held that the Company had failed to exonerate themselves or to displace the inference which naturally arose from the fact that the plaintiff's goods were destroyed while in the exclusive possession of the Company. But the Judgment examines and discusses the evidence offered on behalf of the Company, and that evidence is set aside not as irrelevant, but as insufficient. I agree, therefore with ROBERTSON, J. that it was open to the Railway Company in this case to exonerate themselves by satisfying the Court of their carefulness, both generally and in respect of the plaintiff's goods notwithstanding that they were unable to prove the exact cause of the fire. If that is so then I think upon the evidence that they have exonerated themselves *quoad* the outbreak of the fire, but not *quoad* the steps taken to extinguish it.

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ORIGINAL CIVIL.

*Before Sir M. R. Wischopp, Kt., Chief Justice, and
Sir C. Sargent, J.*

KUVERJI TULSIDAS, (PLAINTIFF)

v.

**THE GREAT INDIAN PENINSULA RAILWAY
COMPANY, (DEFENDANTS) ***

*Railway Company—Carrier, Liability of—Indian Contract Act (IX of 1872),
Ss 151, 152—Act XVIII of 1864—Act III of 1865*

1878
December,
8 and 7

The English common law rule under which common carriers are held liable as insurers of goods against all risks except the act of God or the king's enemies, is not now in force in India. In cases not met by the special provisions of the Act relating to Railways and carriers, the liability of carriers for loss of or damage to goods entrusted to them is prescribed by Ss. 151 and 152 of the Indian Contract Act (IX of 1872).

The plaintiff's goods were being carried in a train of the defendants from Nangaon to Fagatpuri. During the journey the train was plundered by robbers and the plaintiff's goods were stolen.

Held, the defendants were entitled to the benefit of S. 152 of the Indian Contract Act, and should be permitted to give evidence that the robbers of the plaintiff's goods were not the servants or agents of the defendants and that the defendants (by their servants and agents) took as much care of their goods as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods in question.

This was a case stated for the opinion of the High Court, under S. 7 of Act XXVI of 1864, by W. L. Hart, First Judge of the Court of Small Causes at Bombay.

The question for the High Court was whether the defendants, as bailees defined in S. 148 of the Indian Contract Act could rely on the provisions of S. 152 of that Act as exempting them from liability in respect of goods delivered to them to be carried,

* Small Cause Court Reference, Suit No. 11,211 of 1878

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- unless negligence on their part was proved. The learned Judge stated the case as follows —
- ‘ In the present case the goods of the plaintiff were in a waggon forming part of a goods train running between Dargaoon and Legatun on the night of the 2nd October 1877. On reaching the foot of a steep incline the driver found about 60 men by the side of the road, and a quantity of sand on the rails. The sand made it impossible for the wheel to hold the rails properly and the driver finding that on that account it was not possible to get the whole train up the incline, went on with the first half leaving the latter half in charge of the guard. He was absent about 25 minutes, and on his return with the engine found that the waggon which he had left at the bottom of the

Contract Act, can rely on the provisions of S 152 as protecting them from liability in respect of goods carried by them for reward. If the answer to that question be in the affirmative, the verdict in the present case will be set aside, and a new trial ordered."

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Starting for the Plaintiff—Section 152 of the Indian Contract Act does not apply to Railway Companies or other common carriers as such. The preamble and Section 1 show that this Act was not intended to be a general or exhaustive measure but merely a partial statement of contract law. Neither Act XVIII of 1854 nor Act III of 1865 is repealed by this Act. The definition of bailment in Sec 148 of the Contract Act does not point to the case of carriers, and Sec 158 in referring to the bailment of goods to be carried, speaks only of gratuitous conveyance. He cited *Minet v Leman*,⁽¹⁾ *O Flaherty v McDouell*,⁽²⁾ *Ex parte Harrington* ⁽³⁾

The Advocate General (Honourable J Marriott) and *Latham* for Defendants.—The liability of Railway Companies previously to the passing of the Indian Contract Act was regulated partly by Act XVIII of 1854 and partly by common law. The effect of the Indian Contract Act is to relieve Railway Companies of their common law liability, and to subject them to the liability imposed by Act XVIII of 1854 and by the Contract Act. The Railway Act (XVIII of 1854) did not affect the common law liability of Railway Companies. But that liability is affected by Sec 152 of the Contract Act. Section 148, which defines bailments, is wide enough to include bailments to carriers, and Sec 158 expressly deals with the case of goods to be carried, thus showing that the Act was intended to apply to carriers. If so, it is clear that Sec 152 must apply. They referred to *The East Indian Railway Company v Jordan* ⁽⁴⁾

WEBSTER, C J (having stated the facts above set forth)—The learned Chief Judge dissented from the contention of the defendants, that the law now applicable in this country to carriers besides the special provisions of the Acts relating to railways and carriers is that contained in Chap IX of the Indian Contract Act which relates to bailment. And he, accordingly prevented the defendants from giving evidence to show that the robbers were not

(1) 20 Bea 269 278

(2) 6 H L C 142 157

(3) 3 Deg M and G 159

(4) 4 Beng L R 97 O C

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their servants, and that all reasonable precaution had been taken for the safety of the goods, the protection of the train, and the watching of the line, and gave a verdict for the plaintiff for Rs 902-12, which he held to be the value of the plaintiff's goods and costs, subject, however, to the opinion of this Court on the question—"Can the defendants, as bailees defined in Sec 148 of the Indian Contract Act, rely on the provisions of Sec. 152 as protecting them from liability in respect of goods carried by them for reward?" He has put the same question in another case (*Ishwardas Gulabchand v The G. I P Railway Company*, No 13,993 of 1878) referred to this Court, in which case he stated his reasons for not permitting the Railway Company to rely on S 152 of the Indian Contract Act. Those reasons may be summarized thus: that, although that Act has been in force for six years, no judicial authority was cited to show that Sec 152 applies to carriers for reward, and although many actions had been tried in the Court of Small Causes against the Great Indian Peninsula Railway Company, such a defence had never been raised in these actions: that, although the terms of S 148 are wide enough to include all carriers, yet Ss 151 and 152 only declare the law as it existed before the Indian Contract Act, in regard to ordinary bailees other than carriers, side by side with which there also existed the special common-law liability of common carriers, who nevertheless then, as now, fell within the strict letter of the definition of ordinary bailees, which special liability of common carriers had been "apparently recognised" by the Legislature in the Railway Act (XVIII of 1854) and the Carriers' Act (III of 1865): that the preamble and Sec 1 of the Indian Contract Act showed that it was not intended to be exhaustive and applicable in all cases of bailment, and that Act is silent as to the Railway Act, the Carriers' Act, and carriers for hire, the only reference to carriage in the chapter on bailment being in Sec 158, where the bailment, dealt with, is gratuitous bailment, and he stated his opinion to be "that had the Legislature intended by Ss 151 and 152 to effect a complete revolution of the law as applied to carriers (for if the construction contended for by the defendants be correct, it must apply, not only to Railway Companies, but to ships' captains, and, in fact, to all who, as carriers for reward, are under special liabilities to the owners of the goods entrusted to them), express words would have been used for the purpose of giving effect to such intention."

The Indian Contract Act (IX of 1872) is and purports to be only a partial measure. Its preamble recites that 'it is expedient to define and amend certain parts of the law relating to contracts'. Its first section repeals certain enactments specified in the schedule but provides that nothing contained in the Act "shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of this Act."

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The words "not inconsistent with the provisions of this Act" must, we think, be limited in their application to the immediately preceding words 'nor any usage or custom of trade nor any incident of any contract' and are not applicable to the words 'the provisions of any Statute, Act or Regulation,' and, therefore, such Acts as the Railway Act (XVIII of 1854) and the Carriers' Act (III of 1865) not being mentioned in the schedule to the Indian Contract Act, are not repealed or affected by that Act. The provision of its first section, that nothing contained in the Act shall affect any usage or custom of trade or incident of any contract not inconsistent with the provisions of the Act, does not aid us in arriving at a solution of the question submitted to this Court inasmuch as, if the 152nd Section of the Act is applicable to common carriers for hire, the Act is in that respect inconsistent with the rule or usage of common law relied upon by the Court of Small Causes as the basis of its opinion. That rule is that a common carrier, while the goods entrusted to him for conveyance are in his custody, is bound to the utmost care of them and, unlike other bailees falling under the same class (1) is, at common law, responsible for their loss, and every injury sustained by them, occasioned by any means whatever, except only the act of God or the king's enemies (2). The 151st Section of the Indian Contract Act is as follows—"In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed." The 152nd Section, here relied upon for the defendants, enacts that "the bailee in the absence of any special contract, is not responsible for the loss,

(1) The fifth class of bailments viz *Locatio operis et rei* is.

(2) The authorities are collected in Mr J W Smith's note to *Coyys v Ber* 11 Sm L C 153 (7th ed) and in Angell on Carriers (4th ed) pl 149 et seq.

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destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in S 151." If, indeed, the rule of common law already mentioned, and which makes the common carrier an insurer of the goods against loss and injury, except occasioned by the act of God or the king's enemies, has been adopted by the Indian Legislature in Act XVIII of 1854 Act III of 1865, or any other Act not mentioned in the schedule to the Indian Contract Act, the first section of that Act would save the rule. It has not, however, been shown to our satisfaction that the common law rule has been adopted in Act XVIII of 1854, Act III of 1865, or any other Act of the Indian Legislature. An examination of Act XVIII of 1854 and Act III of 1865 shows why it is impossible successfully to maintain that there has been in those Acts any such adoption of the common law rule, or that the former of those Acts is exhaustive as to the liabilities of Railway Companies as carriers, and the latter, of the liabilities of carriers generally.

The important sections in Act XVIII of 1854, in relation to the liability of Railway Companies for goods delivered to them for conveyance are ss 9, 10, 11 and 15. Of these, S 9 relieves Companies of liability in respect of loss or injury to passengers' luggage 'in any case,' unless it shall have been booked and separately paid for and S 10 relieves Companies of responsibility 'in any case' for loss or injury to gold, silver, and numerous other articles of great value particularly enumerated in that section, unless the value and nature of such goods have been declared by the sender, and an increased charge for their safe conveyance accepted by a specially authorized person on behalf of the Company. It is manifest that neither of these sections states or implies what, in the case of goods not within the descriptions therein given shall be the extent of the liability of Railway Companies. Nor do those sections state what, in the case of loss or injury to goods therein described, shall be the extent of the liability of Companies when the requisites to render them at all liable have been complied with. The silence of those sections leaves the solution of that point to the law, as it then subsisted, outside that Act, and a variation of such law *after* the Act cannot be deemed to affect the provisions of the Act.

The two sections, of which we have been treating, are in favour of Railway Companies. The next section (the 11th) of the same Act (XVIII of 1854) has a different aspect. At common law, an

ordinary carrier for hire might, by special contract, protect himself from responsibility, even for loss or injury occasioned by the gross negligence of himself or his agents (1). In the case of *Surutram Bhaya v. The G I P Railway Co* (2) recently referred by the Court of Small Causes to this Court it was said here that the 11th Section, taken in the aggregate, appears to mean "that a Railway Company shall be responsible for loss or injury caused by gross negligence or misconduct of their agents or servants (except in cases otherwise specially provided for by the Act, e.g., such cases as are mentioned in Ss 9 and 10), notwithstanding any public notice given or private contract made by such companies to the contrary. If, as we think, that be the true construction of S 11, it leaves untouched the question whether Railway Companies, as common carriers, shall be answerable, in cases of loss or damage to goods in the absence of any special contract to the contrary, where such loss or damage is not occasioned by the negligence or misconduct of the Companies their servants or agents. That question, if it arose before the Indian Contract Act came into force, would necessarily have been decided by the common law, which would have treated the common carrier as an insurer against all risks, except the act of God or the king's enemies and, if the loss had not been attributable to either of these exceptions, would have held the common carrier liable although neither misconduct nor negligence had occurred on his part or on that of his agents &c. If this be no longer so since S 152 of the Indian Contract Act came into force, the change thus made is not any alteration of S 11 of Act XVIII of 1854, but is a departure from the common law. Section 15 relates to the carriage of dangerous goods, and sheds no light on the liability of Railway Companies free from the imputation of negligence or misconduct, nor, so far as we can perceive, is there any other portion of Act XVIII of 1854, not already noticed, which has such a result.

Act III of 1865 (3) is intitled "An Act relating to the rights and liabilities of common carriers," and in its preamble recites that "it is expedient not only to enable common carriers to limit their liability for loss of or damage to property delivered to them to

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(1) See the cases collected in Angell on Carriers note (a) to pl 265 4th Ed

(2) I L R, 3 Bom 96 at page 105

(3) The analogous enactment in England is Stat 11 Geo IV and 1 Wm IV c 68, but it is not in all respects similar to Act III of 1865.

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be carried, but also to declare their liability for loss of, or damage to, such property occasioned by the negligence or criminal acts of themselves, their servants or agents. The preamble, therefore, betrays no intention on the part of the Legislature to fix on the common carrier the character of an insurer against all risks, except the act of God or the Queen's enemies. The 2nd Section declares that in the Act "a 'common carrier' denotes a person other than the Government, engaged in the business of transporting, for hire, property from place to place, by land or inland navigation, for all persons indiscriminately," and that "a 'person' includes any association or body of persons, whether incorporated or not." The 3rd Section in effect enacts that no common carrier shall be liable for the loss of, or damage to, property delivered to him to be carried exceeding in value Rs. 100, and of the description contained in the schedule (including gold and silver and many other specified articles of value), unless the person delivering the property to be carried, or his agent, has expressly declared to the carrier or his agent the value and description of such property. The 4th Section relates to the rate to be charged in the cases mentioned in the preceding section, and the 5th Section provides for a refund of such charge in the event of loss or damage to the goods in such cases. With respect to property other than that specified in the schedule to the Act, the 6th Section prevents any common carrier from limiting or affecting his liability by any public notice, but permits such a carrier (not being the owner of a railroad or tramroad constructed under Act XXII of 1863, which the defendants' railway was not), by special contract signed by the owner of the property or his agent, to limit his liability in respect of the same. This 6th Section does not lay down what shall be the extent of the common carrier's liability if he do not limit it by special contract, but leaves that question to be dealt with by the common law. If that liability has been varied by the Indian Contract Act, it is the common law, and not the 6th Section of Act III of 1865, which has been interfered with. The 7th Section prevents the owner of any railroad constructed under Act XXII of 1863 from limiting or affecting his liability by any special contract, but enacts that he "shall be liable for the loss of, or damage to, property delivered to him to be carried, only when such loss or damage shall have been caused by negligence, or a criminal act on his part or on that of his agents or servants." This is the first mention of negligence in the enacting part of this Act, and

no measure is given whereby to determine what constitutes such negligence, or, in other words, there is not any statement as to the amount of care which the owner of a railroad or tramroad, constructed under the provisions of Act XXII of 1863, is bound to take of property entrusted to him for carriage. Hence subsequent legislation, defining the amount of care to be taken in such a case, would not be any interference with Section 7. The 8th Section is as follows — “Notwithstanding anything herein before contained, every common carrier shall be liable to the owner for loss of, or damage to, any property delivered to such carrier to be carried where such loss or damage shall have arisen from the negligence or criminal act of the carrier, or of any of his agents or servants” Here, again, the measure of negligence being omitted, the same remark as that made on Section 7 is applicable. Section 9 in effect relieves the owner of goods, in suits brought against common carriers, of the burden of proving negligence or criminal conduct against the latter, and leaves it to them to prove that the loss, damage, or non delivery of the goods was not owing to the negligence or criminal act of themselves (the carriers), their servants or agents. This section also leaves untouched the question of the degree of care necessary on the part of common carriers in order to exonerate themselves from liability. The 10th (and last) Section provides that “nothing in this Act shall affect the provisions contained in the ninth, tenth and eleventh Sections of Act XVIII of 1854 (relating to Railways in India)”

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We must now revert to the Indian Contract Act (IX of 1872). It has already been remarked that the preamble shows that the Act is not exhaustive, but, on the other hand, when we turn to the Chapter (IX) on bailment, we find at its commencement in Section 148 the following definition of a bailment, viz., “A bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise according to the directions of the person delivering.” This definition is not narrowed by any subsequent chapter, and is sufficiently comprehensive to include of the fifth class as well as of the other classes. The goods for the purpose of carriage is one of those of it and although not amongst the bailments specified in following Section 148 down so far as it

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find that the Act somewhere either expressly or by clear implication excludes bailments for the purpose of carriage from the scope of the chapter, we think that we should regard such bailments as comprised within it. So far, however, from discovering any provision of that excluding character, we find that Section 158 distinctly shows that bailments of goods for conveyance were in the contemplation of the Legislature when framing the ninth chapter. That section provides that "where, by the conditions of the bailment, the goods are to be kept, or *to be carried*, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment." Although the special provision made by this section is for the benefit of gratuitous bailees only, we find in that circumstance no logical means whereby we could limit S 148 and the rest of the chapter on bailment, including S 152, to gratuitous bailees generally, or to gratuitous carriers only.

We are of opinion that the defendants are entitled to the benefit of S 152 of the Indian Contract Act. Consequently, we must set aside the verdict for the plaintiff, and direct a new trial, at which the defendants should be permitted to give evidence that the robbers of the plaintiff's goods were not the servants or agents of the defendants, and that the defendants (by their servants and agents) took as much care of these goods as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. The costs of the suit and of this reference we leave for disposal by the Court of Small Causes on the new trial in such manner as that Court may deem to be just.

We observe that Messrs Cunningham and Shephard, in the note to S 148 of the Indian Contract Act in their first edition of that Act, give it as their opinion that Chapter IX on Bailment will govern the law of carriers so far as Act III of 1865 and Act XVIII of 1854(1) fail to provide such law. The first page of the Introduction, however, has been referred to as stating that amongst other "special and subsidiary chapters of the law of contract" the subject of "consignor and carrier" has been "intentionally omitted" as not having "received that elaborate consideration which their importance deserved." The observa-

(1) That Act has been amended by Acts XIII of 1870 and XXV of 1871 but not in any respect material to the present question.

tions, however, at page 4 of the Introduction show that the remark at page 1 of the same is not intended to be, and is not inconsistent with that in the note to S 118 above quoted. After saying that the definition of bailment is wide enough to include all classes of bailment, they continue thus — ' But the Act deals specifically with only five of the various sorts of bailment which fall within the definition. These five are—the bailment of hiring, of loan, for work to be done, of goods found, and of pledge. The bailment for carriage is intentionally omitted, that subject being already provided for by a distinct enactment nor is any special mention made of the bailment which arises out of the relation of a vendor and vendee when the former is either exercising his original right of hire or has revived it by stoppage in transitu. As the Act does not profess to deal with the several kinds of bailment separately, it is presumable that the rules given are, so far as they are applicable, intended to regulate the relations between bailor and bailee, whatever be the character of the bailment."

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Attorneys for the Plaintiff—Messrs Jirdasir and Hormusji
Attorneys for the Defendants—Messrs Hearn, Cleveland
and Little

In the Chief Court of the Punjab.

Before Elsmie and Rathgan, JJ

SLIH BANSI LAL RAM RATIAN

(PLAINTIFF), APPELLANT,

v

THE AGENT, S P AND D RAILWAY COMPANY

(DEFENDANT), RESPONDENT

CASE No 1428 OF 1881

Railway Company—Receipt Notes—Contract to deliver goods—Higher
charge refusal to pay—Alternative mode of carriage—Election by
Consignor

1883
February 5

The plaintiff delivered to the defendant Company at Amritsar a consignment of ballies for conveyance to Mian Mir and obtained a receipt for the same. They were charged at the second class rate of one anna nine pies per maund and were carried in a closed wagon to the destination. When the plaintiff applied for delivery of the goods at Mian Mir the servants of the defendant Company demanded a higher rate than that at which they were originally charged on the ground that

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find that the Act somewhere either expressly or by clear implication excludes bailments for the purpose of carriage from the scope of the chapter, we think that we should regard such bailments as comprised within it. So far, however, from discovering any provision of that excluding character, we find that Section 158 distinctly shows that bailments of goods for conveyance were in the contemplation of the Legislature when framing the ninth chapter. That section provides that "where, by the conditions of the bailment, the goods are to be kept, or *to be carried*, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment." Although the special provision made by this section is for the benefit of gratuitous bailees only, we find in that circumstance no logical means whereby we could limit S 148 and the rest of the chapter on bailment, including S 152, to gratuitous bailees generally or to gratuitous carriers only.

We are of opinion that the defendants are entitled to the benefit of S 152 of the Indian Contract Act. Consequently, we must set aside the verdict for the plaintiff, and direct a new trial, at which the defendants should be permitted to give evidence that the robbers of the plaintiff's goods were not the servants or agents of the defendants, and that the defendants (by their servants and agents) took as much care of these goods as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. The costs of the suit and of this reference we leave for disposal by the Court of Small Causes on the new trial in such manner as that Court may deem to be just.

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Attorneys for the Plaintiff—*Messrs Ardasir and Hormusji*
 Attorneys for the Defendants—*Messrs Hearn, Cleveland*
and Little

In the Chief Court of the Punjab.

Before Elsmie and Rattigan, JJ

SLTH BANSI LAL RAM RATIAN

(PLAINTIFF), APPELLANT,

v

THE AGENT, S P AND D RAILWAY COMPANY

(DEFENDANT), RESPONDENT

CASE No 1428 of 1881

Railway Company—Receipt Notes—Contract to deliver goods—Higler
 charge refusal to pay—Alternative mode of carriage—Election by
 Consignor

1883
 February 5

The plaintiff delivered to the defendant Company at Amritsar a consignment of ballies for conveyance to Mian Mir and obtained a receipt for the same. They were charged at the second class rate of one anna nine pies per maund and were carried in a closed wagon to the destination. When the plaintiff applied for delivery of the goods at Mian Mir, the servants of the defendant Company demanded a higher rate than that at which they were originally charged on the ground that

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the charge entered in the receipt covered the rate chargeable for *ballies* carried in open trucks and a higher charge should be paid on closed wagons used in this case and that the defendant Company were entitled to correct mistakes of charges and rates entered in the receipt notes. The plaintiff having refused to pay the higher rate and take delivery of the *ballies* they were sold in auction. He therefore sued the defendant Company to recover the value of the undelivered goods.

Held as follows —

(1) That the defendant Company at the time the consignment was booked should have ascertained from the plaintiff whether it was his desire that the goods should be conveyed in open trucks or in closed wagons to enable the Company to bind him by his election of the mode of conveyance which they, however, failed to do.

(2) That the higher rate collected from the plaintiff was not an undercharge which he was asked to make good inasmuch as it was not a charge claimable on *ballies* sent otherwise than in covered goods wagons as prescribed in the Goods Tariff.

(3) That it is alleged at the time the *ballies* were booked there was a practice in force to send them in covered goods wagons unless the consignor desired to send them otherwise but there is no evidence to prove that such practice was then in vogue nor is there anything on record to show that the plaintiff or his Agent had any knowledge of the existence of such practice.

(4) That for these reasons the defendant Company were not justified in demanding a higher charge than that entered in the receipt and in selling the *ballies* subsequently by auction owing to the refusal of the plaintiff to pay the increased charge.

SECOND appeal from the order of the Additional Commissioner, Lahore Division, dated 13th June 1881.

Higgins for Appellant

Rivaz for Respondent

The facts of this case fully appear from the following Judgment —

ELSMIE, J. — As this is a second appeal it is not open to us to arrive at a different finding on the facts from that which has been arrived at by the Additional Commissioner. Those facts appear to me to be briefly these. A servant of the plaintiff contracted at the Amritsar Railway Station with an agent of the S P and D Railway for the conveyance by goods train of 510 *ballies* weighing 100 maunds from Amritsar to Miran Mir. The *ballies* were made over to the Railway officials, and plaintiff's servant received the usual receipt in which the amount to be charged for carriage was entered at Rs 11, the goods being described as 2nd class and the rate as As 1-9 per maund.

No stipulation was made as to the mode of conveyance, that is to say, no agreement was made as to whether the *ballies* should be conveyed in open trucks or in closed wagons, though the Company's tariffs show that the rates chargeable for *ballies* conveyed in closed wagons is higher than for *ballies* conveyed in open trucks. As a matter of fact, the *ballies* were conveyed in closed wagons, and when they reached Mirn Mir the Company's servants there, discovering that the rate of carriage noted in the receipt was less than was demandable for the same weight of *ballies* carried in closed wagons, refused to deliver the goods unless the plaintiff paid Rs 24 10, being the full amount chargeable at closed wagon rates.

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Now it is not denied by the plaintiff that by the terms of the endorsement on the receipt granted to his servant the Railway Company are entitled to correct mistakes and to charge a higher rate of carriage if it be found that the rate charged in the receipt is incorrect. But what the plaintiff contends is that the amount entered in the receipt, viz., Rs 11, fully covers the rate chargeable for the *ballies* had they been conveyed in open trucks, and that in the absence of an express stipulation the Company was not at liberty to charge for the conveyance of the *ballies* by a more expensive mode of transit than that which the officials at Amritsar had charged for in the receipt.

In reply to this contention, the defendant relied—1st, on a circular notice, dated 31st August 1890, but an examination of this circular shows that it does not affect the question, as it does not cancel the entry in the Tariff book to the effect that *ballies* are conveyed as 2nd class goods, but merely shows the rate of carriage for *ballies* conveyed in closed wagons. 2nd, the defendants say that it is their practice in the absence of a request to the contrary to convey goods in closed wagons and not in open trucks, and that it is incumbent on any person who desires to have his goods conveyed in open trucks to state the fact and to furnish the Company with a risk note.

In regard to this alleged practice, there is not so far as I can discover any mention of it whatever in the Tariff book, and if the practice is in vogue there is nothing to show that the plaintiff was aware of it or that his servant was informed of it at Amritsar. If such a practice is rigidly observed and is well known, it is extraordinary that the official at Amritsar should have overlooked it, and should have failed to enter the higher rate in the receipt.

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According to the Tariff book *ballies* are entered as being carried on the S P & D Railway at 2nd class rates and at no other rate. In the circular, dated 31st August 1880, it is clear that the carriage of *ballies* in closed wagons is also contemplated but there is not a word to show that closed wagons will be used unless a special request is made for open trucks.

This being the case, I am of opinion that when the Railway authorities at Amritsar contracted to carry the plaintiff's *ballies* to Mian Mir for 11 Rupees, a sum which is really in excess of that chargeable at second class rates, the Company was not at liberty to withhold delivery of the goods until plaintiff had paid carriage at closed wagon rates. It may be that the Company has a right to correct charges that have been incorrectly entered in the Railway receipt or invoice, but here it cannot be held that the amount was incorrectly entered, unless it can be shown that after contracting to convey the *ballies* at a certain rate the Company had a right to charge a higher rate merely because they thought fit to convey the *ballies* in closed wagons instead of as second class goods in open trucks.

I would therefore accept this appeal, and as there has been no plea raised as to the value of the *ballies* I would grant a decree for the amount claimed with costs throughout.

RATTIGAN, J. —I concur in the proposed order. The plaintiff's agent is found by the Court below to have delivered the *ballies* for the value of which the present suit is brought, at the defendant Company's station of Amritsar, and to have then received a receipt note wherein the Company contracted to convey the *ballies* to Mian Mir at the rate of As 1 9 per maund, and that on the arrival of the consignment at the place of destination the plaintiff's agent there tendered the freight entered in the receipt as payable, which the agent of the defendant Company refused to accept. The *ballies* were afterwards sold by the defendant Company as the plaintiff refused to pay a higher rate which was claimed for the carriage in consequence of the *ballies* having been conveyed in covered trucks, and the present suit is brought by the plaintiff to recover the value of the undelivered *ballies*.

Now it appears that at the time when this contract was entered into between the parties two alternative methods of carriage, involving a different scale of charges, prevailed on the defendant's line, with respect to articles of the description tendered

by the plaintiff. In the Goods Tariff book of the 15th August 1880, *ballis* are simply classified, so far as the defendant's line is concerned, as second class goods. But by Circular No 128 of the 31st August 1880, the Company informed its "Station Masters and others" that from the 1st September 1880 an "additional rule" was to come into operation, similar to that prevailing on other lines, whereby *ballies* loaded in covered wagons were to be charged "at a minimum rate per wagon as for 164 maunds per wagon." The *ballis* having been delivered for carriage at Amritsar on the 30th September 1880, and having been conveyed by covered wagons are said by the Railway Company to have been subject to the charge provided for by the additional rule, which it is alleged was not charged in the first instance by mistake, and such mistake being liable to rectification before delivery of the goods to the consignee in accordance with the express terms of the receipt note. The plaintiff, on the other hand, contends that his agent made no application, which is admitted, for the conveyance of the *ballis* by covered wagons, and that as the charge entered in the receipt-note was allowable under the Tariff of the 30th August 1880, the defendant Company's agents are themselves responsible for having employed covered wagons for which the plaintiff had neither applied, nor contracted to pay.

Now, assuming that the additional rule above quoted was lawfully introduced and published, I think it was the duty of the Company's agent at the receiving station to ascertain by which of the alternative modes of carriage the plaintiff or the consignor desired the *ballis* to be conveyed for an alternative rate implies an option on the part of the consignor, and it must be shown that he had an opportunity of exercising that option before he can be held bound by his election. *Rooth v N F Ry Co*, (1) and *Brown v M S Ry Co*, (2). It was sufficient, therefore, in the first instance, for the consignor to simply declare the description, number, or weight of the articles he wished to have transmitted by rail, and the name and address of the person to whom they were to be consigned. Having obtained this information it was then the business of the Company's goods clerk or other servant entrusted with this particular duty, to declare the class under which the articles fell, and the Railway fare chargeable for the same. Further, if there were alternative modes of carriage involv-

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(2) 51 L J 591 Q B Dn

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ing different rates, it was his duty, as I have said, to ascertain by which of those modes the consignor desired his goods to be conveyed, and if he selected the cheaper mode, to which according to the rules of the Company a condition of signing a risk-note was attached, the goods clerk or other servant of the Company concerned should have caused such a note to be prepared, and signed before accepting the goods for transit. Thus in *Behrens v The Great Northern Railway Company*, 31 L J 299 Exch., it was held with reference to the provisions of 11 Geo IV, and 1 Will, IV c 68, which required a declaration of the nature and value of certain goods, and an increased charge paid thereon as conditions precedent to the imposition of the character of an insurer upon a common carrier, when the value exceeded £10, that it was only necessary for the person delivering such goods, in the first instance to declare their nature and value, and that it was then the duty of the carrier to demand an extra charge payable thereon. But that if the carrier chose to accept the goods without making any demand of such increased rate, or requiring it to be paid or promised, there was nothing in the statute to protect him from liability. In the present case, however, none of the above matters were attended to, and the *ballis* were received as falling under class II, which in fact they did on the supposition that they were to be conveyed otherwise than in covered wagons, a receipt note being granted to the plaintiff's agent specifying the conditions under which the Company had agreed to convey his goods. Now this receipt-note must be regarded as the contract between the parties, and although it does stipulate for undercharges being made good by the consignee, it contains nothing to indicate the mode of carriage which the Company is to employ for the purpose of conveying the goods to their destination. The question therefore really comes to this, whether the freight entered in the receipt note was an undercharge or not? Looking at the published Tariff table of 15th August 1880, and the additional rule embodied in the circular of the 31st August 1880, the charge was not necessarily an undercharge. It was the only charge in fact which was legally claimable on *ballis* sent otherwise than in covered wagons, and as the consignor had neither expressly nor by his conduct authorised the use of such wagons the Company cannot, in my opinion, be permitted to demand a higher rate because its servants subsequently chose to use covered wagons for its own protection.

I am quite prepared to concede, as was pressed in argument, that a Railway Company may reasonably enough provide in its Tariff of charges for alternative rates of carriage according to the risk undertaken by the Company. But the question before us is not whether the Company may not have been entitled to demand the execution of a risk-note if the consignor elected to send his goods by the cheaper mode. The goods were in point of fact received by the Company's servant for transmission without any specification of the precise mode of conveyance to be used, whether covered or uncovered wagons, and it was too late after the contract had been once concluded for the Company, without the consent of the consignor, to employ the mode of conveyance for which a higher rate was chargeable, and then to demand that higher rate from the consignor, and in default of payment to sell his goods.

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It is said, however, that the practice of the Company at the time when the *ballis* were delivered was to send such articles by covered wagons unless instructions to the contrary were given by the consignor. Now it is to be observed in the first place that as the Goods Tariff book of the 15th August 1880 only provided one rate for *ballis* on the S P and D Railway Company's lines, and it was not until the 1st September 1880, that an alternative rate when covered wagons were used was introduced, there was not much time for a 'practice' to have grown up between the latter date and the 30th September when the plaintiff's *ballis* were delivered for carriage to fix the plaintiff with constructive knowledge of its existence, from which an implied consent on the part of the plaintiff that covered wagons were to be used could reasonably be inferred. There is moreover nothing on the record to show that such a practice did exist, or that plaintiff or his agent had any notice of its existence.

For the above reasons, I think the defendant Company was not justified in demanding a higher charge than that entered in the receipt note, and in subsequently selling the plaintiff's *ballis* because he refused to comply with that demand. The only question therefore which remains is, what is the *quantum* of damages to which the plaintiff is entitled. Inasmuch, however, as the defendant Company did not dispute the valuation claimed by the plaintiff, viz, Rs 1 a *balli*, in the Court of first instance, and as no application was made to this Court at the hearing of the appeal to remand the case for an express finding on this point, I think the plaintiff's valuation may be accepted as correct.

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A decree will accordingly issue in plaintiff's favour for Rs 510, with costs throughout

**The Indian Law Reports, Vol. XXIX. (Allahabad)
Series, Page 228.**

FULL BENCH.

*Before Sir John Stanley, Knight, Chief Justice,
Mr. Justice Sir William Burnt and
Mr. Justice Richards.*

CHUNNI LAL AND OTHERS (PLAINTIFFS)

v

**THE NIZAM'S GUARANTEED STATE RAILWAY
COMPANY, LD. (DEPENDANT)***

1906
Dec, 18

Contract—Railway Company—Receipt of goods by one Company for carriage over its own and another Company's line—Liability in respect of overcharge made by delivering Company—Bye laws—Power of Railway Company to alter the principle of calculation of rates

Two wagon loads of chillies were received by the Station Master at Bezwaḍa on the Nizam's Guaranteed State Railway for carriage to Agra station on the Great Indian Peninsula Railway at a rate of Rs 270 per wagon for the whole distance. On arrival at Agra the Great Indian Peninsula Railway Company's Station Master demanded payment of higher rates, calculated per maund, and refused delivery until such rates were paid. The consignees paid under protest and sued both Railway Companies for a refund of the excess charges.

Held, that the contract for carriage of the goods for the whole distance was an entire contract with the receiving company, who were liable for the overcharge, if any, wrongfully demanded from the consignees. *Muschamp v. Lancaster and Preston Junction Railway Company*(1), *Webber v. The Great Western Railway Company*(2) and *Kalu Ram Maugraj v. The Madras Railway Company*(3) followed.

Held, also that a bye law of the Great Indian Peninsula Railway Company, which reserved to the Railway the right of remeasurement,

* Second appeal No 623 of 1904 from a decree of H G Warburton Esq. District Judge of Agra dated the 16th of April 1904, reversing a decree of Biba Baidya Nath Das, Munsif of Agra, dated the 21st of November 1903.

(1) (1841) 8 M and W, 421; 58 R R, 758 (2) (1865) 3 H and O, 771

(3) (1881) 1 L R, 3 Mad, 240

reweighment, recalculation and reclassification of rates, terminals and other charges at the place of destination and of collecting before the goods are delivered any amount that may have been omitted or under charged, did not authorize the Great Indian Peninsula Railway Company to alter the contract between the parties and charge at the place of destination maund rates instead of wagon rates.

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The facts of this case are fully stated in the Judgment of the Chief Justice.

The Hon'ble Pandit Sundar Lal, for the Appellants.

Babu Kedar Nath and Babu Mohan Lal Sandal, for the Respondents.

STANLEY, C J—This appeal is connected with Second Appeal No. 593 of 1904. The litigation arose under the following circumstances. The plaintiffs appellants, who carry on a grocery business at Rawatpara, Agra, under the style of Govind Ram Har Prasad, desiring to obtain chulies from Bezwada, inquired of the rate for the carriage of chulies per wagon load from Bezwada to Agra Fort and Agra Cantonment Stations from the Station Master at the Bezwada Station on His Highness the Nizam's Guaranteed State Railway, and were informed by him by letter, dated the 13th of September 1902, that the rate was Rs 270 per wagon load. The plaintiffs also made the same inquiry from the Station Master at the Agra Cantonment Station and obtained the same information. Acting upon this information they ordered two wagon loads of chulies from Bezwada and consigned the same to Agra Fort Station, obtaining two railway receipts, in each of which the freight at the rate quoted to them, viz., Rs 270 is entered. On the arrival of the goods at Agra Fort Station the Station Master demanded payment of higher rates, namely, maund rates, and refused to deliver the goods except on payment of the higher rates. The plaintiffs in order to obtain delivery paid the excess under protest and took delivery. They then brought a suit against the Great Indian Peninsula Railway Company and the Nizam's Guaranteed State Railway Company for the recovery of the amount so paid in excess of the amount mentioned in the railway receipts, and they claimed a decree for this amount with interest by way of damages, against either or both the defendant Companies. The Railway Companies defended the suit, Mr Alexander, District Traffic Superintendent of the Great Indian Peninsula Railway Company, representing both the Railways at the hearing before the learned Munsif. The Munsif dismissed the suit against the last men-

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tioned Company, but held that the Nizam's Railway was liable to refund the amount paid in excess of the amount for which that Company agreed to carry the goods, as mentioned in the railway receipts. From this decree the Nizam's Railway appealed, but did not make the Great Indian Peninsula Railway Company a party to the Appeal. In their memorandum of appeal they set up, amongst others, the following grounds of appeal, namely, that the amount claimed having been collected by the Great Indian Peninsula Railway the appellant Company was not liable to refund it, further that the appellant Company was not responsible for the quotations given by their Station Master at Bezwada, and that under the terms of the consignment note all goods were liable to recalculation of charges at destination. On the 23rd of January 1904, before the hearing of the appeal, the plaintiffs applied to the Court to bring upon the record the Great Indian Peninsula Railway Company as parties to the appeal. The learned District Judge, acting presumably under section 559 of the Code of Civil Procedure acceded to this appeal and directed that a notice fixing the 25th of February 1904 for hearing should be issued. At the hearing it was contended on the part of the Great Indian Peninsula Railway Company that, inasmuch as the plaintiffs did not appeal against the decree of the Munsif so far as it dismissed their suit as against the Great Indian Peninsula Railway Company, no relief could be given to them in the appeal as against that Company. The learned District Judge did not accede to this contention. He heard the appeal and came to the conclusion that the Great Indian Peninsula Railway Company was not justified in levying any freight over and above the amount specified in the freight notes, and was therefore liable to refund to the plaintiffs the amount claimed. Accordingly he decreed the claim of the plaintiffs against that Company and allowed the appeal of the Nizam's State Railway.

In the view which I take of the case, it is unnecessary to determine the question whether the Court below was right in adding the Great Indian Peninsula Railway Company as a party to the appeal under the provisions of Section 559 and in passing a decree against that Company. This question is one of considerable difficulty. It seems to me, upon the facts which have been established in evidence, that the plaintiffs cannot in any event succeed as against the Great Indian Peninsula Railway. The suit is one for damages for breach of a contract entered into with the Nizam's State Railway Company for the carriage

of the goods from Bezvada to Agra Fort. Only one contract was entered into, namely, with the Nizam's State Railway. To this Company the goods were delivered, and from it the freight notes were received. What the arrangements between the two Companies are as regards the interchange of traffic has not been disclosed. When a Railway Company receives and undertakes to carry goods from a Station on its Railway to a place on another distinct Railway with which it communicates this is evidence of a contract with the receiving Company for the whole distance, and the other Railway Company will be regarded as their Agents and not as contracting with the holder—*Melamp v. Lancaster and Preston Junction Railway Company*⁽¹⁾ *Hebber v. G. H. Railway Company*⁽²⁾. A receipt given by a Railway Company for goods to be sent to a place on another Railway and there to be delivered for one entire sum is one entire contract for the whole distance and constitutes an entire contract with the Railway which gave the receipt note. In the case of *Kalu Ram Mungiray v. The Malwa Railway Company*⁽³⁾ it was held that when two Railway Companies interchanged traffic, goods and passengers with through tickets, rates and invoices, payment being made at either end and profits shared by mileage, the receiving Company by granting the receipt note for goods to be carried over and delivered at a station of the delivering Company's line, does not thereby contract with the consignor of the goods as Agents of the delivering company. The contract with the receiving Company was held to be one and entire. So here in this case the contract was one and entire with the Nizam's State Railway Company and that railway alone appears to me to be responsible for the refusal to deliver the goods on payment of the freight agreed on.

For the foregoing reasons the suit against the Great Indian Peninsula Railway cannot in my opinion be maintained, but the Court of first instance properly, I think, held that the Nizam's State Railway Company is responsible in damages to the extent of the sum which was exacted from the plaintiffs by the Great Indian Peninsula Railway in excess of the sum for which the Nizam's Railway Company agreed to carry the goods.

But it is said that the Company is protected by the provisions of paragraph 31 of the Great Indian Peninsula Railway Goods

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(1) (1841) 8 M & W 421 53 R R 753 (2) (1861) 3 H & C 771

(3) (1881) 1 L R, 3 Mad 210

Civil Appeal
Nizam's State Railway
Company v. Great Indian Peninsula Railway Company

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(1) (1841) 8 M and W 421 58 R R 758 (2) (1863) 3 H and C 771

(3) (1881) 1 L R 3 Mad 240

Chunni Lal
N G S By

Tariff This paragraph runs as follows —“ It must be distinctly understood that the weight and description of goods, as given in the railway receipt and forwarding note, are inserted for the purpose of estimating the railway charges and the Railway reserves the right of remeasurement, reweighment, recalculation and reclassification of rates, terminals and other charges at the place of destination and of collecting before the goods are delivered any amount that may have been omitted or undercharged. It is contended that under this rule it is open to the Companies to alter the contract between the parties and charge at the place of destination mind rates in lieu of Wagon rates. I agree in the view expressed by the learned District Judge that this rule does not give the Company the power for which the Companies contend. The action taken by the Great Indian Peninsula Railway in exacting mindage instead of Wagon rates cannot in my opinion be considered to be covered by any of the words “ remeasurement, reweighment, recalculation, or reclassification of rates ”

It was further urged that the Station master at Berwada had no authority to enter into a special contract on behalf of the Company. The answer to this argument is that the contract was an ordinary and not a special contract.

I would therefore set aside the decree of the Lower Appellate Court and restore the decree of the Court of first instance with costs against the Nizam's State Railway in all Courts. As the Great Indian Peninsula Railway has been the cause of this litigation I would direct that Company to abide its own costs in all Courts.

BURKITT, J —I concur.

RICHARDS, J —I also concur.

By the Court —The order of the Court is that the decree of the Lower Appellate Court be set aside, and the decree of the Court of first instance restored with costs, in all Courts, against the Nizam's State Railway Company. The Great Indian Peninsula Railway will abide its own costs in all Courts.

Appeal decreed

The Calcutta Weekly Notes, Vol. XV, Page 195.

CIVIL APPELLATE JURISDICTION

Before Jenkins, C J, and Woodroffe, J.

HARI LAL SINHA

1

THE BENGAL NAGPUR RAILWAY COMPANY

SMALL CAUSE COURT REFERENCE No 1 of 1910

India : Patheas Act (IX of 1890) Sec 17—General Rules published in the ' Gazette of India —Adoption by a Railway Company—Sanction—Publication

1910
July 27

The general rules framed by the Governor General in Council and published in the *Gazette of India* by notification dated the 3rd July 1902, do not become operative as the rules of any individual Railway Company merely upon their adoption by the Company. It must be shown that the particular Railway Company made rules and that those rules have received the sanction of the Governor General in Council and have been published in the manner prescribed by the Act.

THIS was a reference by the Calcutta Small Cause Court and it arose in this way

One Hari Lal Sinha brought a suit in the Small Cause Court of Calcutta against the Bengal Nagpur Railway Company for the recovery of two sums of Rs 12 5 0 and Rs 8 5 0 respectively, alleged to have been illegally charged by the defendant Company as wharfage due on two consignments of grain despatched respectively from Kalikot and Cuttack to Shalmar. The suit was tried before Mr HARI NATH RAY, the Fourth Judge, who held as follows —

"This suit is for refund of two items one of Rs 8 5 0 and the other of Rs 12-5 0, levied on the plaintiff as wharfage. There was a contract for carrying 252 bags from Kalikot to Shalmar. The defendant Company brought 195 bags first and these goods were ready for delivery on the 6th October 1907. The remaining bags were brought later on and were ready for delivery on the 11th. The consignee took delivery on this latter date. He was charged Rs 12 5 0 as wharfage for not taking delivery of 195 bags in due time. The consignee maintained that he was not

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N G S Ry

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I would therefore set aside the decree of the Lower Appellate Court and restore the decree of the Court of first instance with costs against the Nizam's State Railway in all Courts. As the Great Indian Peninsula Railway has been the cause of this litigation I would direct that Company to abide its own costs in all Courts.

BURKITT, J — I concur

RICHARDS, J — I also concur

By THE COURT — The order of the Court is that the decree of the Lower Appellate Court be set aside and the decree of the Court of first instance restored with costs, in all Courts against the Nizam's State Railway Company. The Great Indian Peninsula Railway will abide its own costs in all Courts.

Appeal decreed

The Calcutta Weekly Notes, Vol. XV, Page 195.

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bound to pay the wharfage and he has assigned his claim for refund to the plaintiff

"The question is—was the consignee bound to pay the wharfage? It appears to me that he was not. The contract was for carrying 252 bags and it was only when the defendant Company had brought all the bags at Shalimar, that they could ask the consignee to take delivery. It was urged on behalf of the defendant that the consignee was bound to take part delivery and Rule 58, Part I, Goods Tariff, April 1907, was pointed out to me. It appears to me that the rule contemplates cases when there has been shortage or damage. Here there was no shortage or damage. The Company only sent the goods in two instalments.

"There was another contract for carrying some goods from Cuttack to Shalimar. The goods were ready for delivery on the 6th and they were taken delivery of on the 11th. A wharfage of Rs 8 5-0 had to be paid for the delay in taking delivery. This charge was certainly in accordance with the rules of the Company, but the plaintiff contends that the rules are not binding because they have not been published in the *Gazette of India* as required by sub section 3 Section 47 of the Indian Railways Act, (Act IX of 1890). It may be that the rules of the Government of India, dated 3rd July 1902, cover the sanction required by the above sub section but there is no getting out of the requirement of the publication in the *Gazette of India*. It has not been shown that there has been any such publication. So I hold that the rules of the Company in this respect are not binding. There is no doubt that the plaintiff is entitled to refund of Rs 12 5 0 and I also decide that the plaintiff is entitled to refund of the other sum, the claim for interest not being made out."

On the application of the defendant Company, the matter was re-heard before the Chief Judge, Mr A HASSAN, and the Fourth Judge, with the result, that they differed. The Chief Judge thereupon made the following reference to the High Court.

"Case stated for the opinion of the High Court, Calcutta by A HASSAN, Esquire, Officiating Chief Judge and BABU HARI NATH RAY, 4th Judge of the Court of Small Causes of Calcutta, under Sec 69 of Act XV of 1862 the Presidency Small Cause Courts Act

"The facts of the case are shortly these —

The plaintiff instituted a suit in the Small Cause Court for a refund of Rs 850 and Rs. 1250 paid to the defendant Company on account of wharfage. The plaintiff made over to the defendant Company 252 bags for transit from Kalikot to Shalimar, out of which the defendant Company brought to Shalimar 195 bags on the 6th of October 1907, and the remainder on the 11th of October on which date the consignee took delivery of the entire lot. Therefore, the defendant Company charged Rs 1250 as wharfage for 195 bags which were not taken delivery of in due time.

"The plaintiff despatched another lot from Cuttack to Shalimar which arrived at Shalimar on the 6th October, but delivery was not taken till the 11th of October. The defendant Company has charged Rs 850 as wharfage.

"As a difference of opinion has arisen between me and my colleague, the learned 4th Judge, BABU HARI NATH RAY, the following questions are referred to their Lordships for decision:—

"(1) Whether the rules under which the defendant Company charge demurrage are legally enforceable?

"(2) Whether the plaintiff was bound to take delivery of 195 bags (out of 252) which arrived at Shalimar on the 6th October 1907?

"With regard to the first question, the Railway Company is authorised under Sec. 47, Cl (f) of the Railways Act to make general rules for regulating the terms and conditions on which the Railway administration will warehouse or retain goods at any Station on behalf of the consignee or owner and subsection (3) provides that such rule shall not take effect until it has received the sanction of the Governor-General in Council and been published in the *Gazette of India*. By notification, dated the 3rd July 1902, published in the *Gazette of India* of the 5th July 1902, the Governor-General acting under sub sec (3), Sec 47 has sanctioned the general rules for regulating the terms and conditions on which the railway administration will warehouse or retain goods at any Station or Depot on behalf of consignee or owner and the Rule No 3 (2) limits the maximum which may be charged for demurrage, being not exceeding one anna per maund per day. Therefore, the demurrage which has been charged by the defendant Company not being in excess of the above rate is, in my opinion, perfectly legal.

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"With regard to the second question, I am of opinion that under rule No 58 the plaintiff was bound to take delivery of 190 bags which had been received on the 6th October and were ready for delivery and could not refuse because only a portion of the consignment had then arrived. That rule gives a warning to the consignees that their consignments are liable to be short or damaged or a portion only may be received, but that circumstance will not justify them in refusing to take delivery of such consignments and if they do so, they will remain at their risk and subject to the usual charge for wharfage.

"Therefore, the plaintiff having refused to take delivery of 190 bags was bound to pay demurrage charged under the afore said rule.

The reference was heard before the Chief Justice and Woodroffe, J who on the 18th January 1910, made the following order —

JENKINS, C J, —On the materials before us it is quite impossible to dispose of the case. In the first place it must be shown that this particular Railway Company has made rules and that those rules have received the sanction of the Governor General in Council and have been published in the Gazette of India. There is nothing on the record to show that that has been done. We have been referred to a general set of rules of the 8th July 1902. But there is nothing there which shows that those were the rules made by this Railway Company, and until this matter is made clear, it is impossible for us on a reference under Sec. 69 to deal with the case.

(The case having been referred back to the Small Cause Court the Chief Judge Mr PEARSON, and the Fourth Judge took further evidence and submitted the following report to the High Court —

"The High Court Bench, before which this reference came, has referred the matter back to this Court for a finding on the point whether this particular Railway Company has made rules and whether those rules have received the sanction of the Governor General in Council and have been published in the Gazette of India. The Attorney for the defendant Company states to this Court that he is not in a position to give any further evidence on the point and that he is not able to show that these particular rules, *qua* rules of this Railway Company, have received such

sanction or been published in the *Gazette*, otherwise than as rules imposed on all Railways by the Government by their notification, No 231, dated 3rd July 1902

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“ Mr. Ridsdale, Acting Goods Superintendent of the Railway Company, has been called and has given evidence of the existence of Rule No 100 in the Goods Tariff of his Railway which, he states, was in force at the time of the matters in suit and by which the amount payable by the Company is fixed at a rate within the rate sanctioned by the Government in the notification abovementioned. He further states that these wharfage rules (of which No. 100 is one) have always been acted upon by the Company since April 1907, but his evidence is (and our finding must be in accordance with his statement) that they have not been published in the *Gazette of India*. To establish Government sanction to the rules in the Goods Tariff of his Railway he relies upon two letters which passed between the Agent and Chief Engineer of the B N. Railway Company on the one hand and Junior Consulting Engineer to Government of India for Railways on the other.

The witness states that he is not in a position to show that the Government officer referred to had authority from the Governor-General in Council to convey sanction of this kind.

“ In returning the original reference we also forward the Goods Tariff and the letters spoken to by the witness ”

Their Lordships' Judgment was as follows —

It now appears that the rules have not been published in the *India Gazette* in the manner prescribed by the Act. The plaintiff's contention must therefore succeed and we so answer the reference. We make no order as to costs.

The Calcutta Weekly Notes Vol. XVI Page 360.

CIVIL REVISIONAL JURISDICTION.

Jenkins, C.J. and N. R. Chatterjee, J.

THE BENGAL NAGPUR RAILWAY COMPANY

(DEFENDANT), PETITIONER,

v.

RAMPROTAS GONESHAM DASS (PLAINTIFF),

OPPOSITE PARTY.

RULE No 4273 OF 1911.

1912
January, 19

Indian Railways Act (IX of 1890), Section 47—Rules "made" by a Railway Company, what are—Sanction of Government—Publication—General rules framed by Government

Rules adopted by a Railway Company though not originally prepared by it would satisfy the requirement of Section 47 of the Railways Act if they were subsequently sanctioned by the Governor-General in Council and published in the *Gazette of India*

Hari Lal Sinha v The Bengal Nagpur Railway Company (1) referred to.

This was a Rule granted on the 28th of July 1911 against the order of BABU NISTARAN BANERJEE Small Cause Court Judge at Sealdah, dated the 29th of April 1911.

The suit was brought against the Bengal Nagpur Railway Company for refund of wharfage charges alleged to have been illegally realised from the plaintiff. The claim was laid at Rs. 158

The defendant admitted that the money was realised agreeably to the Rules of the Company.

The consignment in question arrived at its destination on 5th August 1910, and plaintiff obtained delivery of the goods on 9th August 1910, on payment of freight and other charges legally payable. The goods, however, were not removed from the Railway premises till 27th August. This the plaintiff was allowed to do on payment of wharfage or godown rent. The delay in the delivery of the goods and their removal from the godowns was due to some dispute between the parties, the plaintiff—

iff insisting on the weightment of the goods, the defendant Company objecting to the same

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The plaintiff claimed the refund on the ground that the Railway Company could not legally recover wharfage under the Rule relied upon inasmuch as they were not made and published in the *Gazette of India* in the manner prescribed by Section 47 of the Act.

The trial Judge held that the Rules were not made as contemplated by the Act by the Railway Company. Nor were they published as such in the *Gazette*, and he accordingly decreed the suit.

The defendant Company thereupon moved the High Court and obtained this Rule.

Mr. Bargan and Babu Monmath Nath Mukherjee for the Petitioner.

The Opposite Party appeared in person. The Judgment of the Court was as follows —

JENKIN, C J — This application arises out of a suit brought against the Bengal Nagpur Railway Company for the refund of wharfage charges alleged by the petitioner to have been illegally realised from him.

A decree was passed against the Railway Company in the Petitioner's favour.

The Railway Company then obtained a Rule under Sec. 25 of the Provincial Small Cause Courts Act, 1887, questioning the validity of the decree, and it is with that application that we are now concerned.

Having regard to the circumstances of the case and the materials on the record, the only point that arises for decision is whether Rules have been made, sanctioned and published as prescribed by Sec. 47 of the Indian Railways Act, 1890, which entitled the Railway Company to make the wharfage charges claimed by them. Sec. 47 provides that "every Railway Company shall make General Rules consistent with this Act for regulating the terms and conditions on which the Railway Administration will warehouse or store goods at any Station on behalf of the consignee or owner." It is however enacted by sub sec. (3) that a Rule made under this section shall not take effect until it has received the sanction of the Governor General in Council and been published in the *Gazette of India*.

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The Rules on which the Railway Company relies are those which were published in the *Gazette of India* on the 3rd of July 1902, and those Rules were sanctioned by the Governor-General in Council

But the question is whether they were made by the Railway Company

Rules adopted by the Railway Company, though not originally prepared by it, would come within this description, and Rules so adopted, if then sanctioned by the Governor-General in Council and published in the *Gazette of India* would satisfy the requirements of Sec 47

It is not clear that the learned Judge considered the case from this point of view. Moreover, he appears to have regarded the decision in *Hari Lal Sinha v The Bengal Nagpur Railway Co (1)* as in some measure governing this case

But this is not so that case came before the High Court on a reference under Sec 69 of the Presidency Small Cause Courts Act, with the limitations that procedure implies, and the decision turned wholly on the finding of the Small Cause Court that it had not been proved that these were Rules made, sanctioned and published as required by the Act

Here, on the other hand, the question is whether the Rules were so made, sanctioned and published, and this question must be considered afresh by the Courts of Small Causes in the light of the above remarks

It is to be regretted that any doubt on this point should be permitted to continue

The remedy is simple and it may reasonably be hoped that it will be applied, so that Railway Companies may be spared the expense and annoyance of that class of litigation of which the present suit is a type

The rule is therefore made absolute, the decree of the Small Cause Court is set aside, and the case sent back to the Small Cause Court for a fresh hearing in the light of the above remarks. The parties will be at liberty to adduce further evidence for the purpose of establishing or negating the identity of the Rules (if any) made by the Railway Company with those sanctioned and published, and I would here remark that it is not

necessary, as the learned Judge seemed to suppose that this identity should appear on the face of the circular or the Gazette

The costs of this application, which we assess at two gold mohurs and of the suit up to this stage will abide the result of the re-hearing.

N. R. CHATTERJEE, J.—I agree.

Rule made absolute

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The Calcutta Weekly Notes, Vol. XVI., Page 359.

CIVIL REVISIONAL JURISDICTION

Before Jenkins, C J. and N. R. Chatterjee, J.

SURAJA MULL NAGAR MULL (PLAINTIFF), PETITIONER

v.

THE EAST INDIAN RAILWAY COMPANY (DEFENDANT),

OPPOSITE PARTY

RULE No 4979 OF 1911

Indian Railways Act (IX of 1890), Sec 47.—Rules made by Railway Company, Validity of—Sanction of Government and publication

1913
January, 19

Upon the finding of the Small Cause Court that the rules of the East Indian Railway Company in question regarding the recovery of demurrage charges from consignees of goods despatched by the Railway, were made sanctioned and published as prescribed by Sec 47 of the Railways Act

Held—That there was no case for the exercise of the Court's power of revision with reference to the Small Cause Court's decision dismissing the suit for refund of demurrage charges paid

This was a Rule granted on the 28th of August 1911, against the order of BABU J N CHUCKERBUTTY, Small Cause Court Judge at Howrah, dated the 27th of June 1911 *

The suit was for refund of Rs 93 which the plaintiff was obliged to pay to the defendant Company as demurrage for making a delay of 9 days in taking delivery of jute-bales sent from Badshapur to Howrah by plaintiff's agent, on the allegation that

* Small Cause Court Suit No 426 of 1911
See Appendix A, Case No 29

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the levying of the charge was unauthorized and illegal as the Rule under which the charge was levied was not framed by the Company and not sanctioned by the Governor General in Council and not published in the *India Gazette* in the manner provided in Sec 47 of the Railways Act

The defendant Company in defence produced a mass of documentary evidence. The Small Cause Court Judge after going through them came to the conclusion that the Rules of the Company were duly framed by the Company and approved by the Governor General in Council and published in the *Gazette of India*, and that the Company is entitled to retain the demurrage charges levied by it from the plaintiff. In this view he dismissed the suit.

Mr Garth and Babu Probodh Chundra Roy for the Petitioner
Messrs S P Sinha, Graham and G B McNair for the Opposite Party

The Judgment of the Court was as follows —

JENKINS C J — In my opinion the Rule should be discharged. The Judge of the Small Cause Court finds on the evidence before him that the Rules under which the Railway Company acted were made sanctioned and published as prescribed by Sec 47 of the Indian Railways Act 1890, and in the circumstances no case arises for the exercise of our powers of revision. The applicant should pay the costs of the application which we assess at one gold mohur.

N R CHATTERJEE, J — I agree
Rule discharged

The Indian Law Reports, Vol. XVI. (Bombay) Series,
Page 434.

ORIGINAL CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and
Mr. Justice Bayley.*

LALJIBHAI SHAMJI AND OTHERS
(ORIGINAL PLAINTIFFS), APPELLANTS

1.

THE GREAT INDIAN PENINSULA RAILWAY
COMPANY (ORIGINAL DEFENDANTS), RESPONDENTS *

*Railway Company—“Terminal Charges”—Right of G I P Railway Com- 1892
pany to levy terminal charges—Statute 12 and 13 Vict., Cap LXXXIII January, 15
(Loc and Pers)—Government sanction*

By the Act of Incorporation of the defendant Company it was enacted that it should be lawful for the Railway Company and the East India Company to enter into such contracts, &c, as they thought fit (*inter alia*) “for performing all matters and things necessary or convenient for carrying into effect the making, maintaining and working the railway * * * including any provision as to the tolls, receipts and profits thereof. Subsequently the defendant Company and the East India Company entered into an agreement with each other, under which the defendant Company were empowered to make certain charges called ‘terminal charges’—charges which are levied on account of the carrying of goods to and from the wagon loading and unloading them on and from the wagon and for the use of the Company’s premises till the goods are removed

The plaintiffs objected to these charges as not within the scope of the powers conferred by the Act of Incorporation of the defendant Company

Held, that these charges were within the authority given by that Act such charges—if not strictly “tolls”—were certainly charges for performing of services, if not ‘necessary at any rate convenient for the working of the railway,’ and payment of such services might also properly be regarded as a source of “profit to the Railway Company within the meaning of that Act

The only ‘terminal charge’ sanctioned by Government was a charge sanctioned in 1865, and then expressly defined as ‘including collection

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and delivery' The defendant Company had since that date given up collecting and delivering but there had been no new scale of terminal charges submitted for sanction or sanctioned

It was consequently contended by the plaintiffs that the terminal charge now levied had never been sanctioned

Held that a review of the proceedings leading to the sanction of 1865 showed that Government had contemplated the possible abandonment by the Company of collection and delivery when it sanctioned the rate then fixed and that consequently it must be presumed that Government had left it to the defendant Company to make such deductions in case of abandonment of this portion of their services as they should think proper, which they had done

APPEAL from Farran, J (See I L R, 15 Bom, 337)

The plaintiffs sued to recover Rs 1,34,152-11-0 from the defendants The plaintiffs were cotton merchants in Bombay to whom large consignments of cotton were made from up country stations They complained that before delivery of such consignments the defendants, in addition to freight for carriage, exacted from them a further charge, under the name of a 'terminal charge,' of Rs 2 7 1 for 27 maunds at Bombay, and twelve annas and five pies for 27 maunds at the forwarding station They alleged that during the three years prior to suit they had been thus obliged by the defendants to pay, as terminal charges, a total sum of Rs 1,34,152-11 0, which they now sued to recover, contending (1) that such charge was wholly illegal, and (2) that, if the defendants were entitled to any such terminal charge, the amount levied was excessive

The defendants in their written statement contended that they were entitled to levy terminal charges, subject only to the sanction of Government as to rate and amount, and that a much higher rate had been sanctioned than had been charged to the plaintiffs They relied on Statute 12 and 13 Vic, c 83, (Loc and Pers), and on agreements made from time to time with Government, and in particular on Bombay Government Resolution No 2052 of 1865, Railway Department, and Bombay Government Notification, Railway Department, dated 30th April, 1868

Anderson (Budrudin Tyabji with him) for Appellants

Latham (Advocate General) (Jardine with him) for Respondents

In addition to the arguments addressed to the Court below, it was argued, for the appellants, that the only sanction ever asked for or obtained by the defendants, was for a gross terminal charge including collection and delivery. That was so because, at that time, the Company used to undertake collection and delivery, sometimes bringing the goods from a considerable distance. It was impossible to say how much of the rate of Rs 5 then allowed the Government had allowed for collection and delivery, as there was no apportionment, but it was reasonable to suppose it was something substantial. Since that time collection and delivery had been abandoned by the defendant Company, but no new rates had been submitted for sanction, or sanctioned. Consequently no terminal charge, as now understood, had ever been sanctioned. And this was no mere technicality. There was nothing whatever to prevent the Railway Company, at this moment, charging the whole Rs. 5, or, at any rate, merely an anna or so less, although omitting to do so important part of the work as remuneration for which that sum had been originally fixed by Government.

The judgment of the Court was delivered by

SARGENT, C.J. —This appeal arises out of a suit by the plaintiffs, who are cotton merchants, to recover from the G. I. P. Railway Company the sum of Rs 1,34,152-11-0 alleged to have been paid by them in respect of terminal charges on goods consigned to them during the three preceding years and which, they contend, the Railway Company had no right to levy, whether as being wholly illegal, or illegally excessive.

The Company base their right to levy the charges on their Incorporating Acts XII and XIII Vict, c 83, Sec 5, and on their agreement with the East India Company, dated 17th August, 1849, clause 8, on the subsequent contracts, agreements, and arrangements from time to time made between the Company and Government, and in particular on Government Resolution No 2052 of 1865, and the Bombay Government Notification dated 30th April, 1868. The Company also contend, if necessary, that the terminal rates levied by them, and complained of in this suit, have always been and are reasonable. The 5th Section of the Act of Incorporation of the Railway Company enacts "that it shall be lawful for the Company from time to time to enter into and conclude with the East India Company, on account of the Government of India, such contracts, agreements, and arrange-

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ments as the respective parties may think fit and agree upon, for making any railway, and for maintaining and working the same and for the other objects and purposes aforesaid" (which as shown by Section I include doing and performing all matters and things "necessary or convenient for carrying into effect the making, maintaining, and working of the railway,") and also "including any provision as to the tolls, receipts and profits thereof"

In virtue of this section, an agreement was made on the 17th August, 1849, between the Railway Company and the East India Company, by which the Company agreed to construct the railway on certain terms, and by the 8th Section of that agreement it was provided that the Railway Company should and would allow the use of the railway to the public on such terms as should be approved by the said East India Company, and that the Company should be authorized and empowered to charge such fares for the carriage of the passengers and goods, and such tolls for the use of the railway, as should have been approved by the East India Company, and should not, in any case charge any higher or different fares or tolls without such approval being first obtained. The history of the terminal charges commences with a correspondence which took place in 1865 between the Agent of the Company and the Consulting Engineer of the Government for Railways. In a letter dated 8th August, 1865, the Agent of the Company complains of the insufficiency of the goods rates, terminal charges, and rates of insurance which were then charged, and asks that a maximum should be sanctioned by Government in respect of them, within which the Company should have power to vary the rates and charges. In paragraph 5 of that letter the Agent says "We propose that the excessively low terminal charge of 4d per ton should be increased, and that there should be terminal charges which more adequately cover the expenses connected with station accommodation, loading, unloading, delivery &c., of goods, fixed at a maximum of Rs 5 per ton in Bombay and Rs 2 8 0 per ton at country stations. The Company are of course to be at liberty to charge loss if they like, and the terminal would include collection and delivery within certain limits where done by the Company or their Agents, a reduction being made where the service was not performed"

On the 10th August, 1866, the Consulting Engineer for Railways writes to the Agent, asking him to prepare a scale for goods

including terminals, as he may deem advisable, and forward it for sanction of Government. On the 12th August, 1865, the Agent replies that the scales of goods rates, terminals, and insurance rates, to which he solicits the sanction of Government, are the maximum rates enumerated in his communication of the 8th instant.

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On the 15th August, 1865, the Government passed a resolution sanctioning the above scales of tolls, terminal charges, and rates of insurance, and specifying the maximum rates for terminal charges, including collection and delivery, to be Rs 5 per ton at Bombay and Rs 2 8 0 per ton up country.

It appears that for some years past the Railway Company have ceased to collect and deliver goods, and that the terminal charges which the plaintiffs have been paying have been exclusively for services performed, and accommodation afforded, in the premises of the Company, in connection with goods consigned to them for carriage.

It was not seriously contended before us that such terminal charges were not within the purview of Clause 8 of the agreement of 17th August, 1849, between the East India Company and the Railway Company, by which the use of the railway is to be allowed the public "on such terms" as the East India Company might sanction, but it was said that the above agreement, so far as it relates to purposes and objects other than those within the contemplation of Section 5 of the Incorporating Act, is *ultra vires* and that terminal charges are not included in the above purposes and objects. We entirely agree with the Division Court that this objection is ill founded. The terminal charges in question are levied on account of the carrying the goods to and from the waggon, loading and unloading them on and from the waggon and for the use of the company's premises, where the goods frequently remain for some time before they are taken away. Such charges if not strictly perhaps "tolls," are certainly charges for performing of services, if not "necessary," at any rate "convenient for the working of the railway." Again, such services must be performed if the railway is to be used, and if performed by the servants of the Railway Company, who are the obvious persons to do the work, payment for such services may be properly regarded as a source of "profit" to the Company for which the Act expressly provides.

It was argued, however, that the sanction of Government in 1865, as required by the agreement of 1849, was not given to the

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charges now complained of, but to a maximum charge for terminals, including the collection and delivery of goods. This point would appear not to have been expressly taken in the Division Court, but, as the company have to prove their right to make the charges complained of, it can be properly taken on appeal. It was argued by the Advocate General that the notification of 1868 only mentions "terminals," and is silent as to collecting and delivering, but we think that it must be read in connection with the resolution of Government in 1865, where the "terminals" sanctioned by Government are expressly defined as including collection and delivery. At the same time the Government resolution of 30th April, 1868, must, we think, be read in connection with the correspondence already referred to between the Company's Agent and the Consulting Engineer for Railways, and which was before the Government when the resolution was passed.

The Government sanction to the maximum charge of Rs 5 per ton for terminal charges, including collection and delivery, "as recommended by the Agent," must, therefore, be understood, and would be properly understood, by the Company, as given on the assumption that the Railway Company might possibly give up collecting and delivering goods—the Company, however, making, at the same time, a deduction for the work of collecting and delivering, as stated by the Agent in his letter of 8th August, 1866. If this be so, the sanction given by Government left it presumably to the Company to make such deduction as it might think advisable, and, if the plaintiffs objected to it, the only course open to them was to have applied to Government to withdraw, or modify its sanction, but, in any other view of the sanction under consideration, it would, at the utmost, be only open to the plaintiffs to contend that, if a reasonable sum in respect of collection and delivery were added to the actual charges paid by them for the terminals now under consideration, the total would exceed the maximum Rs 5 per ton at Bombay, or Rs 2 8 0 at up country stations, as sanctioned by Government. But that has been no part of the plaintiffs' case, which was confined to the charges being wholly illegal, or at any rate illegally excessive.

It remains to consider one other objection urged for the plaintiffs, viz., that the Government of Bombay had no authority to sanction the charges. Section 28 of the agreement provides "that any notice, direction, approval, or sanction, to be given or signified, on behalf of the East India Company, for any of the

purposes of these presents shall be sufficient and binding if signed by the Secretary or Deputy Secretary of the East India Company in London, or by the Secretary of the Government at Bombay, authorized to act on behalf of the East India Company, and that the East India Company shall not, in any case, be bound in respect of matters aforesaid unless by some writing signed in the manner before mentioned "

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According to this Section the sanction notified in the *Bombay Gazette* on 30th April, 1868, signed by the Secretary of the Bombay Government, (and which must be presumed to have been duly authorized in that behalf), was a sufficient authority to the Railway Company to charge the rates mentioned in it and the Company were not, in our opinion called upon to give any further evidence of the requisite sanction

However, it has been urged that Section 28 was itself *ultra vires*, because it was said the East India Company could not delegate the necessary "sanction" to the Government of Bombay, but the Act of Incorporation left it to the East India Company, without any restriction whatever, to enter into such agreement with the Railway Company, in all respects, as it might think best in furtherance of the objects and purposes for which the Company was formed, and the East India Company could, therefore, fix whatever form of sanction it thought best to insist on

We must, therefore, confirm the decree, with costs on the appellants

Decree affirmed

Attorney for Appellants —*Mr Mir a Husein Khan*

Attorneys for Respondents —*Messrs Little, Smith, Frere and Nicholson*

In the High Court of Judicature for the
North-West Provinces

APPELLATE CIVIL

*Before The Honorable P. C. Banerji, Judge, and
The Honorable H G Richards, Judge*

SHIAM LAL, MINOR UNDER THE GUARDIANSHIP OF
LALA JAI NARAIN (PLAINTIFF), APPELLANT

v

EAST INDIAN RAILWAY COMPANY THROUGH
AGENT (DEFENDANT), RESPONDENT *

1905
July, 11

*Non delivery of goods—Prior debt due by the consignee—Duty of Railway
Company to sell detained goods—Particulars of liability—Notice of—
Act IX of 1890 S 55 (2)*

A Railway Company can detain goods in exercise of the powers conferred upon them by S 55 of the Indian Railway Act No IX of 1890 for prior debts due to them by the owner. They are not bound under Sub-section 2 of the said Act to sell the goods but they ought to inform him distinctly in time that his goods are detained owing to a debt due to the Company giving full particulars.

This is a suit against the East Indian Railway Company for damages sustained by the plaintiff by reason of the non-delivery of 100 sacks of indigo seed. It appears that the indigo seed was consigned to the plaintiff on the 26th of January from Delhi. The invoice and the Railway Receipt were received by the plaintiff on the 28th of January and on the same day he applied for delivery and was refused through his Agent. The Railway Company plead that they detained the goods in exercise of the powers conferred on them by Section 55 of the Railways Act No IX of 1890. The lower Court finds that there was a prior debt due by the plaintiff, and upon this finding and the other findings we are bound to affirm the decree dismissing the plaintiff's claim based on non delivery.

* Second appeal from the decision of the Judge of Allahabad dated the 22nd day of September 1903. Case No 47 of 1904.

The plaintiff further contends that under Sub section (2) of the same section the Railway Company were bound to sell the goods, and he alleges that by reason of the delay in selling or omission to sell the goods he sustained further loss. We cannot hold that Sub-section (2) imposes any liability or duty upon the Railway Company to sell. It merely empowers them to do so. Although on the findings of the lower Appellate Court we feel bound to affirm this decree, we at the same time must express our disapproval of the conduct of the Company. We consider that when a Railway Company purport to exercise the rights conferred on them by Section 55, they ought to make it absolutely clear to the person whose property they detain, the nature of the right which they purport to exercise and give particulars of the liability in respect of which they claim the right. This we think ought in the ordinary course to be done in writing, and if it is impossible to do so at the moment, the earliest possible opportunity should be taken to communicate in writing the fullest particulars and so avoid all possibility of mistake. In the present case a letter was given in evidence from the District Traffic Superintendent at Delhi to the Station Master dated the 20th of April 1901 in the following terms — "Give him (plaintiff) distinctly to understand that his consignment has been so detained under the existing rule of the Company." In our opinion that plaintiff ought to have been made distinctly to understand not on the 20th of April but on the 28th of January that his goods were being detained not under the existing rules of the Company but in exercise of the rights of the Company to detain his goods because he was indebted to the Company in the sum of Rs 120 11-0 which the Company had demanded from him and which he had neglected to discharge. If this had been done, it would have been impossible for the plaintiff to have made any mistake, and possibly heavy loss might have been avoided. To mark our disapproval of the way in which the Company acted we direct that they get no costs in any Court, and we accordingly vary the decree of the Court below by directing that the parties abide their own costs in all Courts.

Shyam Lal
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The Indian Law Reports, Vol. XIV. (Bombay) Series,
Page 57.

ORIGINAL CIVIL

*Before Sir Charles Sargent, Kt, Chief Justice, and
Mr. Justice Bayley.*

THE GREAT INDIAN PENINSULA RAILWAY
COMPANY, PLAINTIFFS

v.

HANMANDAS RAMKISON AND VIRJI HANSRAJ,
DEPENDANTS *

1889
September,
27

Stoppage in transitu—Railway receipts—Effect of endorsing railway receipts—Title of indorsement of such receipts—Contract Act (IX of 1872), Sec 10.

The firm of China Devakaran carried on business in Bombay A., the agent of the firm, bought from the first defendant, Hanmandas at Bijapur, a quantity of wheat which at A's request was on the 28th and 29th May 1889 consigned by Hanmandas to the firm of China Devakaran at Bombay, on the understanding that the consignees were not to have the wheat until they had paid the *hundis* drawn in respect of it. The wheat was sent to Bombay on the 28th and 29th May, 1889, in three consignments, viz., of 56, 104 and 181 bags respectively, and two *hundis* for Rs. 1,000 and Rs. 1,500 respectively, payable at sight were drawn by A. in Bijapur on the firm of China Devakaran in Bombay, and were given by him to the first defendant, Hanmandas, who thereupon handed to A. the three railway receipts for the three consignments which had been despatched by the first defendant's agent at Bijapur Railway Station. The *hundis* were sent by the first defendant Hanmandas to his agent in Bombay for collection. The *hundi* for Rs. 1,000 arrived in Bombay on the 31st May, and was paid on the 1st June. The *hundi* for Rs. 1,500 arrived in Bombay on the 1st June, and was dishonoured on the 2nd June by the firm of China Devakaran which afterwards stopped payment and became insolvent. The railway receipts given by the first defendant to A. at Bijapur were in the following form—

Received from Hanmandas Ramkison the undermentioned goods, 181 bags of wheat

"This receipt must be produced by the consignee,* or the goods will not be delivered, if he does not himself attend, he must endorse a request for delivery to the person to whom he wishes it made. If the consignee

* Small Cause Court Suit No 186
14,316 of 1889

ment or this railway receipt, is sold one or more times, the endorsement must be a distinct order to deliver to a certain person or firm, and this order must be on a one anna stamp. If more than one order appear on the face hereof, each order must bear a stamp.

I (we) hereby certify that I (we) am (are) aware that the Southern Malabar Railway has received the abovementioned goods subject to the conditions noted on the back, and that I (we) agree that it should receive them subject to these conditions.

"(Sender's signature)

On obtaining these railway receipts, A sent them at once to the firm of China Devakaran in Bombay, and on the 31st May, 1889, they were endorsed by China Kanji a member of the firm, to the second defendant, Virji Hansraj, to secure an advance of Rs. 2000. The endorsement was as follows:—Signature of China Devakaran. I have sold the delivery, as per this receipt, to Virji Hansraj. The handwriting of China Kanji. Two consignments (viz. 56 bags and 104 bags) and part of the third (viz. 73 bags out of 181) had arrived in Bombay by the 2nd June, in bags bearing China Devakaran's marks. On that day the second defendant, Virji Hansraj, applied to the Railway Company for delivery, and paid full freight on all three consignments. He was allowed to remove the 56 bags and the 104 bags. After having done this he loaded his carts with the 73 bags, which had then arrived out of the consignment of 181 bags without any objection on the part of the Railway Company, but he was not allowed to take them out of the station yard, and the 73 bags were consequently unloaded, and together with the balance of the consignment of 181 bags, which subsequently arrived, were retained by the Railway Company. The reason given by the Company's servants for the detention was the receipt of a telegram sent by the first defendant Hanmandas from Bijapur, on hearing of the dishonour of the hundi for Rs. 1,500 directing that the 181 bags should not be delivered. At the trial the Judge found that this telegram had probably been received before all of the 73 bags had been loaded into the carts.

Held—

(1) That there was no such delivery of the 181 bags to China Devakaran's agent at Bijapur as to deprive the first defendant Hanmandas of his right of stoppage in transitu.

(2) That there was such a delivery of the 73 bags at the Railway Station to the second defendant, Virji Hansraj as to determine the first defendant's right of stoppage in transitu. It was to be assumed that the first defendant's telegram did not arrive in time to prevent the bags being placed with the consent of the Railway Company, on the second defendant's carts, for it was not until the carts had been loaded that the Company's servants interfered to prevent their leaving the station yard. Before that time the freight for the 73 bags had been paid by the second defendant, and the railway receipt had been given up to the company duly signed by the second defendant's servant. Everything had been done on the part of the Company to divest themselves of their lien of

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G I P By carriers for the mere fact that the carts were still standing in the goods compound of the Railway Station after the bags had been placed on them could not affect the question there being no suggestion that the matter as between the Company and the second defendant had not been completely settled

(3) That the railway receipts were not instruments of title within the meaning of Section 103 of the Indian Contract Act (IX of 1872) and that by endorsing and handing them over the firm of China Devakaran did not assign them to the second defendant within the meaning of the said section

CASE stated for the opinion of the Judges of the High Court by W L Hart, Chief Judge of the Court of Small Causes at Bombay

"1 This was an interpleader suit brought by the G I P Railway Company to determine the question of title to 181 bags of wheat in their hands which the first defendant claimed to stop in transit as the unpaid vendor of the insolvent consignee, and of which the second defendant claimed delivery as the holder of the railway receipt of Southern Mahratta Railway Company for the goods endorsed to him by the consignee to secure an advance made on them

"2. These 181 bags formed one of three consignments of 56, 101 and 181 bags which were consigned by the first defendant at Byapur on the 28th and 29th May, 1889, to the firm of China Devakaran in Bombay at the request of their agent in Byapur, on the understanding that the consignees were not to move the wheat till they had paid the *hundis* drawn in respect of it

"3 The *hundis* so drawn by China Devakaran's agent in Byapur in respect of these consignments were two in number, for Rs 1,000 and 1,500 respectively, drawn on the firm of China Devakaran in Bombay and payable at sight and were sent by the first defendant to his agent in Bombay for collection

"4 The former of these two *hundis* arrived in Bombay on 31st May, and was paid on 1st June. The latter, which arrived here on the 1st June, was dishonoured on the 2nd by the firm of China Devakaran, who afterwards stopped business and filed a petition in insolvency

"5 On receiving these two *hundis* from China Devakaran's agent at Byapur, the first defendant handed to him the three receipts of the Southern Mahratta Railway Company for the three consignments of 56, 101 and 181 bags which had been despatched by the first defendant's forwarding agent at the Byapur Railway Station

"6 The form of receipt in use by the Southern Mahratta Railway Company is somewhat peculiar, and differs from that used by the other and older Railway Companies in Bombay, especially in the notification printed in English and Marathi at the foot of it I would, therefore, solicit particular attention to the railway receipt, exhibit B (original annexed), for the 181. (1)

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(1) The railway receipt was in the following form:—

"SOUTHERN MAHRATTA RAILWAY

'GOODS RECEIPT NOTE

'Bijapur Station dated

"Received from Hanman Das Ramkison the undermentioned goods —

| Consignee | Number of Articles | Description | Paid |
|-----------------|--------------------|---------------|------|
| China Devakaran | 181 | Bags of wheat | |

" This receipt must be produced by the consignee, or the goods will not be delivered, if he does not himself attend, he must endorse a request for delivery to the person to whom he wishes it made. If the consignment or this railway receipt is sold one or more times the endorsement must be a distinct order to deliver to a certain person or firm, and this order must be on a one anna stamp. If more than one order appear on the face hereof each order must bear a stamp.

' I (we) hereby certify that I (we) am (are) aware that the Southern Mahratta Railway has received the abovementioned goods subject to the conditions noted on the back, and that I (we) agree that it should receive them subject to these conditions

' (Sender's signature)

"

"7 The three railway receipts mentioned in paragraph 5 were immediately sent by their agent at Bijapur to the firm of China Devakaran in Bombay, and by China Kanji, a member of that firm, were endorsed to the second defendant to secure an advance of Rs 2,000 on 31st May in the following form written across a one anna receipt stamp —

"Signature of China Devakaran I have sold the delivery as per this receipt to Virji Hansraj The handwriting of China Kanji "

"8 The consignments of 56 and 104 bags and 73 bags out of the consignment of 181 had all arrived in Bombay by 2nd June in bags bearing China Devakaran's marks, into which they had been packed by the first defendant in his warehouse at Bijapur,

G I P By and some of which belonged to China Devalaran, while others had
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 Hanmandas been purchased for them and debited to their account by the first
 Ramk son defendant
 and
 Virji Hansraj

"9 The second defendant applied to the Railway Company by his servant for delivery on 2nd June, and paid the full freight on all the three consignments. After some delay, owing to a mistake of this servant in regard to the signature of the delivery order at the foot of the plaintiffs' advice notes accompanying their bills for the freight, he was allowed to remove the 56 bags and the 104 bags in carts hired by him on the second defendant's account of the carting agent at the Wari Bandar Goods Station, who is not a servant of the plaintiffs.

"10 After the 56 bags and the 104 bags had been so removed, the second defendant's servant without objection on the part of the plaintiffs in like manner loaded into the carting agent's carts, with a view to their removal, the 73 bags which had then arrived out of the consignment of 181 bags. But, on his proceeding to sign a receipt for the delivery of these goods, the plaintiffs' servants refused to allow him to do so, and without such receipt they would not issue the gate pass necessary to allow the carts to leave the station-yard with the 73 bags. These were accordingly unloaded, and together with the balance of the consignment of 181 bags, which subsequently arrived, were retained by the plaintiffs.

"11 The reason given for this refusal on the part of the plaintiffs' servants was the receipt of a telegram despatched by the first defendant from Byapur (on being apprised of the failure of China Devalaran to pay the *hundi* for Rs 1,500) on the same 2nd June to the Goods Traffic Inspector at Wari Bandar in the following terms — '181 and 104 bags wheat marked 596 and 598 don't deliver to China Devalaran till further intimation.'

"12 There was no proof of the exact time when this telegram was received by the Goods Traffic Inspector at Wari Bandar. I found, however, that he had certainly not received it before the 73 bags arrived at Wari Bandar, but had probably received it before they had been all loaded into the carts.

"13 It is usual in Bombay among merchants engaged in the grain trade for railway receipts of the Southern Mahratta Railway Company to be endorsed by one holder to another frequently many times, and each time upon a oneanna receipt stamp. These receipts so endorsed are considered as representing the goods,

and entitling the last endorsee to delivery to such an extent that many merchants in Bombay advance money on them to the amount of several lakhs of rupees yearly

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"14 On these facts I held, in regard to the first defendant's right of stoppage in transit under Section 99 of the Indian Contract Act IX of 1872,

"First, (on the authority of *James v. Griffin* (1) and Benjamin on Sale (4th ed.), p 853), that there had not been such a delivery of possession of the 181 bags to Chinn Devakaran's agent at Bijapur as disentitled the first defendant to exercise his right of stoppage in transit, and,

"Secondly, that there had not been such a delivery of possession to the second defendant's servants at Warri Bandar as determined the first defendant's right of stoppage in transit in regard to the 73 bags. This ruling was based—having regard to the axiom enunciated in *Bell v. Clark* (2) that the Courts should favour the right of stoppage in transit (see also Benjamin on Sale, 4th ed., p 843)—partly on the determination by the first defendant's telegram of the plaintiffs' authority to deliver to Chinn Devakaran, partly on the authority of the Judgment of Scott, J, in the unreported case of *Haji Sher Mahomed v. The B B and C. I. Railway Company*, and partly on the fact of the agreement between the first defendant and Chinn Devakaran's agent at Bijapur that Chinn Devakaran was not to have the goods till they had paid the *kunds*, as to which see remarks of Jessel, M R, in *Merchant Banking Company of London v. Phoenix Bessemer Steel Company* (3)

"15 I, therefore, considered the first defendant, as the unpaid vendor of the insolvent firm of Chinn Devakaran, on 2nd June, 1889, had the right, under Section 99 of the Indian Contract Act, to stop in transit the whole consignment of 181 bags as well as those then loaded into the carts at Warri Bandar Station as those which had not then arrived

"16 But this right of the first defendant I held to be subject to the right of the second defendant under Section 103 of the Indian Contract Act, as I thought, having regard to *Merchant*

(1) 2 M and W at p 633

(2) L R 20 Q B D 615

(3) L R 5 Ch D 205, at p 219

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Banking Company of London v Pharms Bessemer Steel Company(1) and the remarks at pages 785 and 786 of the 4th edition of Benjamin on Sale, that a document in the form of the annexed receipt of the Southern Mahratta Railway Company with its endorsement, which the evidence shows to be so treated in the local usage of the grain trade as I have pointed out in paragraph 13, was an 'instrument of title' within the meaning of Section 103 of the Indian Contract Act, and that by its endorsement and delivery to the second defendant under the circumstances herein set forth it had been sufficiently 'assigned' within the meaning of that section

' 17 It appeared that, after giving credit for the net proceeds realized by the sale of the 56 and 104 bags, there still remained a balance due to the second defendant in respect of his advance of Rs 2,000 as a charge on the remaining consignment of 181 bags I, therefore, held that the first defendant could as against the second defendant, exercise his right of stoppage in transit as regards these bags only on payment of that balance

" 18 Against this decision the first defendant desires to have a case stated for the opinion of the High Court on the questions

" (i) Whether the railway receipt of the Southern Mahratta Railway Company in the form annexed is, in the circumstances above set forth, an instrument of title within the meaning of Section 103 of the Indian Contract Act

" (ii) Whether by so endorsing and handing it over as aforesaid, the firm of Chinn Devakaran assigned the said railway receipt to the second defendant within the meaning of the said section

" To these questions the second defendant desires to add—

" (iii) Whether the facts above set forth show such a delivery of the 181 bags to Chinn Devakaran's agent at Bijapur as to deprive the first defendant of his right of stoppage in transit

" (iv) Whether there was such a delivery of the 73 bags to the second defendant's servant at Wari Bandar as determined the right, if any, of the first defendant to stop the same in transit "

Lang for Hanmandas Ramkison

Intervenor for Virji Hansraj

The following authorities were referred to upon the third and fourth questions of the case—*Merchant Banking Company of London v The Panar Besmer Steel Company*, (1) *Bethel v Clark* (2) *Benjamin on Sale*, pp 762, 776, (4th ed), *Tudor's Mercantile Cases*, pp 488, 489, (ed 1881) *Couasji v Thompson* (3) As to the first and second questions *Indian Contract Act IX of 1872*, Secs 102 103, 103 *Stat 3 and 6 Vic, c 39*, Sec 4, (Factors' Act), *Stat 40 and 41 Vic, c 39*, (Factors' Act of 1877), *Benjamin on Sale*, pp 793 764 801, (4th ed) *Couasji v Thompson* (3), *Gunn v Bolcklow*, *Vaughan and Co* (4), *Hathesing v Lajng*, *Lainj v Zeden* (5), *Zuinger v Samuda* (6), *Noble v Kennaway* (7), *Tudor's Mercantile Cases*, (ed 1884), p 434, *Suit No 134 of 1884* (unreported) *Suit No 287 of 1886* (unreported), *Suit No 484 of 1888* (unreported)

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SARGENT, C J —The facts out of which this reference by the Chief Judge of the Small Causes Court arises are fully set out in the case stated by the Court. With respect to the third question, whether there was such a delivery to Chhoa Devakaran's agent at Bijapur as to deprive the first defendant of his right of stoppage, we agree with the Chief Judge that it must be answered in the negative. There was no actual delivery to the agent of that firm at Bijapur, and the wheat, therefore, remained in *transitu* in the hands of the Railway Company until delivery to the consignee. See *James v Griffin*, (8) where Parke, B, says "The vendor has a right if unpaid, and if the vendee be insolvent to retake the goods before they are actually delivered to the vendee, or some one whom he means to be his agent, to take possession and keep the goods for him." It is clear therefore that, whether the first defendant be regarded as a factor and quasi vendor, he was entitled to stop the 73 bags before they were delivered by the Company in Bombay (*Faise v Bray* (9) and *Ireland v Livingston* (10))

With respect to the fourth question, we think there was such a delivery of the 73 bags at the Wari Bandar to the second defendant's servant as to determine the first defendant's right of stoppage in *transitu*. Section 105 of the Contract Act provides

(1) L 1, 5 Cl D 203 at p 213

(2) 3 Moore I 1 4 2

(3) L 1, 17 Eq 92

(4) 2 Douglas 510

(5) 3 East 93

(6) L P O Q B D 615 at p 617

(7) I R 10 Ch A 1 4 1

(8) 7 Taunt 63 at p 70

(9) 2 M and W 693 at p 632

(10) L R, 5 H L 335

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that the notice by the vendor to the carrier to stop the goods must be given to the principal in possession at such time and under such circumstances that the principal by the exercise of reasonable diligence may communicate it to his servant in time to prevent a delivery to the buyer. It is left in doubt by the case whether the goods traffic inspector received the first defendant's telegram before all the 73 bags had been placed on the carts, but in any case we must assume that it did not arrive in time to prevent the bags being placed with the consent of the railway officials on the second defendant's carts hired for the purpose, for it is plain that it was not till the loading of the carts had been completed that the Company's servants interfered to prevent the second defendant's servant from removing the carts from the railway compound. Before that the freight for these 73 bags had been paid by the second defendant's servant to the Company and the railway receipt had also been given up to the Company, duly signed by the second defendant's servant. Mr Justice BAYLEY says in *Crawshay v Eades*(1) "In order to divest the consignor's right to stop *in transitu* there ought to be such a delivery to the consignee, as to divest the carrier's lien." Here everything had been done on the part of the Company to divest themselves of their lien for the mere fact that the second defendant's carts were still standing in the goods' compound after the bags had been placed on them cannot, in our opinion, affect the question, there being no suggestion that the matter was between the Company and the second defendant had not been completely settled. It is true the 73 bags formed a part of the consignment of 181 bags but the rest of the 181 bags had not arrived,—a circumstance which distinguishes the case from *Crawshay v Eades*,(1) where the Court held that the delivery was in course of a proceeding, and that there was, therefore, no such delivery of a portion of the goods as to deprive the vendor of his lien even as to them. After what had occurred, the company could no more refuse, in the interest of the first defendant, to let the carts leave their premises than the carrier in *Bird v Brown*(2) had the right to refuse to deliver the goods to the purchaser. In that case the Court says "The goods had then arrived at Liverpool, and were ready to be delivered to the parties entitled. Bird, on behalf of the assignees of the consignee, demanded the goods, and tendered the amount due for the freight. Assuming that there had been no previous stop-

(1) 1 B. and C., 161

(2) 4 Ex. 786, at p. 79"

page *in transitu*, the masters of the several ships were thereupon bound to deliver up the goods to Bird. and they could not, by their wrongful detention of them and delivering them over to other parties, prolong the *transitus*, and so extend the period during which stoppage might be made. The *transitus* was at an end when the goods had reached the port of destination, and when the consignees, having demitted the goods and tendered the amount of the freight, would have taken them into their possession but for a wrongful delivery of them to other parties."

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It remains to consider the first and second questions as to the effect of the endorsement and delivery by the firm of China Devakaran of the railway receipts to the second defendant as regards the remainder of the 181 bags. In *Trikam Panachand v Bombay, Baroda and Central India Railway Company*,⁽¹⁾ Mr Justice Farrar held that the railway receipts in that case, which were in the same form as those which are issued by the G. I P Railway Company, were not documents of title being in form simple receipts with a notification that "the Company reserve the right of delivering the goods without the production of the receipts," and, therefore, not distinguishable from wharfingers' certificates and mates' receipts, which were held not to be documents of title in *Gunn v Bolcklow, Vaughan and Co* ⁽²⁾ and *Hathesing v Lang Lang v Zeden* ⁽³⁾. However, in *Chunilal Jodraj v The G I P Railway Company* ⁽⁴⁾ the same learned Judge had under consideration a railway document, signed by the Rajaputna-Malwa Railway officials, in the same form as that of the present goods receipt note, and which is, we are informed, the one in use on all the State Railways, and is somewhat differently worded from the goods receipt in the former cases. It runs thus —

"Received from the consignor the undermentioned goods for conveyance to C Baodir Station by goods train, consignee—China Devakaran, description—181 bags of wheat. This receipt must be produced by the consignee, or the goods will not be delivered, if he does not himself attend, he must endorse a request for delivery to the person to whom he wishes it made. If the consignment of this railway receipt is sold one or more times, the endorsement must be a distinct order to deliver to a certain

(1) Suit No 287 of 1886 (Unreported)

(2) L R 10 Ch Ap 491

(3) L R 17 Eq, 92

(4) Unreported

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porson or firm, and this order must be on a one anna stamp. If more than one order appear on the face hereof, each order must bear a stamp. For conditions of contract see back—Signature (—) ”

The learned Judge expressed the inclination of his opinion that such goods receipts were instruments of title within the contemplation of Section 103 of the Contract Act, but added that he did not intend to decide the question whether he should have held them to be such without some evidence that they were so treated by merchants and the trade, as he had come to a conclusion on another part of the case which made it unnecessary for him to do so.

There can be no doubt, we think, that such a document, if endorsed, would not have been treated in the English Courts as a document or instrument of title to exclude the vendor's right of stoppage *in transitu* when the Contract Act came into force in September, 1872. The decision of the Exchequer Court in 1846 in *Iarina v Home*(1) was then in force, by which a delivery warrant signed by a wharfinger, whereby the goods were made deliverable to the plaintiff “or his assignee by endorsement,” was held to be “no more than a token of authority to receive possession —(Blackburn on Sales, p 297,) or, as Mr Baron Parkes states it, ‘only an engagement by the wharfinger to deliver to the consignee, or any one he may appoint, and that until the wharfinger has attorned to the assignee and agreed with him to hold for him there was no constructive delivery to the assignee.’ That decision was never overruled, and authoritatively determined the legal effect of such documents—at any rate until the passing of the Factors’ Act of 1877, (40 and 41 Vic, c 39)

The language of the goods receipt in question scarcely affords so strong an indication of an authority to the assignee by endorsement to receive the goods as that of the document before the Court of Exchequer, and the document, therefore, is in no higher degree “a symbol of the goods” so as to exclude the right of stoppage than the wharfinger's certificate in the above case. It may be that both of them would have that character by virtue of Section 5 of the English Factors’ Act of 1877, which, as pointed out in Benjamin on Sales, (4th ed.), p 708, assimilates all documents of title as defined by Section 1 of the previous Factors’ Act, 5

and 6 Vic, c 39, to bills of lading for the purposes of defeating the right of stoppage. But that Act has not been extended to India. In *Trilok Panachand v. Bomlay, Bajoda and Central India Railway Company*,⁽¹⁾ Mr Justice FARRAN seems to have thought that, in the absence of any definition of a document of title in the Contract Act itself, Section 4 of Act XX of 1844 (by which the English Factors' Act, 5 and 6 Vic, c 39, was extended to India) might be properly accepted as a guide to the meaning of the expressions "documents showing title of goods," or "instruments of title to goods," in Sections 108 and 103 of the Contract Act, but it appears to us that, however much that definition might assist in construing the expression "document showing title" in Section 108 of the Contract Act, which was virtually substituted for the Factors' Act, and is *in pari materia*, it cannot be properly used in construing the expression "instrument of title" in Section 103, which relates to an entirely different subject matter from the Factors' Act, and that it is, therefore, more reasonable to presume that, in a matter of such general commercial importance, the framers of the Contract Act intended to leave the term "instrument of title" in Section 103 to be construed with reference to the decisions then in force in the English Courts. The case of *Merchant Banking Company of London v Phoenix Bessemer Steel Company*,⁽²⁾ which was decided before that Act came into force, was referred to as bearing on the question. There doubtless the Master of the Rolls, Sir G Jessel, decided against the right of stoppage, but it was on special grounds (see p 217)—first, on account of the general custom of the iron trade, and, secondly, because he thought he ought to impute to the vendors special notice and special knowledge that the warrant was intended to be used for the purpose of raising money on it, and having that knowledge they issued the document in that particular form. In conclusion he adds: The vendors "purposely issued a second document of title with a view of its being used for a special purpose." In the present case no custom has been proved, and there are no special circumstances from which the intention could be inferred that the goods' receipt should be used for pledging the bags.

We must, therefore, answer the first and second questions in the negative. If this be thought by the commercial community to be an unsatisfactory state of the law, it will be necessary in

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(1) Suit 287 of 1886 (Unreported)

(2) L R 5 Ch D 205

O I P Ry our opinion, that the desired change should be made by the
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Costs of this reference to be costs in the case

Attorney for first Defendant — *Mr D S Garud*

Attorneys for second Defendant — *Messrs Chalk, Walker
 and Smetham*

The Indian Law Reports, Vol. V. (Bombay) Series,
 Page 371.

ORIGINAL CIVIL.

*Before Sir M R. Westropp, Kt., Chief Justice, and
 Mr Justice M Melvill.*

THE GREAT INDIAN PENINSULA RAILWAY
 COMPANY (ORIGINAL DEFENDANTS), APPLICANTS,

v.

RADHAKISAN KHUSHALDAS (ORIGINAL PLAINTIFF),
 RESPONDENT *

1881
 May, 4

*Railway Companies—Agreement for interchange of traffic—Principal and
 Agent—Loss of goods—Liability*

The plaintiff delivered to the Madras Railway Company a bale of cloth for carriage from B a station belonging to that Company, to C a station belonging to the defendants, the G I P Railway Company, and obtained from the Madras Company a receipt which recited that it was granted "subject to the rules and regulations and charges in force on that or any other railway over which the goods might pass." The goods were lost while on the line and in the charge of the defendants the G I P Railway Company, and the plaintiff sued them for damages for breach of the contract of carriage. Between the two Railway Companies there existed an agreement arranging for the interchange of traffic which provided, *inter alia*, that goods should be booked through to and from all stations on both lines at certain stated rates that in such cases one Company should receive payment and should account to the other that any claim for loss or damage should be paid by the Company in whose custody the goods were when lost or damaged, or, if that could not be ascertained then by both Companies rateably, and that no alteration affecting the through

traffic should be made by either Company without previous notice to the other. The defendants pleaded that the suit was wrongly brought against them as there was no contract between themselves and the plaintiff.

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Held that the suit, whether or not it might also have been brought against the Madras Railway Company, was rightly brought against the defendants inasmuch as the agreement between the two Companies if it did not actually constitute a partnership between them showed at least that the Madras Railway Company became the agents of the defendants to make the contract for carriage with the plaintiff.

Gill v Manchester, Sheffield and Lincolnshire Railway Company(1) followed.

This was an action brought against the G I P Railway Company to recover Rs 1,250 for breach of a contract for the carriage of goods of the plaintiff, made with the plaintiff by the Madras Railway Company, acting therein, it was alleged, as agents for the defendants. The goods in question, viz, a bale of cloth, were delivered by the plaintiff to the Madras Railway Company at Bellary to be carried from that station, belonging to the Madras Railway Company, to Sholapur, a station belonging to the defendant Company. The lines of the two Companies joined at Raichore, and it was between Raichore and Sholapur, and, therefore, while the goods were in the custody of the defendants, that the loss admittedly took place. The plaintiffs also founded their case in the alternative in tort, alleging that the loss was occasioned by the defendants' negligence.

The defendants (1) denied their liability *in toto* asserting that they had entered into no contract with the plaintiffs and (2) alleged that, if that point should be found against them, they were only liable to the plaintiffs to the amount of Rs 825.

The other material facts of the case appear at length from the judgment.

The original hearing took place before Sir CHARLES SARGENT, when the preliminary point of liability or no liability raised by the defendants, was alone gone into, and Sir CHARLES SARGENT held that the suit was rightly brought against the defendant Company, and made a decretal order to that effect and adjourned the further hearing of the case.

Against that order the defendant Company now appealed the memorandum of appeal alleging (1) that the learned Judge

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ought to have held the plaintiffs' cause of action (if any) was against the Madras Railway Company, and not against the defendants, and (2) that he was wrong in holding that the Madras Railway Company acted as the agents of the defendants in concluding the contract with the plaintiffs

A preliminary question having arisen at the hearing of the appeal, as to whether the order of Sir CHARLES SARGENT appealed from, not being an order final in form, was one properly appealable, it was suggested and agreed to by counsel on either side that that order should be amended so as to be in the form of a final decree for the plaintiffs for Rs. 1,100, the amount of damage agreed between the parties to have been suffered by the plaintiffs

Hon F L Latham (*Acting Advocate General*) (with him Farran) for Appellants —No negligence has been shown so the liability, if any, must be merely that of a common carrier, growing out of the contract of carriage. The question raised by this case is this. When a Railway Company contract for carriage beyond their own line and a loss occurs beyond their own line who is liable to be sued, the contracting Company, or the Company on whose line the loss occurred, or both? The contract in this case is embodied in the ordinary railway receipt. Sir CHARLES SARGENT decided against us on the authority of the case of *Gill v Manchester Railway Company*, (2) but that case is distinguishable from the present in two important particulars. First the agreement between the two Companies in that case was such as almost to constitute them partners the agreement in this case is very different. And, secondly, in that case the contract made was to carry exclusively on the defendant Company's line and that appeared expressly on the contract, and was strong evidence of agency. The goods in that case were from beginning to end on the defendant's line. And it is apparent that the case was considered a special one, for no earlier cases were cited. And see Chitty on Contracts, 10th ed, p. 151, where that case is treated as creating an exception to the general rule. If that case is not to be explained by its special circumstances, then it must yield to the authority of several cases inconsistent with it. It is a significant fact that in most of the cases the action has been brought against the contracting Com

pany *Muscharp v Lancaster Railway Company*,⁽¹⁾ *Scotthorn v. South Staffordshire Railway Company*,⁽²⁾ *Great Western Railway Company v Blake* ⁽³⁾ But in two cases, *Collins v Bristol and Exeter Railway Company*⁽⁴⁾ and *Mytton v Midland Railway Company*,⁽⁵⁾ the defendants were the non contracting companies, and in both cases they succeeded in evading liability. The later cases consider the question whether the special features of each case bring it within the recognized principle or not. *Buxton v North-Eastern Railway Company*,⁽⁶⁾ *Thomas v Rhymney Railway Company*,⁽⁷⁾ *Foildes v Metropolitan Railway Company* ⁽⁸⁾

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The only resemblance between this case and the case of *Gill v. Manchester Railway Company* ⁽⁹⁾ is that there is a written agreement between the two Companies in both, but similar arrangements between the various Railway Companies, though not in writing, existed in other cases, e.g. *Mytton v Midland Railway Company*,⁽⁵⁾ *Great Western Railway Company v Blake*⁽³⁾ The agreement in this case does not amount to a quasi partnership. The cases cited show that there is no contract here with the G I P Railway Company, and the suit, therefore, was wrongly brought against them.

Starling (with him *I got*), *contra*, for Respondents—In no case has it been decided that no one else besides the contracting Company was liable. No doubt the cases decide that the contracting party is himself liable. In *Great Western Railway Company v Blake*,⁽³⁾ at page 933, Cockburn, C.J. says: "It is unnecessary to say whether the plaintiff would have had a right of action against the South Wales Railway Company, at all events, he has against the defendants."

The only cases cited in which the Company sued was not the contracting Company, but the Company on whose line the loss occurred, were *Collins v Bristol and Exeter Railway Company*⁽⁴⁾ and *Mytton v Midland Railway Company* ⁽⁵⁾ In both plaintiff failed because he sought to vary the contract, here he does not. The agreement in this case is conclusive as to the agency of one Company for the other. But I submit that the defendants are

(1) 8 M & W 421

(2) 7 H & N 387

(3) 4 H & N 615

(4) L R 3 Q B 549

(5) L R 4 C P D 267; 5 G I D 157

(6) 8 Ex 341

(7) 11 Ex 750 1 H & N 17 (Cam
St.) 7 H L C 194

(8) L R 5 Q 26 L R 6 Q B 266.

(9) L R 8 Q B 163

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also liable on another ground, exclusive of contract. They were in possession of plaintiffs' goods, it was their duty to carry safely, and they did not. That is good *prima facie* evidence of negligence, and they have not disproved negligence, and are liable. *Foules v Metropolitan Railway Company*,⁽¹⁾ *Marshall v York and Berwick Railway Company*,⁽²⁾ *Austin v Great Western Railway Company*,⁽³⁾ *Martin v Great Indian Peninsula Railway Company*,⁽⁴⁾ *Berringer v Great Eastern Railway Company* (5)

Cur adv vult

May 4, 1881 —The judgment of the Court was delivered by

WESITOPP, C J —This is an appeal from a decretal order made by Sir CHARLES SARGENT, J

In August 1877, the plaintiffs' agent at Bellary, a station on the Madras Railway, delivered there to the Madras Railway Company a bale of cloth belonging to the plaintiffs to be conveyed thence to Sholapur, a station on the G I P Railway, and there to be delivered to the plaintiffs. The bale was conveyed safely from Bellary past Ranchore where the Madras Railway terminated, and was lost between Ranchore and Sholapur on the defendants' (the G I P Railway Company's) line, and was never delivered to the plaintiffs, who by their present suit, claimed damages to the extent of Rs 1,250 as the value of the bale. The fifth para of the plaint alleged "that the defendants (the G I P Railway Company) through their agents in that behalf, the Madras Railway Company, agreed with and promised the plaintiffs to safely carry the aforesaid bale from Ranchore and deliver the same to the plaintiffs at Sholapur." The following receipt for the bale was given by the goods clerk at Bellary to the plaintiffs' agent —

' Madras Railway

T (73)

Goods Receipt Note No 135

Traffic Department

Co 101

Bellary Station, 11-8-77

Received from Balmookund

(1) L.J. 4 C 1 D, 267

(2) 11 C B, 655

(3) L.R., 2 Q B, 142

(4) L.R. 3 L.R. 9

(5) L.R., 1 C D, 163

Consigned to Radhakisan Ghoshdhar,
Shimlapur Station

G I P Ry
Radhakisan
Khushaldas

* Number and description of goods—

1 B cloth

(Signed) RUGANLAL,

Clerk

The defendants by their written statement (after a general denial of their liability to pay the sum of Rs 1250 in the plaint claimed, or any part thereof) submitted that the plaintiffs' cause of action (if any) was against the Madras Railway Company and not against the defendants and that, if the action did lie against the defendants, the plaintiffs were entitled to recover Rs 820 only, such sum being the full value of such part of the goods as is not comprised in Section 10 of Act XVIII of 1854.

The issues were —

1 Whether the defendants promised and agreed with the plaintiffs as in the 6th paragraph of the plaint alleged? and

2 Whether the plaintiffs are entitled to maintain this suit?

Both of these issues SIR CHARLES SARGENT, J., found in the affirmative, and so stated in his decretal order of that date, and he adjourned the further hearing of the suit.

The present appeal is against that order. For the purpose, however, of avoiding any question as to the jurisdiction of this Court to hear this appeal, the parties by their respective counsel, agreed that SIR CHARLES SARGENT's order should be amended by making it a decree for the plaintiffs for Rs 1,100 as damages for the bale of goods, the subject of this suit, with costs, reserving to the defendants the right to appeal against the ruling of SIR CHARLES SARGENT on the issues 1 and 2 as to the liability of the defendants to pay any damages or costs and that so much of his order as directed the adjournment of the cause should be struck out.

At the time of the occurrences the subject of this suit there was in force an agreement in writing between the Madras Railway Company and the Great Indian Peninsula Railway Company in

NI — This receipt is granted subject to the Rules and Regulations in force on this railway or any other railway over which the goods may pass and must be produced before the goods can be delivered.

* Number to be expressed in words as well as in figures.

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also liable on another ground, exclusive of contract. They were in possession of plaintiffs' goods, it was their duty to carry safely, and they did not. That is good *prima facie* evidence of negligence, and they have not disproved negligence, and are liable. *Foules v Metropolitan Railway Company*, (1) *Marshall v York and Berwick Railway Company*, (2) *Austin v Great Western Railway Company*, (3) *Martin v. Great Indian Peninsula Railway Company*, (4) *Berringer v Great Eastern Railway Company* (5)

Cur. adv. ult.

May 4, 1881.—The judgment of the Court was delivered by

WESTROFF, C J.—This is an appeal from a decretal order made by Sir CHARLES SARGENT, J.

In August, 1877, the plaintiffs' agent at Bellary, a station on the Madras Railway, delivered there to the Madras Railway Company a bale of cloth belonging to the plaintiffs to be conveyed thence to Sholapur, a station on the G. I. P. Railway, and there to be delivered to the plaintiffs. The bale was conveyed safely from Bellary past Raichore where the Madras Railway terminated, and was lost between Raichore and Sholapur on the defendants' (the G. I. P. Railway Company's) line, and was never delivered to the plaintiffs, who by their present suit, claimed damages to the extent of Rs 1,250 as the value of the bale. The fifth para of the plaint alleged "that the defendants (the G. I. P. Railway Company) through their agents in that behalf, the Madras Railway Company, agreed with and promised the plaintiffs to safely carry the aforesaid bale from Raichore and deliver the same to the plaintiffs at Sholapur." The following receipt for the bale was given by the goods clerk at Bellary to the plaintiffs' agent —

"Madras Railway.

T. (79).

Goods Receipt Note No 135

Traffic Department.

Co 101

Bellary Station, 11-8-77

Received from Balmookund

(1) L R, 4 C P D, 267

(2) 11 C B, 635

(3) L R, 2 Q B, 442

(4) L R 3 L R 9

(5) L R, 1 C D, 163

Consigned to Radhakrishnan Caneshdas,

Sbhalpur Station

* Number and description of goods—

1 B c l t h

(Signed) RUGANLAL,

Clerk

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The defendants by their written statement (after a general denial of their liability to pay the sum of Rs 1 250 in the plaint claimed, or any part thereof) submitted that the plaintiffs' cause of action (if any) was against the Madras Railway Company and not against the defendants and that, if the action did lie against the defendants, the plaintiffs are entitled to recover Rs 820 only, such sum being the full value of such part of the goods as is not comprised in Section 10 of Act XVIII of 1851.

The issues were —

1 Whether the defendants promised and agreed with the plaintiffs as in the 6th paragraph of the plaint alleged? and

2 Whether the plaintiffs are entitled to maintain this suit?

Both of these issues Sir CHARLES SARGENT, J., found in the affirmative, and so stated in his decretal order of that date, and he adjourned the further hearing of the suit.

The present appeal is against that order. For the purpose, however, of avoiding any question as to the jurisdiction of this Court to hear this appeal, the parties by their respective counsel, agreed that Sir CHARLES SARGENT's order should be amended by making it a decree for the plaintiffs for Rs 1,100, as damages for the loss of goods, the subject of this suit, with costs, reserving to the defendants the right to appeal against the ruling of Sir CHARLES SARGENT on the issues 1 and 2 as to the liability of the defendants to pay any damages or costs and that so much of his order as directed the adjournment of the cause should be struck out.

At the time of the occurrences the subject of this suit there was in force an agreement in writing between the Madras Railway Company and the Great Indian Peninsula Railway Company into

NOTE—This receipt is granted subject to the Rules and Regulations in force on this railway or any other railway over which the goods may pass and must be produced before the goods can be delivered.

* Number to be expressed in words as well as in figures.

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also liable on another ground, exclusive of contract. They were in possession of plaintiffs' goods, it was their duty to carry safely, and they did not. That is *good prima facie* evidence of negligence, and they have not disproved negligence, and are liable. *Foules v Metropolitan Railway Company*, (1) *Marshall v York and Berwick Railway Company*, (2) *Austin v Great Western Railway Company*, (3) *Martin v Great Indian Peninsula Railway Company*, (4) *Berringer v Great Eastern Railway Company* (5)

Cur adv vult

May 4, 1881 — The judgment of the Court was delivered by

WESTROFF, C J — This is an appeal from a decretal order made by Sir CHARLES SARGENT, J

In August 1877, the plaintiffs' agent at Bellary, a station on the Madras Railway, delivered there to the Madras Railway Company a bale of cloth belonging to the plaintiffs to be conveyed thence to Sholapur, a station on the G I P Railway, and there to be delivered to the plaintiffs. The bale was conveyed safely from Bellary past Raichore where the Madras Railway terminated, and was lost between Raichore and Sholapur on the defendants' (the G I P Railway Company's) line, and was never delivered to the plaintiffs who by their present suit, claimed damages to the extent of Rs 1,250 as the value of the bale. The fifth para of the plaint alleged "that the defendants (the G I P Railway Company) through their agents in that behalf, the Madras Railway Company, agreed with and promised the plaintiffs to safely carry the aforesaid bale from Raichore and deliver the same to the plaintiffs at Sholapur." The following receipt for the bale was given by the goods clerk at Bellary to the plaintiffs' agent —

"Madras Railway

T (79)

Goods Receipt Ntn Nn 135

Traffic Department

Co 101

Bellary Station, 11-8-77

Received from Balmookund

(1) 11 C 1 D, 67

(3) L R, 2 Q B, 442

(2) 11 C B, 655

(4) L R 3 Ex 9

(5) L R, 1 Q D, 163

each Company to have, in division its own local rates and fares, except in the case of minimum charges, as provided in clause 23' G I P Ry
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The 40th clause was as follows —

"40 That goods claims be settled by the Company in whose custody the loss or damage occurred that, when this cannot be ascertained with certainty, the claim be paid in mileage proportion, but in such cases the consent of both Companies is to be obtained before settlement is made

The 44th clause was as follows —

"44 An alteration of rate or fare or classification affecting the through traffic is to be made by either Company without one month's previous notice to the other" The contention of the appellants (the G I P Railway Company) is that the contract to carry the bale was made by the plaintiffs (respondents) with the Madras Railway Company and not with the G I P Railway Company It may be that according to the law as laid down in *Great Western Railway Company v Blake* (1) *Buxton v North-Eastern Railway Company*, (2) and *Thomas v Rhymney Railway Company*, (3) the Madras Railway Company, if sued would have been liable for the loss of the bale of cloth it is unnecessary for us to say, and we do not say, whether or not that Company is so liable

In our opinion the written agreement between the two Companies of which we have above quoted the material clauses, brings this case within the authority of *Gill v Manchester Railway Company* (4) upon which we understand Sir CHARLES SARGENT to have acted in arriving at his decision upon the issues and albeit that agreement may not have actually constituted a partnership between the two Companies yet it rendered the Madras Railway Company the agents of the G I P Railway Company for the purpose of making a contract for carrying the bale of cloth over, at least, so much of the line of the latter Company as forms part of the distance from Bellary (the place of booking to Sholapur (the place of the delivery) as from Raichore to Sholapur The G I P Railway Company have by that agreement made the Madras Railway Company their agents for the purpose of, at least, so much of the traffic as benefits the G I P Railway Company We think that we may in this case adopt

(1) 7 H L N 987

(3) L R 5 Q B 226

(2) L R 3 Q B 549

(4) L R 5 Q B 156

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titled "A Memorandum of Agreement between the Madras and the Great Indian Peninsula Railway Companies for interchange of Traffic and Rolling Stock."

By the second of its provisions the joint station at Ranchore was erected and maintained at the joint expense of both Companies. The 16th, 17th, 18th and 19th clauses of the agreement were as follows:—

"16 That goods and parcels be invoiced and booked through to and from all stations on both lines where such traffic is dealt with. The traffic managers of both Companies to supply to each other, from time to time, the names of such small stations of their respective Railways as do not book goods and parcels

'17 That the through rates and fares be in all cases the sum of the local rates and fares of the both Companies, to Ranchore, including terminals and cartage of both Companies, but that no terminal be charged by either Company for Ranchore station on through traffic

'18 That each Company be responsible for collecting the proportion due to the other Company on all through traffic, and that on goods traffic invoiced through 'to pay,' the receiving Company check the invoices, and be responsible for collecting any amounts that may be undercharged by the forwarding Company, but the receiving Company not to reduce below the charge mentioned in the invoice or through way-bill without the consent of the forwarding Company

"19 That the mileage to Ranchore from a station on each line be taken for the purposes of this agreement, as per appendix annexed, the G I P mileage to include in all cases (except as mentioned in clauses 32, 33 and 34) 20 miles for the Phul Ghat and 32 miles for the Bhoro Ghat, extra, as sanctioned by Government "

The 22nd clause was as follows —

"22 The exchange of stock, both passengers and goods let between the two Companies, to extend to the whole of the lines of either Company, and to branches that may be worked by them respectively "

The 24th clause was as follows —

24 The division of the receipts on the through traffic to be carried out monthly by the audit officers of the two Companies, and

and the defendants, I should not dissent from the view that such relation has been proved. The affidavit of Mr Forbes is not in itself inconsistent with the notion that the London and South-Western Railway Company, in issuing tickets at their Richmond Station for stations on the defendants' line, so issue them as agents for, or as partners with, the defendants. The notion, too, receives sanction from the decision in *Gill v Manchester Railway Company* (2). There the contract of carriage purported to be made with the Great Northern Railway Company but the usual, which was the subject of the contract, was to be conveyed upon the defendants' line, and there were traffic arrangements between the two companies, under which their rolling stock was treated as one stock, their traffic was interchanged, and the receipts from through traffic were divided by mileage. It was held that by virtue of those arrangements the Great Northern Railway Company, whether as partners with the defendants or otherwise, became the agents of the latter to make the contract of carriage with the plaintiff. In the present case, under the traffic arrangements between the two Railway Companies, the defendants supply the rolling stock and carry, in the exercise of their running powers, the whole of through traffic, taking a mileage proportion of the receipts from such traffic with an allowance for working expenses. It is admitted that traffic between Richmond and the defendants' station at Hammer-smith constitutes through traffic and it may therefore be urged with force that in booking such through traffic at Richmond, the London and South Western Railway contract, either as agents for the defendants or for the defendants jointly with themselves. This view is further strengthened by the form of the ticket issued at Richmond to passengers travelling from Richmond on to the Metropolitan District line when contrasted with that issued to passengers travelling elsewhere, and by what is written over the booking office and although I am by no means prepared to hold that, under traffic arrangements similar to those which exist between the two Companies, it is not open to a Company in the position of the London and South Western Railway Company to make the contracts of carriage in such a way as to make itself exclusively liable upon them, or to deny that, in most cases, it must be a question for the jury whose the particular contract may be, I

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mutatis mutandis, the following passage from the judgment of MELLOB, J, in *Gill v Manchester Railway Company* (1)—“The action was rightly brought against the defendants, inasmuch as if the provisions of the agreement of the 17th June 1877, did not constitute an actual partnership between the respective Companies as to all the matters embraced by it, still they came within the rule expressed by Lord Cairnworth in *Cox v Hickman* (2) “The real ground of liability is that the trade has been carried on by persons acting on his (the defendant's) behalf, and per Lord Wensleydale to the same effect in the same case (3) In our opinion the Great Northern Railway became, by virtue of their agreement with the defendants the agents of the latter for the carriage of the cow with the plaintiff. And, during the argument of the same case BLACKBURN, J, said —“We need not consider whether the two Companies are partners, the traffic is carried on for the joint benefit of the two so that they are joint principals, and either may be sued (4)”

A passage from the judgment of GROVE, J, in *Foulkes v Metropolitan District Railway* (5) when that case was in the Common Pleas Division, was cited to us as supporting the principle on which *Gill v Manchester Railway Company* was decided, although that case does not appear to have been cited to the Common Pleas Division. It was this “Were it necessary to decide this case upon the question of agency, the inclination of my opinion is that the South Western Company were, as regards the plaintiff the agents of the Metropolitan District Company, and that there was a kind of mutual agency for their mutual convenience each Company undertaking to act when it was most convenient for them to issue tickets for their own benefit and the benefit of the South Western Company” Since the present case was argued, an appeal lodged in *Foulkes v Metropolitan Railway Company* has been decided (6). On the appeal the case assumed, to some extent, a different aspect from that which it had borne in the Common Pleas Division. The decision of that Division was affirmed. There THESINGER, L. J, refers with approval to *Gill v Manchester Railway Company*. He said (7) “If the right of the plaintiff to maintain his judgment depended solely on his establishing a contractual relation between him

(1) L. R. 8 Q. B. 186 at p. 191

(2) 6 H. L. C. at p. 206.

(3) 8 H. L. C. at p. 315 (4) 8 H. L. C. at p. 159

(5) 1 L. R. C. P. D. at p. 200

(6) 1 L. R. C. P. D. 157

(7) 1 L. R. C. P. D. at p. 160

The defendants have not excused their non delivery of the bale The plaintiffs were not bound to prove negligence *Ishwardas Golalchand v G I P Railway Company* (1) There must, therefore, having regard to the amendment (made by consent of the parties) of Sir CHARLES SARGENT's decretal order, be a decree for the plaintiffs for Rs 1,100 damages, and for the costs of the suit, and of this appeal

Solicitors for the Plaintiff —*Messrs Lynch and Tobin*

Solicitors for the Defendants —*Messrs Hearn, Cleveland and Little*

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APPELLATE CIVIL

Before Stanley, C J., and Griffin, J.

BENGAL & NORTH-WESTERN RAILWAY COMPANY

v.

HAJI MUTSADDI AND ANOTHER *

Ind an Railways Act (IX of 1890 Sec 80)—Through booking—Loss upon another line—Liability of Railway where goods booked—Wilful neglect

1910
June 8

A Railway Company receiving goods for carriage over a foreign Railway is liable for loss of the goods even though the loss did not occur upon their system

Certain goods were booked on B and N W Ry to be carried to Howrah via the E I Railway A risk note was written by the plaintiff's agent according to which the Company was to be liable for loss only in case of the negligence of its servants Some packages were stolen during transit The Courts found that the carriages were not properly locked and that thefts were constant Held that it was the duty of the Company to see that the carriages were properly locked and they having failed to do so there was wilful neglect on their part and they were liable

Second Appeal from a decree of F D Simpson, Esq, District Judge of Gorakhpur, confirming a decree of Babu Gauri Prasad, the Additional Munsiff of Gorakhpur City

Suit for damages

The material facts will appear from the Judgment

Jogendranath Chaudri (with Jim Satish Chandra Banerji),
for the Appellants

Golul Prasad, for the Respondents

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think that, under the peculiar circumstances of the present and upon the materials before us, the court would not be justified in disturbing the judgment for the plaintiff, and send that question down for trial."

Mytton v Midland Railway Company(1) was cited to us on behalf of the appellants. But that case seems irreconcilable with the subsequent decision in *Gill v Manchester Railway Company*(2) already mentioned, and also with the passages which have quoted from *Foulkes v Metropolitan Railway Company*. And in a case of *Hooper v London and North Western Railway* decided in the Common Pleas Division on the 2nd December 1880, and reported in the *Times* of the 3rd December, 1880, DENMAN J., is reported as saying "the case of *Mytton v Midland Railway* does not appear to have been cited in the subsequent case of *Foulkes v Metropolitan Railway*, but it is really overruled by it." LINDLEY, J., seems to have concurred in that view.

Amongst other cases relied upon for the appellants was *Bristol and Leeder Railway v Collins*(3) which, in its various stages, afforded a strong example as to the possible variety of judicial opinion(4). Neither its facts, however, nor those of any other case cited for the appellants, tally so closely with those in the present case as the facts in *Gill v Manchester Railway* which appears to us to have been a just reasonable decision, and is recognized as such in *Foulkes v Metropolitan Railway*(5) by the court of appeal.

For these reasons we concur with SIR CHARLES SARGENT in finding on the issues.

(1) 4 H & N 610.

(2) L R 8 Q B 186.

(3) L R 6 C P D 157.

(4) 7 H L C 191.

(5) The Court of Exchequer decided in favour of the defendants the *Comp* (11 Exch 790). The Exch. Chamber (Coleridge J., Whitman J., Creswell, Erie J., Williams J.; Crompton, J., Crowder J., and Wallis J.) unanimously reversed that decision and entered a verdict for the plaintiff (11 H & N 5). The House of Lords consulted the judges of these four—Byles J., Crompton, Williams J., and Whitman J.—were in favour of the plaintiff and two only Watson B. and Martin B.—were in favour of the defendants. The case was decided against the opinion of the majority of the judges in favour of the defendants by the House of Lords there being present Chelmsford C. and Lord Cranworth, Wensleydale and Kingsdown, which two last Lords gave their judgment with much doubt.

(6) 1 L R., 6 C P D., 157.

The defendants have not excused their non delivery of the bale The plaintiffs were not bound to prove negligence *Ishwardas Golachand v G I P. Railway Company* (1) There must, therefore, having regard to the amendment (made by consent of the parties) of Sir CHARLES SARGENT's decretal order, be a decree for the plaintiffs for Rs 1,100 damages, and for the costs of the suit, and of this appeal

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Solicitors for the Plaintiff —*Messrs Lynch and Tobin*

Solicitors for the Defendants —*Messrs Hearn, Cleland and Little*

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APPELLATE CIVIL

Before Stanley, C J., and Griffin, J.

BENGAL & NORTH-WESTERN RAILWAY COMPANY

v.

HAJI MUTSADDI AND ANOTHER *

Indian Railways Act (IX of 1890 Sec 80)—Through booking—Loss upon another line—Liability of Railway where goods booked—Wilful neglect

1910
June 8

A Railway Company receiving goods for carriage over a foreign Railway is liable for loss of the goods even though the loss did not occur upon their system

Certain goods were booked on B and N W Ry to be carried to Howrah via the E I Railway A risk note was written by the plaintiff's agent according to which the Company was to be liable for loss only in case of the negligence of its servants Some packages were stolen during transit The Courts found that the carriages were not properly locked and that thefts were constant *Held* that it was the duty of the Company to see that the carriages were properly locked and they having failed to do so there was wilful neglect on their part and they were liable

SECOND Appeal from a decree of F D Simpson, Esq, District Judge of Gorakhpur, confirming a decree of Babu Gauri Prasad, the Additional Munsiff of Gorakhpur City

Suit for damages

The material facts will appear from the Judgment

Jogendranath Chaudri (with 1st Satish Chandra Banerji),
for the Appellants

Gokul Prasad, for the Respondents

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think that, under the peculiar circumstances of the present case and upon the materials before us, the court would not be justified in disturbing the judgment for the plaintiff, and sending that question down for trial."

Mytton v Midland Railway Company(1) was cited to us on behalf of the appellants. But that case seems irreconcilable with the subsequent decision in *Gill v Manchester Railway Company*(2) already mentioned, and also with the passages which we have quoted from *Foulkes v Metropolitan Railway Company*(3). And in a case of *Hooper v London and North-Western Railway*, decided in the Common Pleas Division on the 2nd December, 1880, and reported in the *Times* of the 3rd December, 1880, DENMAN, J., is reported as saying "The case of *Mytton v Midland Railway* does not appear to have been cited in the subsequent case of *Foulkes v Metropolitan Railway*, but it was really overruled by it." LINDLEY, J., seems to have concurred in that view.

Amongst other cases relied upon for the appellants was *Bristol and Exeter Railway v Collins*(4) which, in its various stages, afforded a strong example as to the possible variety of judicial opinion (5). Neither its facts, however, nor those of any other case cited for the appellants, tally so closely with those in the present case as the facts in *Gill v Manchester Railway*, which appears to us to have been a just reasonable decision, and recognized as such in *Foulkes v Metropolitan Railway*(6) by the court of appeal.

For these reasons we concur with SIR CHARLES SAPOORTA in his finding on the issues.

(1) 4 H & N 615

(2) L R 8 Q B 180.

(3) L R 5 C P D 157

(4) 7 H L C 104.

(5) The Court of Exchequer decided in favour of the defendants the *Comptons* (11 Exch 700). The Exch Chamber (Coleridge J, Whitman, J, Creswell, J, Erie J, Williams, J, Crompton, J, Crowder J, and Willes J) unanimously reversed that decision and entered a verdict for the plaintiff (11 H & N 517). The House of Lords consulted the judges of these four—Byles J, Crompton, J, Williams J, and Whitman J—were in favour of the plaintiff and two only—Watson B, and Martin B—were in favour of the defendants. The case was decided against the opinion of the majority of the judges in favour of the defendants by the House of Lords, there being present Cleasford C and Lords Cranworth, Wensleydale and Kingsdown, which two last Lords gave their judgment with much doubt.

(6) 1 L R, 5 C P D, 157

G I P Ry.
v.
Radhakisan
Khushaldas.

The defendants have not excused their non-delivery of the bale. The plaintiffs were not bound to prove negligence. *Ishwardas Golabchand v. G I P. Railway Company* (1). There must, therefore, having regard to the amendment (made by consent of the parties) of Sir CHARLES SARGENT's decretal order, be a decree for the plaintiffs for Rs 1,100 damages, and for the costs of the suit, and of this appeal.

Solicitors for the Plaintiff — *Messrs Lynch and Tobin*

Solicitors for the Defendants — *Messrs Hearn, Cleveland and Little*

The Allahabad Law Journal Vol. VI. Page 833.

APPELLATE CIVIL.

Before Stanley, C J., and Griffin, J.

BENGAL & NORTH-WESTERN RAILWAY COMPANY

v.

HAJI MUTSADDI AND ANOTHER *

1910
June 8

Indian Railways Act (IX of 1890 Sec 80)—Through booking—Loss upon another line—Liability of Railway: here goods booked—Wilful neglect

A Railway Company receiving goods for carriage over a foreign Railway is liable for loss of the goods even though the loss did not occur upon their system.

Certain goods were booked on B and N W Ry to be carried to Howrah viz the E I Railway. A risk note was written by the plaintiff's agent according to which the Company was to be liable for loss only in case of the negligence of its servants. Some packages were stolen during transit. The Courts found that the carriages were not properly locked and that thefts were constant. *Held* that it was the duty of the Company to see that the carriages were properly locked and they having failed to do so, there was wilful neglect on their part and they were liable.

SECOND Appeal from a decree of F D Simpson, Esq, District Judge of Gorakhpur, confirming a decree of Babu Gauri Prasad, the Additional Munsiff of Gorakhpur City.

Suit for damages

The material facts will appear from the Judgment

Jogendranath Chaudri (with him Satish Chandra Banerji),
for the Appellants

Cokul Prasad, for the Respondents

B N W Ry
 v
 Haji
 Mutsaddi.

The judgment of the Court was delivered by

STANLEY, C J, —This appeal arises out of a suit for damages for short delivery of parcels of hide consigned by the plaintiffs to the defendant Company at a station on their line for carriage to Howrah, on the East Indian Railway. A risk note was signed by the plaintiff's servant, in virtue of which the goods in question were conveyed at a lower rate. According to this note the Company is liable for the loss of one or more complete packages forming part of a consignment through the wilful neglect of the Railway administration, provided that the term wilful neglect be not held to be fire, robbery from a running train or other unforeseen event or accident. Five of the packages which were consigned by the plaintiffs were not delivered at Howrah, and it is in respect of these packages that the suit was brought.

Both the Courts below have decreed the plaintiff's claim. The lower Appellate Court in its judgment finds that the loss of the goods was due to the negligence of the Railway, that the wagon in which they were carried was not properly fastened and that the means used by the Railway for the safe carriage of goods were quite ineffective and that thefts were constant. The latter refers to an answer made by a servant of the East Indian Railway to a question put to him as to the security of the fastening of the doors of their wagons, and he observes, "The methods they use are such," that to quote one of the East Indian Railway servants, "the opening of a wagon can be easily done by anybody."

Now if the Railway Company had knowledge, as we assume from the finding of the Court below it had, that the fastening of the doors of their wagons was absolutely insecure and ineffective, and that constant thefts were taking place, it was their duty to see that the fastenings were made more secure so that goods of consignors might be carried over the line with reasonable security. Upon the evidence the Court below has found that there was on the part of the Railway Company wilful neglect. We should not be disposed to differ with it as to this in view of the statement of the servants of the East Indian Railway Company which we have quoted.

Then it is said that the loss in question has been proved to have taken place not on the defendant's line but on the East Indian Railway line, and it is argued that the defendant Company are not responsible for the loss which occurred on another

system This argument is met, we think satisfactorily, by the provisions of Sec 80 of the Indian Railways Act, Act IX of 1890 The question provides that suits for compensation for, amongst other things, loss of goods where the goods are booked through over the Railways of two or more Railway administrations may be brought either against the Railway administration to which the goods were delivered by the consignor or against the Railway administration on whose Railway the loss occurred The Railway Company receiving goods for carriage over a foreign railway is liable for loss of the goods even though the loss did not occur upon their system

B N W Ry
v
Haji
Mutsaddi

In view of the findings of fact this appeal has in our opinion no force. We dismiss it with costs including fees in this Court on the higher scale

Appeal dismissed

**In the High Court of Judicature at Fort William
in Bengal.**

CIVIL APPELLATE JURISDICTION

*Before The Hon'ble Sir Henry Thoby Prinsep, Kt, and
The Hon'ble Chundra Madhub Ghose.*

GUNGA PERSHAD AND OTHERS (PLAINTIFFS), APPELLANTS*

v

1 AGENT, BENGAL & NORTH-WESTERN RAILWAY Co,

2. AGENT, BENGAL-NAGPUR RAILWAY Co,

(DEFENDANTS), RESPONDENTS

Railway Companies—Damage to goods—Claim for compensation—Indian Railways Act, IX of 1890 Section 77

1895
August, 21

A consignment of goods was delivered to the Bengal Nagpur Railway at Raipur Station for conveyance to Ravilganj a station on the Bengal and North Western Railway They were conveyed through the East Indian Railway and delivered by a lurd Railway to the Bengal and North Western Railway at Ravilganj A portion of the goods having been damaged, the plaintiff refused to accept delivery and sued the Bengal and North Western Railway Company for their value The Bengal Nagpur Railway were made parties to the suit only during the trial

*Appeal from Appellate decree No 1078 of 1894

See Appendix A Case No 30

B N W Ry

Haji
Mutsaddi

The judgment of the Court was delivered by

STANLEY, C J,—This appeal arises out of a suit for damages for short delivery of parcels of lude consigned by the plaintiffs to the defendant Company at a station on their line for carriage to Howrah, on the East Indian Railway. A risk note was signed by the plaintiff's servant, in virtue of which the goods in question were conveyed at a lower rate. According to this note the Company is liable for the loss of one or more complete packages forming part of a consignment through the wilful neglect of the Railway administration, provided that the term wilful neglect be not held to be fire, robbery from a running train or other unforeseen event or accident. Five of the packages which were consigned by the plaintiffs were not delivered at Howrah, and it is in respect of these packages that the suit was brought.

Both the Courts below have decreed the plaintiff's claim. The lower Appellate Court in its judgment finds that the loss of the goods was due to the negligence of the Railway, that the wagon in which they were carried was not properly fastened and that the means used by the Railway for the safe carriage of goods were quite ineffective and that thefts were constant. Then it refers to an answer made by a servant of the East Indian Railway to a question put to him as to the security of the fastening of the doors of their wagons, and he observes, "The methods they use are such," that to quote one of the East Indian Railway servants, "the opening of a wagon can be easily done by anybody."

Now if the Railway Company had knowledge, as we assume from the finding of the Court below it had, that the fastening of the doors of their wagons was absolutely insecure and ineffective, and that constant thefts were taking place, it was their duty to see that these fastenings were made more secure so that goods of consignors might be carried over the line with reasonable security. Upon the evidence the Court below has found that there was on the part of the Railway Company wilful neglect. We should not be disposed to differ with it as to this in view of the statement of the servants of the East Indian Railway Company which we have quoted.

Then it is said that the loss in question has been proved to have taken place not on the defendant's line but on the East Indian Railway line, and it is argued that the defendant Company are not responsible for the loss which occurred on another

system. This argument is met, we think satisfactorily, by the provisions of Sec 80 of the Indian Railways Act, Act IX of 1890. The question provides that suits for compensation for, amongst other things, loss of goods where the goods are booked through over the Railways of two or more Railway administrations may be brought either against the Railway administration to which the goods were delivered by the consignor or against the Railway administration on whose Railway the loss occurred. The Railway Company receiving goods for carriage over a foreign railway is liable for loss of the goods even though the loss did not occur upon their system.

B N W By
Haji
Mutesaddi

In view of the findings of fact this appeal has in our opinion no force. We dismiss it with costs including fees in this Court on the higher scale.

Appeal dismissed

**In the High Court of Judicature at Fort William
in Bengal.**

CIVIL APPELLATE JURISDICTION

*Before The Hon'ble Sir Henry Thoby Prinsep, Kt, and
The Hon'ble Chundra Madhub Ghose.*

GUNGA PERSHAD AND OTHERS (PLAINTIFFS), APPELLANTS*

v

1 AGENT, BENGAL & NORTH-WESTERN RAILWAY Co,

2. AGENT, BENGAL-NAGPUR RAILWAY Co,

(DEFENDANTS), RESPONDENTS

*Railway Companies—Damage to goods—Claim for compensation—Indian
Railways Act, IX of 1890, Section 77*

1895
August, 21

A consignment of goods was delivered to the Bengal Nagpur Railway at Raipur Station for conveyance to Ravilganj a station on the Bengal and North Western Railway. They were conveyed through the East Indian Railway and delivered by a third Railway to the Bengal and North Western Railway at Ravilganj. A portion of the goods having been damaged the plaintiff refused to accept delivery and sued the Bengal and North Western Railway Company for their value. The Bengal Nagpur Railway were made parties to the suit only during the trial.

*Appeal from Appellate decree, No 1078 of 1894

See Appendix A Case No 30

Gunga
Peralad
B & W Ry
and
B N. Ry

Held, that, as no notice under S 77 of the Indian Railways Act, IX of 1890 was served on the Bengal Nagpur Railway it could not be made a party to the suit

For Appellants—*Mr. Morison and Babu Karuna Sindo Mukerji*

For Respondents—*Babu Sarada Charan Mitter and Babu Hur Coomar Mitter*

We think that the view taken by the Subordinate Judge is perfectly correct. Section 77 of Act IX of 1890 requires that notice of claim to refund or compensation, on account of loss, destruction or deterioration of goods delivered to a Railway Company, to be carried, shall be made in writing by the party himself, or on his behalf to the Railway Administration, within six months from the date of delivery of the goods for carriage by railway.

In this particular instance, the goods were taken from Raipur by the Bengal Nagpur Railway Company, and were conveyed through the lines of the East Indian Railway, and delivered by a third Railway to the Bengal and North-Western Railway, at Rivilganj.

A portion of the consignment of goods was found in a damaged state and, consequently, was not accepted, and this suit is the consequence. There was some correspondence in the case, the claim being made on the delivering Railway—the Bengal and North-Western Railway. It seems that the Bengal and North-Western Railway passed this on to the Nagpur Railway, and the reply of the Nagpur Railway communicated to the plaintiff repudiating all liability.

On this, the plaintiffs have served notice, under Section 77, on the Bengal and North-Western Railway Company, and they have brought this suit against that Company, holding it liable for the loss sustained.

It would seem that in the course of the trial, either from the correspondence produced by the Bengal and North-Western Railway, or from an expression of some opinion by the presiding officer the Munsiff, the Nagpur Railway Company was made a party.

A decree was passed in the Court of First Instance, partly against the Bengal and North-Western Railway Company, and partly against the Nagpur Railway Company. The Subordinate Judge, on appeal, has, however, dismissed the case against the

Nagpur Railway Company on the ground that no notice was served under Section 77, and that the Munsiff did not properly make the Nagpur Railway Company party to the suit and a defendant

Gunga
Pershad
v
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and
B N Ry.

The plaintiffs have appealed against this order, and it is contended that, although strictly within the terms of Section 77, no notice was served on the Nagpur Railway Company, still, inasmuch as that Company had learnt of the claim made by the plaintiffs in respect of these goods, and to some extent, admitted liability on this account, it must be held that the claim and notice, made on the North-Western Railway Company, was practically a claim and notice, served on the Nagpur Railway Company. It seems to us that this would be construing the law beyond the meaning and object of Section 77 of the Act, and indeed, we may remark that this was not the case made by the plaintiffs. They had some intimation that the Bengal and North Western Railway Company had made a communication with the Nagpur Railway Company, and notwithstanding that, they have deliberately brought this suit after notice, under Section 77, against only the Bengal and North-Western Railway Company and they, moreover, now, after the suit has been brought only against the Bengal and North-Western Railway Company, seek to join the Nagpur Railway Company and hold them liable also, with the Bengal and North-Western Railway Company, and make the information given by the Bengal and North Western Railway Company to the Nagpur Railway Company, on the claim made on the former, a notice that the claim was made also on the latter Company.

It is quite clear, upon the terms of the plaint, that this was never the intention of the plaintiffs, we think that the Subordinate Judge has rightly dismissed the claim against the Nagpur Railway Company, holding that, as no notice has been served on that Company, it could not be made a party to any suit.

The appeals must, therefore, be dismissed with costs.

In the Chief Court of the Punjab.

Before Mr. Justice Stogdon and Mr. Justice Chatterji

CHANGA MAL (Plaintiff), PETITIONER

v.

THE BENGAL AND NORTH-WESTERN RAILWAY
COMPANY (Defendant), RESPONDENT

CASE No. 55 OF 1896

1897
January 31

Indian Railway Act, 1890, S. 77—Wrongful Delivery of Goods—Loss

In a suit against the Bengal and North Western Railway for the value of goods wrongly delivered it was contended by the defendants that no notice of claim was given to them within six months as required by S. 77 of the Indian Railway Act 1890.

Held that the loss referred to in the section does not cover up cases of wrongful delivery of goods to persons other than the owners and that the suit was not therefore barred by S. 77 of the Act.

PETITION for Revision of the order of the Judge, Small Cause Court, Delhi, dated 21st October 1895

Madan Gopal for Petitioner

Gouldsbury for Respondent

The question as to the construction of Section 77 of the Indian Railways Act, 1890, was referred to a Divisional Bench by the following order of the learned Judge in Chambers —

CHATTERJI, J — This was a suit in the Small Cause Court, Delhi, against the B and N-W Railway for Rs. 300/2 value plus certain other charges of goods received by the defendant and not delivered at destination.

The defence was that the claim was barred under Section 77 of the Indian Railways Act, 1890.

The Judge has found that the suit is barred by the above section and has dismissed it.

The plaintiff's contention before me on revision is that Section 77 has no application, that there was no loss of the goods within the meaning of the section, that there was a wrongful delivery of them to one Ali Jan through the negligence or bad faith of

the servants of the defendant Railway, which amounted to conversion of them and that therefore the liability of the defendant as a Railway and carrier is not affected by the section

Changa Mal
v
B N W Ry

The substance of the plaint is that on 18th September 1894 the goods were consigned by the plaintiffs at Delhi through the East Indian Railway for delivery to themselves at Somastipur on the line of the defendant Railway, that on inquiry defendant informed them that the goods were lying undelivered at destination, that in January and February 1895 the East Indian Railway also wrote to them to the same effect, that therefore they sent their servant to Somastipur to take delivery but he was told by defendants' servants on 11th May 1895, that there was no parcel belonging to plaintiff at the station, that on 16th July, after some further correspondence, the Traffic Superintendent finally wrote to the plaintiff that delivery had been made by mistake to one Ah Jan and that the defendant Company was responsible for the value of the goods, but that ultimately the defendant repudiated all liability which led to the institution of the suit after the usual notices

Defendants' agent in the Lower Court admitted the delivery to Ah Jan, but professed his inability to give the date

The plaintiff's counsel produced before me a mass of correspondence which passed between the parties since the delivery of the goods and many of the letters are referred to in the plaint. The explanation for their not being filed in the Court below is that the Judge summarily disposed of the case on the legal objection urged by the defendant and did not go into the facts. This appears extremely probable

The Judge's record is very meagre and his judgment short and open to the strictures passed in Civil Judgment No 78, P R, 1895. It would have been preferable had the facts been more fully gone into but as the mis-delivery to Ah Jan is admitted by the defendant, sufficient materials appeared to exist on the record for the disposal of the legal questions raised in the defence and plaintiff's application for revision

The words "loss, destruction or deterioration of goods" used in Section 77 occur in a series of sections beginning with Section 72 in Chapter VII of the Act, and must be employed in the same sense throughout, and the construction put on them in one Section must serve as a guide for their interpretation in

Changa Mal another The word "loss" has nowhere been defined in the
 B \ v W Rv Act, but its grammatical sense involves the notion of an involuntary or unwilling parting with the thing with reference to which it is used I should think that this action is true of both the person who loses the thing and the owner whose property is lost A thing is not lost in the proper sense of the term if the holder of it detains it wrongfully or wilfully or negligently delivers it to another The latter class of act is termed conversion according to the English authorities (see Macpherson's Law of Indian Railways and Common Carriers pp 248 250) The agent for the defendant contends that in all these cases there is "loss" of the article to the owner or consignee and that Section 77 is therefore applicable I am disposed to put a strict construction on the section as it restricts the ordinary right to proceed with a claim and confers a privilege on the Railway It would seem that the sense in which the word is employed in conjunction with "destruction" and "deterioration" in Section 72 governs its interpretation in Section 77, and I doubt whether in the former it bears such an extended signification as the defendant wishes to put on it If it does it must in conjunction with the two other expressions practically define the entire liability of the Railway in respect of the goods but I doubt whether a case of wrongful detention would be held to be covered by it or governed by the short limitation provided in Section 77

The last section is now and there is a complete dearth of authority as regards its interpretation I find however, that in *Balaram Harilal & S M Ry* (1) the words "loss, destruction, and deterioration" in Section 75 were held to include a loss caused by criminal misappropriation on the part of a servant of the Railway Company and the High Court accepted the view of the Judge of the Small Cause Court, Bombay, (see page 163) as to their meaning This might serve as a guide for the construction of Section 77

As the question is one of considerable difficulty and the view of the Bombay High Court probably goes to a certain extent to support the defendant's contention I think it should be put before and be decided by a Bench Order accordingly

The Judgment of the Divisional Bench was delivered by

CHATTERJI, J (STODOL, J concurring) My previous order dated the 9th July 1896, should be read as part of this judgment

We have now had the advantage of hearing a further argument and of having the defendant's case put before us by a trained lawyer, but after giving the matter my best consideration, I am of the same opinion as before, viz., that the defendant's plea ought to fail. Section 77 of the Indian Railways Act does not exactly lay down a rule of limitation for suits against Railway Administrations, but protects them from being sued for compensation for loss, destruction or deterioration of goods delivered to them for carriage by the Railway unless the claim for such compensation has been preferred by the plaintiff or on his behalf to them within six months from the date of delivery. In other words it confers an exemption or privilege on the Railway Administration. Whichever view may be right I am disposed to think that the section should be strictly limited in its operation to cases clearly falling within its terms. Maxwell on the Interpretation of Statutes, 3rd Edition, pp 401 and 411. In *re Sham Shanker Bhadoory*,⁽¹⁾ *Parasram Jethmal v Rukheas*,⁽²⁾

Changa Mal
v
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The exact meaning of the word "loss" which is in issue in the case is perhaps to a certain extent liable to be obscured by the discussions regarding it in some of the reported cases. It has been held for example to cover a loss of season or market the *Manchester and Sheffield and Lancashire Railway Company v Brown*,⁽³⁾ also a temporary loss arising from misdelivery *Millin v Brasch Co*,⁽⁴⁾ see also *Morrill v South Eastern Railway Company*,⁽⁵⁾ Possibly the case about misdelivery is regarded as giving some colour to the defendant's contention and may have suggested it, but a careful examination of the report does not support this opinion. The misdelivery was unconscious and through mistake, and the defendants were unable for a time to say what had become of the articles consigned to them. For that time and until it was traced it was "lost," whatever meaning may be put on that word. It was not a case of a delivery knowingly made, for thus is how I read the statement of defendant's agent, to a person who was not the consignee or consignee. The two last named cases contain clear expressions of opinion that such delivery or wilful detention of the goods by the carrier is not tantamount to "loss" under the English Carriers Act.

The plaintiff's case is that the goods have not been lost by the defendant Railway as it well knows what has become of them

(1) 111 Cal L R 409

(3) L R 8 App Ca, 703

(2) 1 L R 15 Bom 291

(4) L R 10 Q B D 142

(5) L R 1 Q B D 302

Cham a Mal ind as it has wilfully delivered them to a person who had no
 B N W Ry right to receive them. He sues the defendant for damages for
 breach of contract to carry the goods and to deliver them to
 him at destination. There is no doubt that the defendant Rail
 way has upon the allegations of both parties failed to carry out
 its contract and is responsible for damages, the measure of
 which is the fair market value of the goods consigned and such
 other sums for expenses and other losses sustained by the
 plaintiff as he may be able to prove. Plaintiff does not allege
 loss of the goods or claim compensation for such loss.

As stated in my former order "loss" is nowhere defined in
 the Act, and it seems equally clear that it is used in the same
 sense in all the Sections of Chapter VII in which it occurs. I am
 not prepared to say that according to the ordinary acceptation
 of the term it would cover a case of wilful misdelivery or what
 is practically the same thing, a case of wrongful detention on the
 part of the defendant merely because in its widest signification
 of privation the owner might be said to have sustained the loss
 of the thing in respect of which such notion was taken.

The history of the legislation in this country in respect of
 the responsibilities of common carriers and Railways for goods,
 etc., carried by them may be referred to in this connection with
 advantage. In England the liability of a common carrier for
 safe delivery of goods entrusted to his care has been always
 treated as independent of the contract to carry and was founded
 on Common Law and custom under which he is regarded as an
 insurer of the goods entrusted to his care. *Irrawaddy Flotilla
 Company v. Bhaguradas*,⁽¹⁾ *Berghien v. The Great Eastern
 Railway Company*,⁽²⁾ Per HOLT, C.J., in *Cogg's v. Bernard*,⁽³⁾
 This rule was held to prevail in this country and it was decid-
 ed by a Full Bench of the Calcutta High Court, dissenting
 from the contrary view taken by the Bombay Court in *Aurore
 Tulwals v. Great Indian Peninsula Railway Company*,⁽⁴⁾ that
 the Indian Contract Act, Sections 151 and 152, had made no
 change in it. see *Molloy v. Kant Shave v. The India General
 Steam Navigation Company*,⁽⁵⁾ and this view was upheld by
 their Lordships of the Privy Council in the case cited above.
In The 1st Indian Railway Company v. Jordan,⁽⁶⁾ which was a
 case under Act VIII of 1841, it was ruled by PEACOCK, C.J. and

(1) 1 P. 181, 1 L.J. (2) 3 C. 1 D. 721 (3) 1 Embury L. C. 10th Ed. 171

(4) 1 L. L., 3 Bom., 100 (5) 1 L. P., 10 Cal., 165 (6) 4 B. L. R. O. C. 97

MACPHERSON, J., that Railway Companies in India were common carriers and liable as such, that is, as insurers of goods delivered to them. The Railway Act of 1879, Section 2, provided that nothing in the Carriers Act, 1865, was applicable to carriers by railway. It was nevertheless held in *Chogemal v. The Port Commissioners of Calcutta*,⁽¹⁾ that by the repeal of the latter Act, so far as it related to Railways and of the previous Railway Act of 1854 the liability of carriers as it stood before the Act of 1854 and 1865 was restored, and it was further decided, following the Full Bench case already cited, that the Contract Act did not affect such liability, and that after the passing of the Railways Act of 1879 the liability of Indian Railways was like that of other carriers not limited to a liability for negligence, but also as insurers of goods delivered to them.

Changa Mal
B N W Ry.

Section 72 of the present Railway Act was framed to counteract the effect of these decisions and to declare the law in terms of the decision of the Bombay High Court in *Kuterya Tulsidas v. The Great Indian Peninsula Railway Company*. It says in Sub section (1) that the responsibility of railways "for the loss, destruction or deterioration of animals or goods shall, subject to the other provision of this Act, be that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872." Subsection 8 declares that "nothing in the Common Law of England or the Carriers Act III, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility as in this section defined of a Railway administration."

It seems thus clear that the responsibility regarding which Section 72 legislates is the responsibility which was formerly held to attach to Indian Railways as insurers for the safe delivery of goods under the Common Law and custom of England, and not the responsibility arising from contracts for their carriage and delivery. Chapter VII of the Act has been framed mainly with the object of defining the limits of that responsibility, and as already stated, "loss" in Section 77 must bear the same interpretation as in Section 72. On this view it is difficult to maintain the defendants contention as to the meaning of the word. It clearly signifies loss by the railway and not simply "loss" to the owner, a distinction referred to by Lindley L. J., in *Millen v. Brasch and Co*,⁽²⁾ quoted above. A similar inference may,

(1) L. L. R., 11 Cal., 427

(2) L. R. 10 Q. B. D., 142

Changa Mal I think, be drawn from the references to the Contract Act in
 B N W Ry Section 72 Section 152 of that Act relates to "loss" of goods
 by the bailee while they are in his hands and not to loss caused
 to the bailee by wrongful detention or conversion of them by the
 bailee

Some of the consequences of admitting the correctness of the defendant's plea have been averted to in my former order and need not be repeated here. It would in that case follow that the defendant Railway might detain the goods in its possession or proceed to wrongfully convert them to its own use and still claim the benefit of Section 77. I should not be prepared to accept this result without clear authority in support of the contention.

As the section confers a privilege or exemption and must be strictly construed, that is, not be extended to cases to which it does not in terms apply, I should also hold that as the plaintiff does not say that the goods are lost nor sue for compensation for such loss, and the defendant also does not plead that they have been actually lost, the Section cannot be pleaded in bar of the claim. The suit is for breach of a contract to deliver which on the pleadings has admittedly been committed, and I see considerable force in the reasoning of the Judges of the Calcutta Court who decided the case of *Dan Mal v. British India Steam Navigation Company* (1). That reasoning ought *a fortiori* to apply in favour of the plaintiff in the present suit.

The Bombay decision quoted in my previous order does not appear to be really in point, as the "loss" there was really caused by the act of servants of the Railway and the case related to the liability of the Railway in the capacity of insurer of the goods to use the language in vogue before the passing of the present Railway Act, and not on the contract to carry.

I would accept the application and return the case to the Judge for decision on the merits and make defendants liable for plaintiff's costs in this Court. Counsel's fee Rs. 25.

**The Indian Law Reports, Vol. XXIV. (Calcutta)
Series, Page 306**

Before Mr. Justice Banerjee and Mr. Justice Rampann.

**THE SECRETARY OF STATE FOR INDIA IN
COUNCIL (DEFENDANT), APPELLANT**

v

DIPCHAND PODDAR AND OTHERS (PLAINTIFFS), RESPONDENTS *

*Railways Act (IX of 1890), Section 77—Notice of suit—Agent of Manager—
Traffic Superintendent—Civil Procedure Code (Act XIV of 1882) Sec
tions 147, 149—Practice—Pleadings*

1896

December 3

The Traffic Superintendent is not the manager's agent and notice to him is not notice to the Railway Administration within Section 77 of the Indian Railways Act (IX of 1890)

Under Section 77 of the Indian Railways Act it is not necessary for the defendant to plead want of notice of action in order to avail himself of it, but he may raise the objection at the hearing

The plaintiff, brought this suit against the Secretary of State for India as the proprietor of the Eastern Bengal State Railway, and against the Bengal Central Flotilla Company, for compensation for goods lost while being conveyed from Calcutta to Noakhali. The plaintiffs alleged that six bales of cotton goods were consigned to them on the 8th of June 1893, and that only five of these were delivered, the other bale was detained at Khulna, where goods are transhipped from the Bengal Central Railway to the steamers of the Bengal Central Flotilla Company, and did not reach Noakhali till the end of September, when the covering was torn and the contents so damaged as to be unsaleable, and the plaintiffs refused to take delivery

For the Secretary of State it was pleaded that he was not liable, as there was no negligence shown, that the bale was badly packed and when weighed at Kulna was found to be in excess of the weight stated by the consignor that the bale had

* Appeal from Appellate Decree No 1252 of 1895 against the decree of W H M Gunn Esq District Judge of Noakhali dated the 2nd of May 1895 affirming the decree of Bibi Lal Singh Munsif of Sillara dated the 17th of December 1894

Changa Mal I think, be drawn from the references to the Contract Act in
 B v W Ry Section 72 Section 152 of that Act relates to "loss" of goods
 — by the bailor while they are in his hands and not to loss caused
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 proceed to wrongfully convert them to its own use and still claim
 the benefit of Section 77. I should not be prepared to accept
 this result without clear authority in support of the contention.

As the section confers a privilege or exemption and must be
 strictly construed, that is, not be extended to cases to which it
 does not in terms apply, I should also hold that as the plaintiff
 does not say that the goods are lost nor sue for compensation
 for such loss, and the defendant also does not plead that they
 have been actually lost, the Section cannot be pleaded in bar of
 the claim. The suit is for breach of a contract to deliver which
 on the pleadings has admittedly been committed, and I see con-
 siderable force in the reasoning of the Judges of the Calcutta
 Court who decided the case of *Dan Mal v. British India Steam
 Navigation Company* (1). That reasoning ought a fortiori to
 apply in favour of the plaintiff in the present suit.

The Bombay decision quoted in my previous order does not
 appear to be really in point, as the "loss" there was real loss
 caused by the act of servants of the Railway and the case
 related to the liability of the Railway in the capacity of insurers
 of the goods to use the language in vogue before the passing of
 the present Railway Act, and not on the contract to carry.

I would accept the application and return the case to the
 Judge for decision on the merits and make defendants liable
 for plaintiff's costs in this Court. Counsel's fee Rs 25

**The Indian Law Reports, Vol. XXIV. (Calcutta)
Series, Page 306**

Before Mr. Justice Banerjee and Mr. Justice Rampun.

**THE SECRETARY OF STATE FOR INDIA IN
COUNCIL (DEFENDANT), APPELLANT**

v.

DIPCHAND PODDAR AND OTHERS (PLAINTIFFS), RESPONDENTS *

*Railways Act (IX of 1890), Section 77—Notice of suit—Agent of Manager—
Traffic Superintendent—Civil Procedure Code (Act XIV of 1882), Sec 147, 149—Practice—Pleadings* 1896
December 8

The Traffic Superintendent is not the manager's agent and notice to him is not notice to the Railway Administration within Section 77 of the Indian Railways Act (IX of 1890)

Under Section 77 of the Indian Railways Act it is not necessary for the defendant to plead want of notice of action in order to avail himself of it, but he may raise the objection at the hearing

The plaintiffs brought this suit against the Secretary of State for India as the proprietor of the Eastern Bengal State Railway, and against the Bengal Central Flotilla Company, for compensation for goods lost while being conveyed from Calcutta to Noakhali. The plaintiffs alleged that six bales of cotton goods were consigned to them on the 8th of June 1893, and that only five of these were delivered, the other bale was detained at Khulna, where goods are transhipped from the Bengal Central Railway to the steamers of the Bengal Central Flotilla Company, and did not reach Noakhali till the end of September, when the covering was torn and the contents so damaged as to be unsaleable, and the plaintiffs refused to take delivery

For the Secretary of State it was pleaded that he was not liable, as there was no negligence shown, that the bale was badly packed and when weighed at Kulna was found to be in excess of the weight stated by the consignor, that the bale had

* Appeal from Appellate Decree No 1252 of 1893 against the decree of W H M Gunn Esq District Judge of Noakhali dated the 22nd of May 1893 affirming the decree of Bibi Lal Sool, Munsif of Sullaram dated the 17th of December 1894

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I think, be drawn from the references to the Contract Act in Section 72. Section 152 of that Act relates to "loss" of goods by the bailee while they are in his hands and not to loss caused to the bailee by wrongful detention or conversion of them by the bailee.

Some of the consequences of admitting the correctness of the defendant's plea have been averted to in my former order and need not be repeated here. It would in that case follow that the defendant Railway might detain the goods in its possession or proceed to wrongfully convert them to its own use and still claim the benefit of Section 77. I should not be prepared to accept this result without clear authority in support of the contention.

As the section confers a privilege or exemption and must be strictly construed, that is, not be extended to cases to which it does not in terms apply, I should also hold that as the plaintiff does not say that the goods are lost nor sue for compensation for such loss, and the defendant also does not plead that they have been actually lost, the Section cannot be pleaded in bar of the claim. The suit is for breach of a contract to deliver which on the pleadings has admittedly been committed, and I see considerable force in the reasoning of the Judges of the Calcutta Court who decided the case of *Dan Mal v. British India Steam Navigation Company* (1). That reasoning ought a fortiori to apply in favour of the plaintiff in the present suit.

The Bombay decision quoted in my previous order does not appear to be really in point, as the "loss" there was real loss caused by the act of servants of the Railway and the case related to the liability of the Railway in the capacity of carrier of the goods to use the language in vogue before the passing of the present Railway Act, and not on the contract to carry.

I would accept the application and return the case to the Judge for decision on the merits and make defendants liable for plaintiff's costs in this Court. Counsel's fee Rs 25.

**The Indian Law Reports, Vol. XXIV. (Calcutta)
Series, Page 306**

Before Mr Justice Banerjee and Mr Justice Rampin.

**THE SECRETARY OF STATE FOR INDIA IN
COUNCIL (DEFENDANT), APPELLANT**

v

DIPCHAND PODDAR AND OTHERS (PLAINTIFFS), RESPONDENTS *

*Railways Act (IX of 1890) Section 77—Notice of suit—Agent of Manager—
• Traffic Superintendent—Civil Procedure Code (Act XIV of 1882) Sec 147 149—Practice—Pleadings* 1890
December 8

The Traffic Superintendent is not the manager's agent and notice to him is not notice to the Railway Administration within Section 77 of the Indian Railways Act (IX of 1890)

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* Appeal from Appellate Decree No 1252 of 1893 against the decree of W H M Gunn Esq District Judge of Noakhali dated the 22nd of May 1893 affirming the decree of Bibu Lal Singh, Munsif of Sulliam dated the 17th of December 1894

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been detained at Kulna because it was found on arrival there to be torn, that while in the godowns at Kulna some of its contents had been stolen and that some of the stolen cloths had been recovered, and the bale sent on to Noakhali for delivery to the plaintiffs. The price of the goods as claimed was also disputed. The Hottish Company denied all liability, as they were ready to deliver the goods in the same condition as when received. The Munsif gave the plaintiffs a decree for the value of the goods as claimed. The Secretary of State appealed to the Judge of Noakhali, who dismissed the appeal.

The senior Government Pleader Babu Hem Chandra Banerjee and Babu Ram Charan Mitter for the Appellant

Dr. Rash Behari Ghose and Babu Lal Behari Mitter for the Respondents

The judgment of the Court (BANERJEE and RAMPRASAD, JJ) was as follows —

This appeal arises out of a suit brought by the plaintiffs (respondents) against the Secretary of State for India and the Bengal Central Railway Company for compensation for the loss of goods delivered for carriage to the Eastern Bengal State Railway and the Railway Company. The plaintiffs allege that they sent notices of demand to the Traffic Superintendent and to the District Collector before the institution of the suit. The defence was denial of liability on the ground that there was no negligence on the part of the defendants. A further objection not taken in the written statement, was urged on behalf of the Secretary of State at the time of argument, that the claim for compensation was untenable under Section 77 of the Indian Railway Act (IX of 1890) for want of notice to the Railway Administration. The first Court overruled the objection in law and found for the plaintiffs on the merits, and gave them a decree for a certain amount, and that decree has been affirmed on appeal by the District Judge.

In second appeal it is argued on behalf of the Secretary of State *first*, that the lower Appellate Court is wrong in holding that the Traffic Superintendent should be considered as the Manager's agent, and that the notice to him was a sufficient compliance with Section 77 of the Railway Act, and *secondly* that the lower Appellate Court is wrong in giving the plaintiffs a decree for the amount claimed when there is no evidence to prove that that was the value of the goods damaged.

Upon the second point it is necessary to say only this, that the evidence of the plaintiff's agent shows that the amount claimed is the true value of the goods, and that evidence has been considered sufficient by the lower Appellate Court. The second contention of the appellant must therefore fail.

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The first contention urged for the appellant is however in our opinion correct. Section 77 of the Indian Railways Act requires that in a case like this a notice of the claim should be preferred to the Railway Administration within six months from the date of the delivery of the goods, and by Section 3 of the Act "Railway Administration" in the case of a State Railway is defined to mean the Manager, and to include the Government. The notice that was given to the Government was not served within six months from the date of delivery of the goods, and the notice which was served within six months was a notice not to the Manager but to the Traffic Superintendent, and though there is nothing to show that the notice, though addressed to the Traffic Superintendent, reached the Manager within six months from the date of delivery of the goods, the lower Appellate Court holds the notice to be sufficient, because it is of opinion that the Traffic Superintendent should be considered as the Manager's agent in such matters. We think the Court below is wrong in law in taking this view.

The learned Vakil for the respondents argued in support of the decree of the Court below that though the notice served in this case might not have been shown to be sufficient under the law, the plaintiffs were not bound to prove the service of any notice, want of notice not having been pleaded in defence, and in support of this argument the cases of *Davey v. Warner*(1), *Smith v. Pritchard*(2) and certain other English cases, were relied upon. We are of opinion that that argument cannot succeed, regard being had to the terms of Section 77 of the Railways Act and to the provisions of Sections 147 and 149 of the Code of Civil Procedure, which authorize the Court to frame issues from certain materials besides the pleadings and to amend the issues at any stage of the case. The objection on the ground of absence of notice, though not taken in the written statement was raised in argument, and the objection was entertained and disposed of, though erroneously by the Courts below. It cannot therefore be thrown out on the ground that it was not specially pleaded.

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But though we hold that the objection on the ground of want of notice cannot be thrown out altogether, we are of opinion that as it was not taken in the written statement and was urged only in argument, the plaintiffs are entitled to have an opportunity of meeting it. In our opinion it will be sufficiently met if it is shown that the notice served on the Traffic Superintendent reached the Manager within six months from the date of delivery of the goods.

The case must therefore go back to the first Court, in order that it may be disposed of after determination of the point indicated above. Both parties will be at liberty to adduce evidence upon the point. Costs will abide the result.

As the appeal is only on behalf of defendant No. 1 and the ground upon which the appeal succeeds relates only to the liability of defendant No. 1 the decrees of the Courts below as against defendant No. 2 will stand.

Appeal allowed and case remanded

The Indian Law Reports, Vol XXII (Madras) Series,
Page 137.

APPELLATE CIVIL

*Before Mr Justice Sulramanta Ayyar and
Mr. Justice Benson*

PERIANNAN CHETTI (PLAINTIFF) PETITIONER

SOUTH INDIAN RAILWAY COMPANY
(DEFENDANT) RESPONDENT *

1898
August 26

*Passage Act—Sec 1A of No 37, 149—Notice of delivery of goods
to the Traffic Manager*

In this case the South Indian Railway Company to recover the value of goods delivered to the plaintiff Company for carriage was liable to the plaintiff for loss of the goods if the delivery given notice of the goods to the Traffic Manager of the defendant Company was not made.

Held, that the notice was a good notice, if it in fact reached the Agent of the defendant Company within the period of six months.

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PETITION under Provincial Small Cause Courts Act, Section 25, praying the High Court to revise the proceedings of P. NARAYANASAMI Ayyar, Subordinate Judge of Negapatam, in Small Cause Suit No. 1117 of 1897

The plaintiff sued for the value of a parcel delivered by him to the defendant Company of Madras to be carried to Negapatam.

The defendants pleaded that the suit was not maintainable for want of notice given under the Railways Act, 1890, Sections 77 and 140. The plaintiff had given notice to the Traffic Manager at Trichinopoly less than five weeks after the consignment of the parcel.

The provisions of the Railways Act IX of 1890, Sections 77 and 140, are as follows —

"77 A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be, so

carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the Railway Administration within six months from the date of the delivery of the animals or goods for carriage by railway

"140. Any notice or other document required or authorized by this act to be served on a Railway Administration may be served, in the case of a railway administered by the Government or a Native State, on the Manager, and, in the case of a railway administered by a Railway Company, on the Agent in India of the Railway Company—

Notification of claims
to refund of overcharge
and to compensation
for losses

Service of notices on
Railway Administra-
tions

"(a) by delivering the notice or other document to the Manager or Agent, or

"(b) by leaving it at his office, or

"(c) by forwarding it by post in a prepaid letter addressed to the Manager or Agent at his office and registered under Part III of the Indian Post Office Act, 1866"

The Subordinate Judge held that the notice was bad and dismissed the suit.

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The plaintiff preferred this petition

Kumarasami Sastri for Petitioner

Mr J G Smith and Mr R. J Grant for Respondent

JUDGMENT.—The question in this case is whether the suit was rightly dismissed on the ground that the notice required by law was not given to the Railway Company.

The obligation to give notice as a condition precedent to the recovery of compensation is imposed by Section 77 of the Indian Railways Act, 1890, and all that that section requires is that the claim must be preferred in writing and within a limited time to the "Railway Administration," that is, in the present case, to the Railway Company [Section 3, clause (6)]. In dismissing the suit the Subordinate Judge did not find that, in fact, no notice such as Section 77 requires, was given to the Railway Company itself or to its Agent in India.

He dismissed the suit on the ground that the notice given by the plaintiff was served on the Traffic Manager at Trichinopoly, whereas it ought, under Section 140 of the Act, to have been served on the Agent in India of the Company in one of the modes prescribed in that section. In other words, the Subordinate Judge has held that a notice, served in any manner other than that prescribed in Section 140, is invalid. This view, we think, is clearly wrong, for it is impossible to hold that service on the Railway Company itself at its head office in England would not be in conformity with Section 77.

It seems to us that Section 140 was enacted in order to save parties from the inconvenience of being obliged to serve the Company itself, by rendering service on the Agent in India equivalent to service on the principal, and further by providing that service on the Agent, though not personal, would be sufficient if effected in either of the modes pointed out in clauses (b) and (c) of the section.

We do not think that Section 140 precludes a claimant from showing that the notice required by Section 77 did, in fact, reach the Agent, within the time limited, though not in one of the modes prescribed in Section 140.

The case of *The Secretary of State for India in Council v. Durrani* (1) to which the learned counsel for the Company

has drawn our attention in connection with another point, supports the view that we have taken as to the construction to be placed on Section 110

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We must, therefore, set aside the decree of the Subordinate Judge, and direct that the suit be restored to his file in order that the plaintiff may show, if he is in a position to do so, that the notice of claim addressed by him to the Traffic Manager did, in fact, reach the Agent within the time prescribed by Section 77. If this point is found in favor of plaintiff, the Subordinate Judge will then proceed to dispose of the suit on the merits, if it is not so found he will dismiss the suit. Costs in this court will be costs in the suit.

The Indian Law Reports Vol XXVI. (Bombay) Series,
Page 669.

ORIGINAL CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and
Mr. Justice Crowe.*

THE EAST INDIAN RAILWAY COMPANY
(SECOND DEFENDANTS), APPELLANTS,

v.

JETHMULL RAMANAND AND ANOTHER
(PLAINTIFFS), RESPONDENTS *

*It is a Claim against Railway Company—Notice of claim—Hathi says
Act (IX of 1890), Sections 77 and 110*

1902
July 18

The plaintiffs sued the B B & C I Railway Company and the East Indian Railway Company for damages for non delivery of loads alleged to have been delivered at Ghaziabad for conveyance to Bombay on the 16th May 1898. From Ghaziabad to Delhi the railway line belongs to the East Indian Railway Company, and from Delhi to Bombay the line is that of the B B & C I Railway Company. Both Companies were therefore made defendants in the suit. On the merits the suit was dismissed as against the B B & C I Railway Company but a decree was passed against the East Indian Railway Company for Rs 4,617. It appeared that no notice of plaintiffs claim under Section 110 of the Indian Railways Act (IX of 1890) had ever been directly addressed to the East Indian Railway

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Company. The plaintiffs relied on a notice dated the 25th July 1895, which they had addressed to the General Traffic Manager of the B B & C I Railway Company, making a claim against that Company. The latter Company had at once informed the First Indian Railway Company of the plaintiffs' claim and had given notice that, in case the plaintiffs sued them, they would expect the First Indian Railway Company to bear all the expenses. Further correspondence took place between the two Companies with reference to the plaintiffs' claim, and on the 1st October, 1895, the Solicitors of the First Indian Railway Company wrote to the plaintiffs' Solicitors as follows:

DEAR SIRS—Your letter of the 21st instant to the address of the General Traffic Manager, B B & C I Railway, Bombay has been handed to us by our clients the East Indian Railway, Calcutta, claiming on behalf of your clients a sum of Rs. 7447 being the amount of loss alleged to have been sustained in respect of short delivery of 500 and 125 bags of wheat.

The file of papers has just been handed to us and we will write to you further as soon as we have had an opportunity of going through same.

Yours faithfully,
(Signed) Morgan & Co.

The Lower Court held that in this letter the Solicitors of the East Indian Railway Company treated the communications sent to them by the B B & C I Railway Company as communications affecting them directly and that the B B & C I Railway Company could not afterwards say that the notice of claim given by the plaintiffs to the B B & C I Railway Company and forwarded to them (the B B & C I Railway Company) was no notice to them—that the plaintiffs must be held to have given their notice through the B B & C I Railway Company and that such notice was good. On appeal—

Held (reversing the decree and dismissing the suit), that no sufficient notice had been given to the East Indian Railway Company under sections 77 and 119 of the Railways Act (IX of 1890).

APPEAL from Tybth, J. Suit to recover damages for non-delivery of goods.

The plaintiffs were commission agents in Bombay, and they alleged that in May 1895, their constituents Hardyal Goenka and Co. had delivered to the defendant Company at Ghazabad two consignments of wheat, consisting of 1,000 bags and 500 bags, for transmission to Bombay, and had forwarded to them (the plaintiffs) two railway receipts in respect thereof, endorsed in blank by Hardyal Goenka, against which they had advanced Rs. 7,000 and Rs. 1,000 respectively. Of the first consignment, however, only 500 bags, and of the second only 375 bags, had been delivered to them in Bombay, and they claimed to recover the value of the bags not delivered, viz., 500 bags and 125 bags.

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In coming from Ghaziabad to Bombay the goods in question had to travel in wagons and over the line of the East Indian Railway Company as far as Delhi. They were there transferred to wagons belonging to the Bombay, Baroda and Central India Railway, and travelled from there to Bombay on the line of the latter Company, and during that part of the journey were in charge of the servants of that Company. The plaintiffs, therefore, filed this suit against both Companies and both Companies filed written statements denying the receipt of the goods and contesting the plaintiffs' claim. They alleged that incorrect figures had been fraudulently entered in the railway receipts by the Railway clerk at the instigation of and in collusion with, the consignor Hardayal at Ghaziabad, and that the 500 bags and 125 bags in respect of which the plaintiffs claimed had never really been delivered by Hardayal to the East Indian Railway Company at Ghaziabad for transmission to Bombay at all.

In their written statements both the Railway Companies also raised the point as to whether the plaintiffs had given notice of their claim as required by Section 77 of the Railways Act (IX of 1890). The section is as follows:

77. A person shall not be entitled to a refund for overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the Railway Administration within six months from the date of the delivery of the animal or goods for carriage by railway.

Both the Railways were administered by Railway Companies (see Section 140 of Act IX of 1890).

The East Indian Railway Company allege that neither the plaintiffs nor their constituent Hardayal had given them any notice of claim at all. The Bombay, Baroda and Central India Railway alleged that no notice of claim had been received "by the agent of the Company until after the filing of this suit, a period of eleven months from the date of the said railway receipts. Both the Companies, therefore, contended that this suit was not maintainable.

The goods in question were alleged to have been delivered to the East Indian Railway Company at Ghaziabad for transmission to Bombay on the 16th May 1898. The notice of claim relied on by the plaintiffs was dated the 28th July 1898. This suit was filed on the 28th April, 1899.

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By a consent of Judge's order the suit was set down for hearing on preliminary issues as to notice. It came on for hearing before Tyabji, J., on the 2nd April 1900. The following issues were raised:

1 Whether the plaintiff's claim was preferred in writing by him or on his behalf to the Administrations of the two defendant Companies or to either or which of such Administrations within six months from the date of the alleged delivery of the plaintiff's goods for carriage.

2 Whether if there were any irregularity or insufficiency in the notice given to the defendant Companies or either of them the same has not been waived by the Companies and each or either of them.

3 Whether the said two Companies and each of them are not estopped from raising the defence embodied in issue 1.

The notice of claim relied on was the following letter dated the 28th July 1898, addressed by the plaintiffs, not to the Agent but to the General Traffic Manager of the B. B. & C. I. Railway Company at Bombay:

Bombay, 28th July 1898

THE GENERAL TRAFFIC MANAGER,

B. B. & C. I. Railway, Bombay

DEAR SIR,—With reference to the Railway Receipt No. 70, for 1,000 bags wheat, dated 16th May 1898, consigned from Ghazialad to Carnac Bridge, we beg to inform you that this Railway Receipt was delivered to Messrs. Ralli Brothers to whom you delivered only 500 bags out of this consignment the remaining 500 bags of which you were unable to deliver on account of not receiving the goods.

Please note that we have now paid Railway freight, town duty and 1 per cent. value of the goods (which was paid to us by Messrs. Ralli Brothers) to Messrs. Ralli Brothers on undelivered 500 bags.

Bombay sent the following telegram to the General Traffic Manager of the East Indian Railway Company at Calcutta —

C 61 Your 17 G C of 24th ultimo Our District Traffic Superintendent, Bandikui, wired your District Traffic Superintendent Tundla as follows — Your 6071 C of 21st July 1898 re Ghazirabad C C B Inv 297 of 26th May 1898 Trucks Nos 471 21C, 1031 (not 10327) contained goods under Ghazirabad invoice 301 and truck No 1143 contained goods under Ghazirabad invoice 07 and not in connection with invoice No 297 as stated in your letter Have further enquiries made and advise result early Message ends Consignee has submitted claim for over Rs 6000 and requires settlement within a week otherwise interest at 3 per cent to be charged Please reply early

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On the 14th September, 1898, the General Traffic Manager of the East Indian Railway telegraphed to the General Traffic Manager of the Bombay, Baroda and Central India Railway as follows

59 G C your wires Nos C 76, C 77 of 7th September, 1898 Please repudiate claims for 400 bags under invoice No 297 and 120 bags under invoice No 303 (not 308) We have good grounds for supposing short tendered, and are prepared to contest Letter follows

On the 16th September, 1898, the General Traffic Manager of the East Indian Railway Company addressed a long letter to the General Traffic Manager of the Bombay, Baroda and Central India Railway Company, confirming his last mentioned telegram and discussing the plaintiff's claim This letter stated the facts that had been ascertained in the inquiry, showing (as he alleged) that the missing bags in respect of which the plaintiffs claimed had never been delivered for carriage The letter concluded as follows

19 I consider under the circumstances we have good grounds for contesting the claim and I shall be obliged by your letting me know what steps the owners of the goods in Bombay propose taking in the matter Railway receipt enclosed

A copy of this last mentioned letter was sent by the writer (the General Traffic Manager of the East Indian Railway Company) to the Agent of that Railway for his information He enclosed it to the Agent with the following letter

To

EAST INDIAN RAILWAY,
GENERAL TRAFFIC MANAGERS OFFICE
Calcutta 16th September 1898

The Agent

DEAR SIR,—I enclose for information copy of my letter of date to the General Traffic Manager B B & C I Railway, regarding a serious case of alleged shortage of 625 bags from two consignments despatched from Ghazirabad under the above quoted invoices

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I have arranged for the District Traffic Superintendent Tundla to go into the matter thoroughly with the Deputy Inspector General Government Railway Police Allahabad to ascertain what further steps should in the meantime be taken, as it is likely that the case will be pressed and probably end in litigation

Due notice will be taken of the neglect of the Ghaziabad staff and general want of supervision

I will keep you advised as to what further transpires—Yours &c

(Sd) G HUDDLESTON

Officiating General Traffic Manager

In accordance with the request contained in the above telegram of the 14th September, and the above letter of the 16th September, the General Traffic Manager of the B B & C I Railway repudiated the plaintiffs' claim by the following letter addressed to the plaintiffs

GENERAL TRAFFIC MANAGER'S OFFICE

Bombay, 22nd September, 1898

To

Lala Jethmull Karnayal

Kalbadevi Road Bombay

SIR—With reference to your letter dated the 1st ultimo in connection with your claim for an alleged short delivery of 500 bags wheat consigned under Ghaziabad to Carnac Bridge Invoice No 297 of 20th May, 1898 and your subsequent calls at this office I beg to inform you that I have now heard from the General Traffic Manager, East Indian Railway, and he informs me that after very careful enquiry he finds that the 500 bags were short tendered for despatch at Ghaziabad and that the receipt granted to the sender was erroneously made out for 1000 bags instead of 500 bags as actually received by the Railway

Under the circumstances I have been requested by the General Traffic Manager, East Indian Railway, to repudiate your claim in this case. Please address your further correspondence to the General Traffic Manager, East Indian Railway, Calcutta—Yours &c,

(Sd) T F WOOD,

Deputy General Traffic Manager

B B & C I Railway

On the 21st October, 1898, the General Traffic Manager of the B B & C I Railway Company received the following letter from Messrs Payne, Gilbert and Sayam, the plaintiffs' Solicitors

SIR—We have been consulted this morning on behalf of our clients Messrs Jethmull Karnayal with reference to short delivery of 500 and 12 bags of wheat out of a consignment of 1000 and 500 bags respectively

to them the loss sustained by them by reason of such short delivery, you

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have hitherto failed to do so on the ground that only 500 and 375 bags were in the first instance delivered to the Company by the consignors. We may state, however, that this ground is entirely untenable inasmuch as the Company had passed a receipt for 1 000 and 500 bags, respectively.

We are, therefore, instructed to demand from you payment of the sums of Rs 6,037 13 6 and Rs 1,400 1 6 respectively being the amount of the loss in respect of the short delivery as aforesaid and to give you notice, which we hereby do, that unless the said two sums are paid to us or to our clients within one week from the receipt hereof our clients will take such further steps in the matter to recover the same from the Company as they may be advised holding the Company liable for all costs and consequences. Please also note that our clients will claim to recover interest on the above two sums from the date on which they sent you the debit note till payment.

A copy of this letter was next day sent by the General Traffic Manager of the B B & C I Railway to the General Traffic Manager of the East Indian Railway Company enclosed with the following letter.

GENERAL TRAFFIC MANAGERS OFFICE,
Bombay 22nd October, 1908

To

The General Traffic Manager,
East Indian Railway,
Calcutta

DEAR SIR,—With reference to your letter No 10148 G C of 23rd September, 1898, I beg to send herewith a copy of letter dated 21st instant, I have received from Messrs Payne, Gilbert and Sayani, the consignees Solicitors, for your information, and shall be glad to hear from you in the matter by wire, if possible.

Kindly note that in the event of suit being filed against this Railway we will look to your Railway for all the expenses that may have to be incurred in connection with the case.

Yours &c

(Sd) BRIJMOHAN LALL
for General Traffic Manager

On the 25th October, 1898, the General Traffic Manager of the B B & C I Railway replied to Messrs Payne, Gilbert and Sayani as follows.

GENTLEMEN—In acknowledging the receipt of your letter dated the 21st October 1898 I beg to inform you that we have sent a copy of it to the General Traffic Manager, East Indian Railway, Calcutta and no time will be lost in communicating with you as soon as we hear from him.

Yours &c

(Sd) F W HANSON,
Deputy General Traffic Manager

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On the 27th October, 1898, the General Traffic Manager of the B B & C I Railway wrote a further letter to Messrs Payne, Gilbert and Sayani, the plaintiffs' Solicitors

GENTLEMEN,—In continuation of my letter Nos 2388—14 of 25th instant I beg to inform you that I have since heard from the General Traffic Manager East Indian Railway, Calcutta and he has requested me to repudiate your clients' claims, which I hereby do, for reasons stated in my letters Nos C 2388—12 and C 2207—21 of 22nd September, 1898, to your clients

Yours &c,

(Sd) F W. HANSON,

Deputy General Traffic Manager

On the same day the General Traffic Manager of the E I Railway Company enclosed to the Agent of that Company the above letter of the 22nd October from the B B & C I Railway Company

On the 31st October, 1898, Messrs Morgan and Company, the Solicitors for the East Indian Railway Company, addressed the following letter to Messrs Payne, Gilbert and Sayani, the plaintiffs' Solicitors

Calcutta, 31st October, 1898

To Messrs Payne Gilbert, Sayani & Co

DEAR SIRS—Your letter of the 21st instant to the address of the General Traffic Manager B B & C I Railway, Bombay, has been handed to us by our clients the East Indian Railway Company, Calcutta, claiming on behalf of your clients a sum of Rs 7,437, being the amount of loss alleged to have been sustained in respect of short delivery of 500 and 120 bags of wheat

The file of papers has just been handed to us and we will write to you further as soon as we have had an opportunity of going through same

Yours, &c, .

(Sd) MORGAN & Co

The above letters were put in at the hearing of the preliminary issue before TRYALJI, J, and oral evidence was taken The following were the material facts established by the oral evidence, as stated by TRYALJI, J, in his Judgment

The General Traffic Manager of the B B & C I Railway Company has been examined and he establishes these facts, namely, that the traffic of that Company is generally managed by himself; that he is the head of the Traffic Department, that he ordinarily, and without express instructions from the Agent enquires into all complaints made in regard to the non-delivery or detention of goods, that he ordinarily, unless the amount is very large admits or refuses to admit claims without any direct reference to the Agent, and that if a notice is served upon the Agent the Agent would ordinarily send back the notice to him as General Traffic Manager for investigation

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He further establishes the facts that in the particular case of the B B & C I Railway Company the Agent is the head of all the various departments, each of which is a separate and independent department having a separate head of its own for instance, there is an Audit Department, a Locomotive Department, a Traffic Department, and so on, that the General Traffic Manager only looks after the traffic and is not concerned with the work of the other departments in any way, and that all these various departments—the offices of these various departments—are to be found in the same building but in separate rooms, and that the office of the Agent of the Railway is also in the same building but in a separate room.

Under these circumstances, it is contended on behalf of the plaintiff that service of the notice in question in this suit upon the General Traffic Manager of the B B & C I Railway Company in Bombay at this particular building where the office of the Agent is located, is and ought to be considered good.

On the other hand it is contended on behalf of the defendants that Section 140 of the Railways Act is exclusive, and that in reality when it says the notice may be served on the Agent it really means that that is the only way in which it can be served, namely, on the Agent and the doctrine of mentioning the one as excluding the other is relied upon by them.

The notice relied on by the plaintiffs was their above letter of the 28th July, 1898, (*supra* page 672) which was a notice, *not to the Agent* of the B B & C I. Railway Company, but to the General Traffic Manager of that Company. On behalf of the Agent of that Company (Colonel Oliver) it was stated, and the Statement was accepted, that he knew nothing of the plaintiffs' claim until May, 1899, after the suit was filed.

No notice was ever given by the plaintiffs to the E. I. Railway Company, but the B B & C I. Railway Company had notified the E. I. Railway Company of the claim which the plaintiffs had made (see *supra* page 672), and the matter had admittedly come to the knowledge of the Agent of the E. I. Railway Company within six months from the date (May, 1898) at which the goods were alleged to have been given by the plaintiffs for carriage (see *supra* page 673).

For the B. B. & C. I. Railway Company it was contended that the notice of the 28th July, 1898, was insufficient under Section 140 of the Railways Act (IX of 1890), because it was not served on the Agent of the Company, nor did it come to his knowledge within six months of the delivery of the goods for carriage.

For the E. I. Railway Company it was contended that it never had notice of the plaintiffs' claim at all. The only notice given

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to it was a notice by the B B & C I Railway Company that in case the plaintiffs sued them they would claim against the E I Railway Company (see *supra* page 675)

TYABJI, J, held that the service on both the Companies was sufficient. He found all three preliminary issues in the affirmative for the plaintiff. As to the B B & C I Railway Company he said

Now I have come to the conclusion that there has been good service of the notice in question in this suit having regard to the evidence which the General Traffic Manager has given and to the position which he occupies and the independent authority which he has of investigating these matters

Though he is not the Agent within the meaning of section 140 yet he is an important officer—one of the principal officers of the Company and although service upon him may not be service upon the Agent yet I hold that service upon him is service upon the Railway Administration

According to my view of it the object of the section is not to throw obstacles in the way of a plaintiff recovering in a suit but to protect the Railway Company against stale claims—against claims that may be sprung upon them long after the goods have been delivered to them and therefore enjoins the duty upon claimants to make their claims within a reasonable time so as to enable the Railway Company to make enquiries and if satisfied of their justice to pay the claims. Every one of these requirements has been complied with in the present case

Not only is the General Traffic Manager a very important officer of the Company—so important indeed is he that it is he who has declared the written statement in this case—but he is the principal officer charged with the duty of investigating claims made against the Company. It seems to me therefore that if I were to hold that this notice was not served upon the Company, I must hold that Section 140 instead of being an enabling section where it says that service may be made on the Agent is an exclusive and compulsory section which would be absurd since it is admitted that service of a notice at the head office of a Company in England would be perfectly good. It is therefore not an exclusive section. It indicates one mode in which a notice may be served but in my opinion it does not exclude other modes if the Court thinks that the notice has been brought sufficiently to the cognizance of the Railway Company

Therefore, so far as regards the B B & C I Railway Company I hold that the Railway Administration has been served

As to the E I Railway Company, TYABJI, J, held the notice of the claim given by the B B & C I Railway Company to the E I Railway Company must be considered a notice given by the plaintiffs and that it was sufficient. He was of opinion that the letter of Messrs Morgan & Co, the Solicitors of the E I Railway Company, to Messrs Payne, Gilbert and Sayan, the

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plaintiff's Solicitors, (Exhibit N) dated the 31st October, 1898, (*supra* page 676) was conclusive in the matter. He said

Then comes Exhibit N, which is a letter from the Solicitors of the E I Railway Company to the plaintiffs Solicitors, Messrs Payne Gilbert and Symon, dated the 31st of October, 1898 (*supra* page 676)

In this letter the Solicitors of the F I Railway Company treat the communications sent to them by the B B & C I Railway Company as communications affecting themselves and after having corresponded with the B B & C I Railway Company they now correspond directly with the plaintiff. It seems to me therefore that whatever might have been the position of things if Exhibit N had not been written by the Solicitors of the E I Railway Company in which they treat the correspondence as affecting themselves and put themselves in direct communication with the plaintiff's Solicitors, it seems to me that it is now too late for the E I Railway Company to say that the notice they received from the B B & C I Railway Company was no notice to them of the plaintiff's claim.

I quite admit that there is a great deal in what Mr Macpherson argued before me, that the letters of the B B & C I Railway Company to the E. I. Railway Company were letters rather putting forward a claim of the B B & C I Railway against the E I Railway Company than a claim on behalf of the plaintiffs against the E I Railway Company, and I also say that there is a great deal of force in the contention of the B B & C I Railway Company that the plaintiffs never directly made any claim against the F I Railway Company, that there was no claim of the plaintiffs against the F I Railway Company, and that therefore the B B & C I Railway Company could not communicate any such claim to the E I. Railway Company

Therefore if it had not been for Exhibit N I should have had considerable difficulty in holding that the plaintiffs had made a claim against the E I Railway Company, or that the F. I. Railway Company had regarded the claim sent to them by the B B & C I Railway Company as a claim made on behalf of the plaintiffs

But whatever might otherwise have been my doubt upon that point, that doubt seems to be removed by this letter, Exhibit N. Therefore I have come to the conclusion that the notice of the claim given to the E. I. Railway Company must be taken to be a notice given by the plaintiffs or on behalf of the plaintiffs, though made through the B B & C I Railway Company, and that it was so treated by the E I Railway Company, and that as that notice was admittedly given within six months the notice so far as that Company is concerned must be treated as good

The plaintiffs having thus succeeded on the preliminary issues the case went to a hearing on the merits. The Court dismissed the suit as against the B B & C I. Railway Company, but passed a decree against the E. I. Railway Company, for Rs 4,617.

The E I Railway Company appealed, and on appeal again raised the question as to notice

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Scott (Advocate General) and Kirkpatrick for the Appellants (E I Railway Company) —The notice required by the Act is a condition precedent, and, if not duly given, the plaintiffs' suit must fail. No notice at all was given to us by the plaintiffs. The only notice we had was a notice by the B B & C I Railway Company of a possible claim, not by the plaintiffs but by that Company, against us in case they had to pay damages to the plaintiff. Further, we say that the plaintiffs' notice to the B B & C I Railway Company was not a valid notice under the Act, for it was given to the Traffic Manager and not to the Company or to the Agent. The plaintiffs' claim did not come to the Agent's knowledge until after this suit was filed. If the notice to the B B & C I Railway Company (as we say) was not valid, the fact that it was brought indirectly to our knowledge could not be a valid notice to us. They referred to the Railways Act (IX of 1890) Sections 77 and 140, and Section 3, clause 6, *Secretary of State for India v. Dipchand*(1), *Periannan v. South Indian Railway Company*(2), *Garton v. Great Western Railway Company*(3).

Londoner (with Interarsity) for Respondent (plaintiff) —It is plain that the fact of the plaintiffs' claim came to the knowledge of the Agent of the E I Railway Company. We submit that is sufficient. The letter of the appellants themselves shows they had notice of the plaintiffs' claim. The letter of the 27th October (page 67a) shows the plaintiffs' notice of claim was considered as one for the E I Railway Company. It is clear the appellant Company accepted the plaintiffs' notice. That is shown by their attorney's letter of 31st October (*supra* page 67b). That letter is equivalent to saying that the Railway Company had got the plaintiffs' notice. It is sufficient to satisfy Section 140 of Act IX of 1890, if the notice reaches the Railway Company by other channels than those mentioned in the sections. *Garton v. Great Western Railway Company*(3).

JAYAS, C J —On the 16th and 19th of May, 1898, Hardaval Singh Gochelchand delivered to the East Indian Railway Company at Ghazialahad certain bags of wheat for carriage to Bombay. Railway receipts were issued for 1,000 and 500 bags, and were sent to the plaintiffs, traders in Bombay, by Hardaval, who drew *hundis* against the receipts for Rs 7,500 and Rs 4,000. The

(1) (1896) 24 Cal 306
(3) (1895) 27 L J (Q B) 37a

(2) (1895) 22 Mad 137
(4) (1898) 27 L J (Q B) 30

plaintiffs accepted, and in due course paid the *hundis*. On presentation of the receipts by Messrs Ralli Brothers, to whom they had been endorsed by the plaintiffs the Railway Company delivered only 500 bags in respect of that for 1,000, and only 375 bags in respect of that for 500, and they issued certificates of shortage to that effect.

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To come from Ghazirabad to Bombay the goods would pass over the Railways of the East Indian Railway Company and the Bombay, Baroda and Central India Railway Company, and so both Companies have been made defendants to this suit in which the plaintiffs pray by their plaint for the recovery of Rs 6,037-13-6 and Rs 1,400-1-8, and interest, is the value of the goods not delivered. The suit was heard by TRANI, J, who dismissed it against the B B & C I Railway Company, but passed a decree for the plaintiffs against the East Indian Railway Company, ordering them to pay to the plaintiffs Rs 1,617 and the costs of the suit.

From this decree the East Indian Railway Company have appealed on two grounds—first, they say that the notice required by section 77 of Act IX of 1890 was not given before the institution of the suit, and, secondly, that the plaintiffs are not the proper persons to sue.

I will first consider the sufficiency of the notice. The appellants contend that this question is governed by Sections 77 and 140 of Act IX of 1890. Section 77 provides that a person shall not be entitled to compensation for the loss of goods delivered to be carried by railway, unless his claim to compensation had been preferred in writing by him, or on his behalf, to the Railway Administration within six months from the date of the delivery of the goods for carriage by railway. *Railway Administration* in the case of a railway administered by a Railway Company (as the East Indian Railway is) means the Railway Company, and this expression includes any persons, whether incorporated or not, who are owners or lessees of a railway, or parties to an agreement for working a railway (Section 3, sub sections 5 and 6).

It is provided by Section 140 that

Any notice or other document required or authorized by this Act to be served on a Railway Administration may be served in the case of a Railway administered by a Railway Company on the Agent in India of the Railway Company.

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- (a) by delivering the notice or other document to the Agent or
- (b) by leaving it at his office or
- (c) by forwarding it by post in a prepaid letter addressed to the Agent at his office and registered under Part III of the Indian Post Office Act 1866

It is conceded that the requirements of this section have not been observed but it is urged that the section is not exhaustive as to the methods of service, and does not prohibit service otherwise than in the manner there indicated, so that it be a service that would be effective in those cases where Act IX of 1890 does not apply. Mr Justice TRAYN has accepted this view and has held that the requirements of Section 77 have been satisfied.

While the case was being argued in this Court, it was thought desirable that we should have before us the several Acts relating to the East Indian Railway Company, and this has occasioned some delay as they had to be procured from elsewhere. Now they are before us, but unfortunately since their arrival the plaintiffs have not been represented by counsel, so that we have not had the benefit of any argument for the plaintiffs on the several Acts relating to the Company. We have however, perused them and we think that it was rightly said by the Advocate General that there is nothing in the Acts that advances the case one way or the other.

It is then, in the first place necessary to examine the terms of Section 77. It requires that the claim should be preferred in writing by or on behalf of the person aggrieved, and that it should be so preferred to the Railway Administration within the prescribed period. In this case the plaintiff has not himself preferred a claim in writing to the East Indian Railway Company, but it is said that a claim in writing has been preferred *on his behalf*. For this, reliance is placed on certain correspondence to which I must now refer in detail.

As early as the 28th of July, 1898, the plaintiffs wrote (*supra* page 672) to the General Traffic Manager of the B. B. & C. I. Railway, enclosing a debit note in respect of 500 undelivered bags and asking for payment of Rs. 6,037-13-6, and followed this with another letter on the 1st August, 1898 (*supra* page 672), in which they intimated that if they were not paid within a week they would charge interest at 9 per cent. On the 22nd September 1898, the Deputy General Traffic Manager wrote to the plaintiffs (*supra* page 674) a letter in which he said

Under the circumstances I have been requested by the General Traffic Manager, East Indian Railway, to repudiate your claim in this case. Please address your further correspondence to the General Traffic Manager, East Indian Railway, Calcutta.

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On the 21st October, 1898, Messrs Payne, Gilbert and Sayani, Solicitors of the plaintiffs, wrote (*supra* page 674) to the General Traffic Manager, Bombay, Baroda and Central India Railway, as follows:

We have been consulted this morning on behalf of our clients, Messrs Jethmull Kanayalal, with reference to short delivery of 500 and 125 bags of wheat out of a consignment of 1,000 and 500 bags, respectively consigned by one Hardayal Singh Goculchand from Ghazipur on the 16th and 19th days of May, 1898 through your Company.

We are informed that though our clients called upon you to make good to them the loss sustained by them by reason of such short delivery, you have hitherto failed to do so on the ground that only 546 and 375 bags were in the first instance delivered to the Company by the consignors. We may state, however, that this ground is entirely untenable, inasmuch as the Company had passed a receipt for 1,000 and 500 bags, respectively.

We are, therefore, instructed to demand from you payment of the sums of Rs. 6,087 13 6 and Rs. 1,400 1 6 respectively, being amount of the loss in respect of the short delivery as aforesaid, and to give you notice, which we hereby do, that unless the said two sums are paid to us or to our clients within one week from the receipt hereof, our clients will take such further steps in the matter to recover the same from the Company as they may be advised, holding the Company liable for all costs and consequences. Please also note that our clients will claim to recover interest on the above two sums from the date on which they sent you the debit note till payment.

This was apparently forwarded to the General Traffic Manager of the East Indian Railway on the 22nd (see *supra* page 675).

On the 25th October a reply was written, that a copy of the letter of the 21st had been sent to the General Traffic Manager, East Indian Railway Company, and that no time would be lost in communicating with Messrs. Payne & Co., as soon as anything was heard from him.

On the 27th October, the Deputy General Traffic Manager of the B. B. & C. I. Railway wrote (*supra* page 675) to Messrs Payne & Co.:

In continuation of my letter No. C 2388 14 of 25th instant, I beg to inform you that I have since heard from the General Traffic Manager, East Indian Railway, Calcutta, and he has requested me to repudiate your client's claims, which I hereby do for reasons stated in my letters No. C. 2388-12 and C 2207-21 of 22nd September, 1898, to your clients.

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On the same day the officiating General Traffic Manager of the East Indian Railway Company wrote to that Company's Agent

I beg to enclose copy of the General Traffic Manager B B & C I Railway, Bombay's No. 38813 of the 22nd instant and enclosure together with a copy of my wire No. 20 G C of the 26th idem in reply thereto for information. I have addressed the Deputy Inspector General Government Railway Police, Allahabad, and have asked him to meet and discuss the matter with the District Traffic Superintendent Tundla and to let me know what steps he considers we should now adopt in the case.

I will advise you on hearing from him or on receipt of any further communication from the B B & C I Railway.

On the 31st October Messrs Morgan & Co., the East Indian Railway Company's attorneys, wrote (*supra* page 676) to Messrs Payne & Co.

Your letter of the 21st instant to the address of the General Traffic Manager B B & C I Railway, Bombay has been handed to us by our clients the East Indian Railway Calcutta claiming on behalf of your clients a sum of Rs. 7137, being the amount of loss alleged to have been sustained in respect of short delivery of 500 and 125 bags of wheat.

The file of papers has just been handed to us and we will write to you further as soon as we have had an opportunity of going through the same.

These are the documents on which the plaintiffs rely, and the question is whether they are, in the circumstances, a compliance with Section 77.

As I have already said, the plaintiffs never wrote directly to the East Indian Railway Administration, and they failed to do this though distinctly told by the B B & C I Railway that they should address their further correspondence to the General Traffic Manager of the East Indian Railway. In their plaint they do not allege that a claim was ever preferred by them, or on their behalf, to the East Indian Railway Administration, and it looks as though the provisions of Section 77 had been overlooked. Still, if they have complied with that section, it matters not that they may have done so unwittingly.

How can it be said that notice of their claim was preferred in writing *on their behalf* to the East Indian Railway Administration? A copy of Messrs Payne, Gilbert and Savani's letter of the 21st October, 1898 (*supra* page 674), was, no doubt, sent to that administration, but the claim then made was on the B B & C I Railway, for in that letter written to the B B & C I Railway, Messrs Payne & Co. say

We are therefore instructed to demand from you payment of the sum of Rs. 60,713-11 and Rs. 1,100-16 and to give you notice which

we hereby do, that unless the said two sums are paid our clients will take such further steps in the matter to recover the same from the Company as they may be advised, holding the Company liable for all costs and consequences

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Please also note that our clients will claim to recover interest on the above two sums from the date on which they sent you the debit note until payment.

Notwithstanding the second paragraph of this letter, the Company here referred to is, I think, the B B & C I Railway

But then it is said that any objection there might otherwise have been on this score is removed by Messrs Morgans' letter of the 31st October 1898 (*supra* page 676), for this, it is urged it was a recognition by the East Indian Railway Company's attorneys of the claim as one made on that Company, and the East Indian Railway Company is *non estopped* from asserting otherwise. Mr. Justice TRAYN was evidently much impressed by the importance of this letter. In reference to it he says "It seems to me that it is now too late for the East Indian Railway Company to say that the notice they received from the B B & C I Railway Company was no notice to them of the plaintiff's claim.

If it had not been for the Exhibit N (i.e., the letter of Messrs Morgans of 31st October, 1898, *supra* page 676) I should have had considerable difficulty in holding that the plaintiffs had made a claim against the East Indian Railway Company or that the East Indian Railway Company had regarded the claim sent to them by the Bombay, Baroda and Central India Railway Company as a claim made on behalf of the plaintiffs."

But is not this ascribing too much to this letter? It must be noted (1) that according to its own terms it was written at a time when Messrs. Morgan and Company had not read through the file of papers relating to the matter, (2) that the letter does not speak of the claim, or expressly treat it as one made on the East Indian Railway Company, (3) that the validity of the claim was not recognized then or in any subsequent correspondence brought to our notice, (4) that it is not shown that but for this letter the plaintiffs would have preferred a claim on the East Indian Railway Company as required by Section 77, and (5) that, if the argument be accepted, Messrs Payne, Gilbert and Syani's letter 21st October, 1898 (*supra* page 674), must serve as a claim in writing both on the Bombay, Baroda and Central India Railway and on the East Indian Railway.

In my opinion, it is not enough that the East Indian Railway Company may have *become aware* that a claim was made by the

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plaintiffs in respect of undelivered goods, nor is it open to us to say that the East Indian Railway Company is in as good a position as if the formalities of Section 77 had been observed. Thus a notice in the newspapers of the claim or an oral communication could not have sufficed, we must be satisfied that the terms of the section have been observed. Not only is it not pretended that any claim on the East Indian Railway Company was preferred in writing by the plaintiff to that Company, but it is not suggested that the plaintiffs or their attorneys intended that the claim preferred to the B B & C I Railway should either be preferred by that Company on the East Indian Railway Company's behalf, or be treated as a claim on the East Indian Railway Company.

It seems to me opposed to what is probable or reasonable to hold that when the B B & C I Railway Company forwarded to the East Indian Railway Company, not the original, but a copy of Messrs Payne & Co's letter of the 21st October, 1898, (see the letters of the B B & C I Railway Company of the 25th October and 22nd October, *supra* page 675), they were preferring a claim in writing on behalf of the plaintiffs. The reason for their forwarding the copy is apparent from the concluding paragraph of the covering letter of the 22nd October, where it is said "Kindly note that in the event of a suit being filed against this Railway we will look to your Railway for all the expenses that may have to be incurred in connection with the case."

The effect of Section 77 has been the subject of judicial interpretation in *Gunga Pershad v. The Agent, Bengal and North-Western Railway Company*⁽¹⁾. Those goods were taken from Raipur by the Bengal Nagpur Railway Company and were conveyed through the lines of the East Indian Railway and delivered by a third Railway to the Bengal and North-Western Railway at Ravilganj. A portion of the goods was damaged. A claim was made on the Bengal North Western Railway, and this was passed on to the Nagpur Railway, whose reply, repudiating all liability, was communicated to the plaintiff. The Bengal Nagpur Railway Company was not an original party, but was subsequently added in the course of the trial. The lower Appellate Court held that no notice had been served on the Nagpur Railway Company as required by Section 77. The plaintiff appealed to the High Court. The case came before PILLAI and GUOPE, J J, who affirmed this decision saying

(1) Indian Railway Cases ante p 373

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It is contended that although strictly within the terms of Section 77 no notice was served on the Nagpur Railway Company still inasmuch as that Company had learnt of the claim made by the plaintiffs in respect of these goods and to some extent admitted liability on this receipt it must be held that the claim and notice made on the North Western Railway Company was practically in claim and notice served on the Nagpur Railway Company. It seems to us that this would be construing the law beyond the meaning and object of Section 77 of the Act and indeed we may remark that this was not the case made by the plaintiffs. They had some intimation that the Bengal and North Western Railway Company had made a communication with the Nagpur Railway Company and notwithstanding that they have deliberately brought this suit after notice under Section 77 against only the Bengal and North Western Railway Company, and they moreover now after the suit has been brought only against the Bengal and North Western Railway Company seek to join the Nagpur Railway Company and hold them liable also with the Bengal and North Western Railway Company and make the information given by the Bengal and North Western Railway Company to the Nagpur Railway Company on the claim made on the former a notice that the claim was also made on the latter. We think that the Subordinate Judge has rightly dismissed the claim against the Nagpur Railway Company holding that as no notice had been served on that Company it could not be made a party to any suit.

I think this decision is in point, though no doubt there is the difference, that the Nagpur Railway Company was later added. That, however, is merely relevant to the question of the plaintiff's intention in sending in his claim, and does not affect the decision that knowledge by the Company is of no avail unless it be communicated in the prescribed mode.

I have been unable to find any English authority on all fours with the present, but the decision of the Privy Council in *Union Steamship Company of New Zealand v Melbourne Harbour Trust Commissioners* (1) shows that though notices of action are not to be construed with extreme strictness there must be a substantial compliance with the terms of the Act by which they are prescribed.

We cannot dispense with those formalities which the Legislature has imposed, convinced though we may be that in this particular case the evil aimed at has no existence. Lord Campbell in *Garton v Great Western Railway Company* (2) deals with that aspect of the case thus: "If it be said that the notice so served would probably be forwarded, and that redress should

(1) (1884) 9 A C 365

(2) (1858) 27 L J Q B 375

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plaintiffs in respect of undelivered goods, nor is it open to us to say that the East Indian Railway Company is in as good a position as if the formalities of Section 77 had been observed. Thus a notice in the newspapers of the claim or an oral communication could not have sufficed, we must be satisfied that the terms of the section have been observed. Not only is it not pretended that any claim on the East Indian Railway Company was preferred in writing by the plaintiff to that Company, but it is not suggested that the plaintiffs or their attorneys intended that the claim preferred to the B B & C I. Railway should either be preferred by that Company on the East Indian Railway Company's behalf, or be treated as a claim on the East Indian Railway Company.

It seems to me opposed to what is probable or reasonable to hold that when the B B. & C I Railway Company forwarded to the East Indian Railway Company, not the original, but a copy of Messrs Payne & Co's letter of the 21st October, 1898, (see the letters of the B B & C. I. Railway Company of the 25th. October and 22nd October, *supra* page 675), they were preferring a claim in writing on behalf of the plaintiffs. The reason for their forwarding the copy is apparent from the concluding paragraph of the covering letter of the 22nd October, where it is said: "Kindly note that in the event of a suit being filed against this Railway, we will look to your Railway for all the expenses that may have to be incurred in connection with the case."

The effect of Section 77 has been the subject of judicial interpretation in *Gunga Pershad v The Agent, Bengal and North-Western Railway Company*(1). There goods were taken from Raipur by the Bengal-Nagpur Railway Company and were conveyed through the lines of the East Indian Railway and delivered by a third Railway to the Bengal and North-Western Railway at Ravilganj. A portion of the goods was damaged. A claim was made on the Bengal North-Western Railway, and this was passed on to the Nagpur Railway, whose reply, repudiating all liability, was communicated to the plaintiff. The Nagpur Railway Company was not an original party, but was subsequently added in the course of the trial. The lower Appellate Court held that no notice had been served on the Nagpur Railway Company as required by Section 77. The plaintiff appealed to the High Court. The case came before PRINSEP and GHOSE, J J, who affirmed this decision, saying:

(1) Indian Railway Cases ante p 377

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It is contended that although strictly within the terms of Section 77 no notice was served on the Nagpur Railway Company, still inasmuch as that Company had learnt of the claim made by the plaintiffs in respect of these goods and to some extent admitted liability on this receipt, it must be held that the claim and notice made on the North Western Railway Company was practically in claim and notice served on the Nagpur Railway Company. It seems to us that this would be construing the law beyond the meaning and object of Section 77 of the Act and indeed we may remark that this was not the case made by the plaintiffs. They had some intimation that the Bengal and North Western Railway Company had made a communication with the Nagpur Railway Company, and notwithstanding that they have deliberately brought this suit after notice under Section 77 against only the Bengal and North Western Railway Company, and they moreover now after the suit has been brought only against the Bengal and North Western Railway Company seek to join the Nagpur Railway Company and hold them liable also with the Bengal and North Western Railway Company and make the information given by the Bengal and North Western Railway Company to the Nagpur Railway Company on the claim made on the former a notice that the claim was also made on the latter. We think that the Subordinate Judge has rightly dismissed the claim against the Nagpur Railway Company, holding that as no notice had been served on that Company, it could not be made a party to any suit.

I think this decision is in point, though no doubt there is the difference, that the Nagpur Railway Company was later added. That, however, is merely relevant to the question of the plaintiff's intention in sending in his claim, and does not affect the decision that knowledge by the Company is of no avail unless it be communicated in the prescribed mode.

I have been unable to find any English authority on all fours with the present, but the decision of the Privy Council in *Union Steamship Company of New Zealand v Melbourne Harbour Trust Commissioners*⁽¹⁾ shows that though notices of action are not to be construed with extreme strictness there must be a substantial compliance with the terms of the Act by which they are prescribed.

We cannot dispense with those formalities which the Legislature has imposed, convinced though we may be that in this particular case the evil aimed at has no existence. Lord Campbell in *Garton v Great Western Railway Company*⁽²⁾ deals with that aspect of the case thus: "If it be said that the notice so served would probably be forwarded, and that redress should

(1) (1884) 9 A C 365

(2) (1853) 27 L J Q B 375

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be facilitated, the answer is that the experience of the Courts abundantly proves the necessity of protecting Railways from groundless litigation, and the Legislature has given the protection in question."

Apart from Exhibit N (i.e., the letter of Messrs Morgan & Co., of the 31st October, 1898, *supra* page 67b), there has not, in my opinion, been a compliance with the terms of Section 77, and it has not been shown that in consequence of Exhibit N the plaintiffs refrained from preferring to the East Indian Railway Company their claim to compensation as required by the Act, nor can I attribute to Exhibit N the effect that the requirements of Section 77 were waived or became thereby satisfied.

On this ground I think that Mr Justice TRAYNER's decree should be reversed and the suit dismissed. We have not the B B & C I Railway before us, so we cannot touch any order as to their costs. The appellants will get their costs of the suit and appeal, except so far as such costs have been occasioned by issues 6 and 8. Each party to bear their own costs of those issues.

Decree reversed

Attorneys for appellants—Messrs Crawford, Brown and Company

Attorneys for respondents—Messrs Payne, Gilbert, Sayani and Moos

The Indian Law Reports, Vol. XXVII. (Bombay) Series,
Page 597.

APPELLATE CIVIL

*Before the Hon'ble Mr. E. T. Candy, C.S.I.,
Acting Chief Justice, and Mr. Justice Chandavarkar.*

CHHAGANLAL SHALIGRAM SHET

(PLAINTIFF, APPELLANT

v.

EAST INDIAN RAILWAY COMPANY

(DEFENDANT), RESPONDENT *

Railway Company—Consignment of goods—Diversion of consignment while en route—Delivery to the original consignee—Liability of the Railway Company—Railway Act (IX of 1890), Section 77—Notice—Second appeal—Plea of want of notice—Whether allowable—Practice.

1903
June, 24

G booked a consignment of goods from the Sakrigali Ghat Station on the East Indian Railway to R at Kamptee, a station on the Bengal Nagpur Railway. Whilst the consignment was en route to Kamptee, G directed the Railway servants at Sakrigali Ghat Station to notify to the Station Master at Kamptee to deliver the consignment to plaintiff at Nargaon. This direction was given, but disregarding the order the Station Master at Kamptee delivered the consignment to R at Kamptee. The plaintiff sued the East Indian Railway to recover compensation for loss of goods.

Held, that the Railway Company was liable in damages: the case was a simple case of breach of contract, the defendant contracted to carry the goods and deliver them at Nargaon to the plaintiff and failed to do so.

Held, further, that the liability of the Railway Company was not affected by the fact that the Station Master at Kamptee acted wrongly in disregarding the instructions which he had received from Sakrigali Ghat Station.

Held, further, that a plea of failure to give notice under Section 77 of the Indian Railway Act, 1890 urged for the first time in second appeal, and not supported by any evidence that such notice was not given was taken too late. This could not be regarded as a stale demand as the suit was filed within two months after the cause of action arose.

SECOND appeal from the decision of DAYARAM GIDUMAL District Judge of Khandesh, confirming the decree passed by V. N. RAHDEKAR, Subordinate Judge at Bhilsawar.

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be facilitated, the answer is that the experience of the Courts abundantly proves the necessity of protecting Railways from groundless litigation, and the Legislature has given the protection in question."

Apart from Exhibit N (i.e., the letter of Messrs Morgan & Co., of the 31st October, 1898, *supra* page 676), there has not, in my opinion, been a compliance with the terms of Section 77, and it has not been shown that in consequence of Exhibit N the plaintiffs refrained from preferring to the East Indian Railway Company their claim to compensation as required by the Act, nor can I attribute to Exhibit N the effect that the requirements of Section 77 were waived or became thereby satisfied.

On this ground I think that Mr Justice TYABJI's decree should be reversed and the suit dismissed. We have not the B B & C I Railway before us, so we cannot touch any order as to their costs. The appellants will get their costs of the suit and appeal, except so far as such costs have been occasioned by issues 6 and 8. Each party to bear their own costs of those issues.

Decree reversed

Attorneys for appellants—Messrs Crawford, Brown and Company

Attorneys for respondents—Messrs Payne, Gilbert, Sayani and Moss

The Indian Law Reports, Vol. XXVII. (Bombay) Series,
Page 597.

APPELLATE CIVIL

*Before the Hon'ble Mr. E. T. Candy, C S I,
Acting Chief Justice, and Mr. Justice Chandavarkar.*

CHHAGANLAL SHALIGRAM SHET

(PLAINTIFF, APPELLANT

v.

EAST INDIAN RAILWAY COMPANY

(DEFENDANT), RESPONDENT *

Railway Company—Consignment of goods—Duration of consignment while en route—Delivery to the original consignee—Liability of the Railway Company—Railway Act (IX of 1890) Section 77—Notice—Second appeal—Plea of want of notice not other allowable—Practice.

1901
June, 24

G booked a consignment of goods from the Sakrigali Ghat Station on the East Indian Railway to R at Kamptee, a station on the Bengal Nagpur Railway. Whilst the consignment was en route to Kamptee, G directed the Railway servants at Sakrigali Ghat Station to notify to the Station Master at Kamptee to deliver the consignment to plaintiff at Nargaon. This direction was given, but disregarding the order, the Station Master at Kamptee delivered the consignment to R at Kamptee. The plaintiff sued the East Indian Railway to recover compensation for loss of goods.

Held, that the Railway Company was liable in damages: the case was a simple case of breach of contract, the defendant contracted to carry the goods and deliver them at Nargaon to the plaintiff and failed to do so.

Held, further, that the liability of the Railway Company was not affected by the fact that the Station Master at Kamptee acted wrongly in disregarding the instructions which he had received from Sakrigali Ghat Station.

Held, further, that a plea of failure to give notice under Section 77 of the Indian Railway Act, 1890, urged for the first time in second appeal, and not supported by any evidence that such notice was not given, was taken too late. This could not be regarded as a stale demand as the suit was filed within two months after the cause of action arose.

SECOND appeal from the decision of DAYARAM GIDUMAL, District Judge of Khandesh, confirming the decree passed by V. N. RAHURKAR, Subordinate Judge at Bhusawal.

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Suit to recover compensation for loss of goods

One Gangaram booked, on the 27th May, 1900, a consignment of 166 bags of *lhesary* (lakh gram) from Sakrigali Ghat Station, a station on the East Indian Railway, to one Rupram Govindram at Kamptee, a station on the Bengal-Nagpur Railway. Whilst the consignment was *en route* to Kamptee, Gangaram, on the 31st May, 1900, requested the Railway servant at Sakrigali Ghat to divert the consignment from Kamptee to the plaintiff at Nurgion, another station on the same line (Bengal-Nagpur Railway), 20½ miles distant from Kamptee. This diversion was communicated to the Station Master of Kamptee. But the latter took no notice of the communication as the original consignee Rupram Govindram threatened to sue the Company for damages if the consignment were not delivered to him. The consignment was accordingly delivered to Rupram on his paying the hire and passing an indemnity note.

The plaintiff thereupon filed this suit against the East Indian Railway to recover Rs 1,164 as compensation for loss of goods.

The Subordinate Judge dismissed the suit for non-joinder of parties, inasmuch as the Bengal-Nagpur Railway was not joined as a defendant.

On appeal, the District Judge held that the Bengal Nagpur Railway was not a necessary party to the suit, but held that the defendant was not liable on the following grounds:

Though the Station Master was guilty of default I do not see why the defendant should be held liable. The Station Master was either the agent (or sub agent) of the defendant or he was not. If he was his act was clearly not within the scope of his authority and the defendant is therefore not responsible (vide Section 238 Contract Act 1872). If he was not defendant did his utmost to protect plaintiff's interest and there can be no liability.

Plaintiff preferred a second appeal.

D. A. Khare, for the Appellant.

Scott (Advocate General), with Crawford & Co, for the Respondent.

CANDY, Acting C J.—In this case we have no doubt that on the merits the plaintiff was entitled to a decree.

In the first Court one of the defences was that the defendant's servant had no authority to divert the consignment, and that therefore the defendant was not bound by the act of the servant.

In the District Court this defence was disallowed by the District Judge, who held that the Station Master of Kamptee was guilty of default in directing the delivery of the goods to the original consignee, but the District Judge further held that the defendant Company was not liable for the act of the Station Master which was not within the scope of his authority (quoting section 238 of the Contract Act)

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We are unable to agree with the applicability of this section. It seems to us that this is a simple case of breach of contract, the defendant contracted to carry the goods and deliver them at Nargan and failed to give such delivery to the plaintiff. The Station Master at Kamptee may have acted wrongly in disregarding the telegram which he had received, but that fact cannot divest the Company of its liability under the contract.

As there is no dispute about the rates, the plaintiff would be entitled to the sum claimed with all costs.

But in this second appeal the defendant Company have filed cross objections the third one being pressed by the learned Advocate General. That objection runs — 'That the lower Courts should have dismissed this suit on the ground *inter alia* that the plaintiff did not prove that his claim for compensation had been preferred in writing by him or on his behalf to the Railway administration as required by Section 77 of the Indian Railway Act 1890.'

That section provides that a person shall not be entitled to compensation for the loss of goods delivered to be so carried, unless his claim to the compensation has been preferred in writing by him or on his behalf to the Railway administration within six months from the date of the delivery of the goods for carriage by Railway.

Here the breach of contract occurred in May or June 1900. The suit was filed and summons was served on the defendant in August 1900. Neither in the written statement nor in the arguments before the Court of the first instance nor in the District Court on appeal, was any mention made of this plea. No affidavit has now been filed on behalf of the Agent of the Company to the effect that no notice was received according to the section. Under these circumstances, we are asked to assume that no such notice was given.

The learned Advocate General's argument is based on the proposition that the plaintiff not being entitled to compensation unless notice was given was bound to allege in his plaint and prove

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that such a notice had been given, in short that proof of the notice was a condition precedent to the filing of the claim.

We are unable to agree with that view. If notice had not been given it is difficult to suppose that the Agent or his officers or their legal advisers would not have made mention of the fact.

We do not think that it would be right at this stage of the case to send it back in order that evidence might be taken. We have no reason to suppose that the notice was not given. The object of the section apparently is to prevent stale claims and this most certainly was not a stale claim, for the Company were sued within 2 months of the breach of the contract. We therefore reverse the decisions of the lower Courts and award the amount of the claim with costs in all Courts.

Decree reversed

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Page 207.

REVISIONAL CIVIL.

Before Mr. Justice Atkman.

BOMBAY, BARODA AND CENTRAL INDIA RAILWAY
COMPANY, DEFENDANT,

v

(SAUTH LAL, PLAINTIFF) *

1903
November, 7

Act No. IX of 1890 (Indian Railways Act), Sections 77 and 80—Suit against
Railway Company—Notice of claim—Notice to be given to the Company
which it is intended to sue

Under Section 80 of the Indian Railways Act, 1890, when goods are booked through over the lines of two or more Railway Administrations and are lost or damaged in transit, it is at the option of the person damaged to sue either the Railway Administration to which the goods were delivered by the consignor or the Railway Administration on whose line the loss occurred. But under Section 77 of the Act, it is a condition precedent to the bringing of such a suit that notice of the plaintiff's claim must be given within six months from the date of the delivery of the goods for carriage to the Railway Administration which the plaintiff

seeks to render liable In default of such notice the plaintiff will not be entitled to a decree against the defendant Company

The facts of this case are as follows —

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On the 19th of February, 1900, the plaintiff's agent delivered to the Railway officials at the Lalkua Station on the Rohilkhand and Kumaun Railway a consignment of timber scantlings for conveyance to the plaintiff at Agra. In the forwarding note the plaintiff's agent entered the number of scantlings as 418. For this number the Railway Company gave a receipt and this number of scantlings was actually delivered to the plaintiff at Agra. The plaintiff apparently took delivery without making any objection at the time. Subsequently, however, it was discovered that 501 scantlings had in fact been loaded up by the plaintiff's agent at Lalkua. In order to reach Agra, the timber had to pass over the lines of four different Railway Companies, namely, the Rohilkhand and Kumaun as far as Bareilly, the Oudh and Rohilkhand between Bareilly and Aligarh, the East India Railway between Aligarh and Hathras Junction and the Bombay, Baroda and Central India Railway between Hathras Junction and Agra. When the consignment had to be transhipped at Bareilly from the Rohilkhand and Kumaun to the Oudh and Rohilkhand Railway the Bareilly goods clerk loaded up the number of scantlings entered in the forwarding note as 448. He entered into communication with the Lalkua Station Master with regard to the 61 extra scantlings, ascertaining that these had formed part of the consignment delivered by the plaintiff's agent for conveyance to Agra. The 61 scantlings were subsequently sent on to Agra, but without any intimation to the Railway officials there as to the consignee for whom they were intended. It was ultimately discovered that they were intended for the plaintiff and he was asked to take delivery thereof, but he refused to do so, on the ground that the 61 scantlings offered to him were other than those which his agent had delivered at Lalkua for conveyance to Agra. The plaintiff lodged a claim with the Rohilkhand and Kumaun Railway Company for the value of the 61 scantlings. Considerable correspondence ensued and ultimately the plaintiff on the 8th of July, 1902, instituted a suit against the Bombay, Baroda and Central India Railway Company. Afterwards the Rohilkhand and Kumaun Railway Company was impleaded as a defendant, but the claim was dismissed as against them and a decree was passed against the Bombay, Baroda and Central India Railway Company.

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Against this decree the defendant Company applied in revision to the High Court under Section 25 of the Provincial Small Cause Courts Act, 1887

Pandit Sundar Lal, for the Applicant

Babu Jogindro Nath Chaudhri, for the Opposite Party

ALFMAN, J.—This is an application under Section 25 of the Provincial Small Cause Courts Act, No. IX of 1887, for the revision of a decree of the Judge of the Court of Small Causes at Agra. It appears that on the 19th of February, 1900 the plaintiff's agent delivered to the Railway officials at Lalkar Station on the Rohilkhand and Kumaon Railway a consignment of timber scantlings for conveyance to the plaintiff at Agra. In the forwarding note, plaintiff's agent, whether from carelessness or with the view of defrauding the Railway Company in the matter of freight entered the number of scantlings as 118. For this number the Railway Company gave a receipt, and it is found that the actual number entered in the Railway receipt was delivered to the plaintiff at Agra. The plaintiff seems to have taken delivery without making any objection at the time. It is now alleged and found, that 509 scantlings, i.e., 61 scantlings in excess of the number entered in the consignment note, which was certified by the plaintiff's agent to be correct, were loaded up by that agent at Lalkar. The timber in order to get to Agra had to pass over the lines of four different Railway administrations i.e., the Rohilkhand and Kumaon as far as Bareilly, the Outh and Rohilkhand Railway between Bareilly and Aligarh, the East Indian Railway between Aligarh and Hathras Junction, and the Bombay Bore and Central India Railway between Hathras Junction and Agra. When the consignment had to be transferred at Bareilly from the Rohilkhand and Kumaon Railway to the Outh and Rohilkhand Railway, the Bareilly goods clerk looked up the number of scantlings entered in the forwarding note, i.e., 118. He entered into communication with the Lalkar Station Master in regard to the 61 extra scantlings and ascertained that the plaintiff's agent had a part of the consignment delivered by the plaintiff's agent for conveyance to Agra. The 61 scantlings were subsequently sent on to Agra, but with no intimation to the Railway officials there as to the consignment for whom they were intended. It was ultimately ascertained that they were intended for the plaintiff and he was asked to take delivery thereof, but he refused to do so, on the ground

that the 61 scatchings which were offered to him were other than those which his agent had delivered at Lalkua for conveyance to Agra. It appears that the plaintiff lodged a claim with the Rohilkhand and Kumaun Railway for the value of the 61 scatchings. Considerable correspondence ensued and ultimately on the 8th July, 1902, the plaintiff instituted the suit out of which this application arises against the Bombay, Baroda and Central India Railway Company. Subsequently the Rohilkhand and Kumaun Railway Company was impleaded as a defendant, but the claim as against them was dismissed and a decree was pronounced against the Bombay, Baroda and Central India Railway Company.

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In the application for revision there are three grounds taken, but only one has been argued before me, *i.e.*, that under the provision of Section 77 of the Indian Railways Act of 1890 the plaintiff was not entitled to compensation for the loss of the timber, because he had not within six months from the date of the delivery of the goods for carriage by railway preferred a claim in writing for compensation to the defendant Railway Company. In order to enable me to deal with this plea I had to refer an issue to the lower Court. It appears from the finding returned that the plaintiff did not prefer any claim against the defendant Company until the 18th of January, 1901. That was long beyond the period mentioned in Section 77. The learned advocate for the plaintiff argues that the limit for a claim for compensation referred to in Section 77 refers only to a claim against the Railway Administration to which the goods are delivered to be carried. Under Section 80 of the Railways Act, when the goods are hooked through over the railways of two or more Railway Administrations, it is at the option of the plaintiff to sue either the Railway Administration to which the goods were delivered by the consignor or the Railway Administration on whose line the loss occurred. In my opinion the meaning of Section 77 is that notice of the claim must be given within the period therein fixed to the Railway Administration which the plaintiff seeks to render liable. If this view be correct, as I think it is, it follows that the plaintiff was not entitled to the decree which he has obtained against the Bombay, Baroda and Central India Railway Company. I am therefore of opinion that the application must be allowed. I have less hesitation in coming to this conclusion having regard to the conduct of the plaintiff's

BB & CI agent in greatly understating the number of scantlings delivered
 Rv by him. It was this understatement which was the cause of all
 v the trouble which ensued
 Sauti Lal

For the reasons set forth above I think the plaintiff's suit ought to have been dismissed as against the Bombay, Baroda and Central India Railway Company. I set aside the decree of the Court below so far as it affects that Company and dismiss the plaintiff's suit as against that Company with costs here and in the Court below.

**The Indian Law Reports Vol XXVIII (Allahabad)
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APPELLATE CIVIL

*Before Sir John Stanley, Knight, Chief Justice, and
 Mr Justice Sir William Burdett.*

**GREAT INDIAN PENINSULA RAILWAY COMPANY,
 DEFENDANT,**

v.

CHANDRA BAI, PLAINTIFF *

1906
 April 2

*Act No IV of 1890 (Indian Railways Act) Sections 3 (c) 77 and 140—Act
 states of claim for refund as condition precedent to suit—To whom
 such notification must be given*

Where the plaintiff sued a Railway Company for recovery of money alleged to have been taken by the defendant as freight upon certain goods in excess of what was legally due and before filing the suit gave notice of her claim for a refund to the General Traffic Manager, it was held that this was not a compliance with the provisions of the Indian Railways Act 1890 and the suit could not be maintained. *Periannan Chetti v S N S Indian Railway Company* (1) *The Secretary of State for India in Council v Dyichand Poldar* (2) *East Indian Railway Company v Jethmul Panna* (3) and *Bombay Baroda and Central India Railway Company v. Sauti Lal* (4) followed.

This was a suit to obtain from the Great Indian Peninsula Railway Company a refund of Rs. 469 1-0, with interest and certain

* Second Appeal No 596 of 1904 from a decree of H B Warburton Esq. District Judge of Agra, dated the 11th of April, 1904 reversing a decree of Baidya Nath Das Munsif of Agra, dated the 21st of November 1902.

(1) (1899) 11 I R 223 M.L. 137 (2) (1897) 11 I R., 24 Cal., 246.
 (3) (1902) I. L. R., 26 Bom., 609 (4) (1904) 11 I R., 26 All., 207

costs, alleged to have been overcharged by the defendant company on certain goods consigned to the plaintiff at Agra from Bezwada Station. The suit was resisted on the ground, *inter alia*, that no claim for a refund had been made in the manner provided by Section 77 of the Indian Railways Act. The plaintiff set up a notice of claim served on the General Traffic Manager, and this the Court of first instance (Munsif of Agra) held to be sufficient, but for other reasons that Court dismissed the plaintiff's suit. On appeal, however, the District Judge of Agra reversed the decision of the Munsif and decreed the plaintiff's claim. The defendant thereupon appealed to the High Court.

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Dr Satish Chandra Banerji, for the Appellant

The Hon'ble Pandit *Sundar Lal*, for the Respondent

STANLEY, C J and BURKITT, J.—On the question of notice raised in the memorandum of appeal this appeal must succeed. The ground of objection is that no proper notice within the meaning of Section 77 of the Indian Railways Act is proved to have been served on the appellant Company and therefore the suit was not maintainable. Section 77 precludes any person from maintaining a suit for a refund of an overcharge in respect of animals or goods carried over a Railway unless the claim for a refund has been preferred in writing by him or on his behalf to the Railway Administration within six months from the date of the delivery of the animal or goods for carriage by railway. Section 140 prescribes modes of service of notice directing that the notice may be served in the case of a Railway administered by a Railway Company (a) by delivering the notice or other document to the Manager or Agent, (b) by leaving it at his office, (c) by forwarding it by post in a prepaid letter addressed to the Manager or Agent at his office and registered under Part III of the Indian Post Office Act of 1866. The notification of a claim prescribed by Section 77 may therefore be given either to the Railway Administration as defined in Section 3 sub section (6) or in any of the ways mentioned in Section 140. In this case, therefore it was necessary for the plaintiff to prove service of notice of the claim upon the Great Indian Peninsula Railway Company at their office in London or else in any of the three ways prescribed in Section 140. There is no proof of any such service, and the time for serving such notice has long since expired. It was contended on behalf of the plaintiff, respondent, and the contention indeed found favour with both the lower Courts that service upon the General Traffic Manager

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of the Company was sufficient service, but in view of the express and distinct provisions of the Act, we are of opinion that this service is not a good service. We are supported in this view by a number of authorities and amongst others the cases of *Periannan Chetti v. South Indian Railway Company*, (1) *The Secretary of State for India in Council v. Dipchand Poddar*, (2) *East Indian Railway Company v. Jeth Mull Ramanand* (3) and *Bombay, Baroda and Central India Railway Company v. Sant Lal* (4). We therefore allow the appeal, set aside the decree of the lower appellate Court, and restore the decree of the Court of first instance with costs in all Courts.

Appeal decreed.

In the Chief Court of the Punjab.

REVISION SIDE.

Before Mr. Justice Johnstone and Mr. Justice Lal Chand.

AZIZI L RAHMAN (PLAINTIFF), PETITIONER

BOMBAY, BARODA AND CENTRAL INDIA RAILWAY
COMPANY (DEFENDANT), RESPONDENT

CIVIL REVISION No 511 of 1906

1907
July 13

Liability of Railway Company—Loss of packages—Notice of claim—Railways Act IX of 1890 s 77—Condition on the back of Railway Receipt—s 11(1)—Lyca

The plaintiff travelled by train from Colaba to Delhi and delivered to the defendant Company seven packages, obtaining a receipt for the same. On arrival at Delhi one of the packages was found short. The defendant Company denied their liability for the loss on the ground that under a condition printed on the back of the receipt note granted to him a written statement of the description and contents of the missing package was not forthcoming. It is to the District Traffic Superintendent of Colaba or Delhi.

Held that this condition is a bye law made under s 1(1) of the Indian Railways Act IX of 1890 and being unreasonable and inconsistent with the terms of s 77 of the Act, it was ultra vires and the written notice given under s 77 was the proper notice.

(1) (1899) 1 L. R. 22 Mad., 137

(3) (1902) 1 L. R., 26 Bom., 602

(2) (1897) 1 L. R., 21 Cal., 57

(4) (1904) 1 L. R., 20 All., 57

PETITION for Revision of the order of MOULVI MAHOMI D HUSSAIN,
Judge, Small Cause Court, Delhi, dated 16th December 1905.

Shah Nawaz for Petitioner

Morton for Respondent

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The point of law involved was referred to a Division Bench by the following order of the learned Judge in Chambers —

RATHGAN, J — With reference to my order, dated 5th January 1907, the Judge of the Small Cause Court after making some enquiry reports that (1) the plaintiff has proved that he duly complied with the provisions of Sections 77 and 140 of Act IX of 1900, but that (2) the plaintiff failed to show that he sent a statement of the description and contents of the articles missing to the District Traffic Superintendent Bombay Baroda and Central India Railway as required by condition 4 of the receipt page

For petitioner his learned counsel Mr *Shah Nawaz*, argues —

(a) that the present suit is one in respect of non-delivery of goods and not for damages for loss of goods, that it is consequently a suit under the provisions of the Indian Contract Act, and not under the Indian Railways Act, and thus in respect of a suit for compensation for mere non delivery of goods is distinct from a suit for compensation for loss of goods, the Railway Administration stands in the position of insurers and not merely of bailees, in this connection reliance is placed on (*henganwall v The Bengal and North Western Railway Company*⁽¹⁾) and *Motiram v East Indian Railway Company*⁽²⁾ and reference is made to Articles 30 and 31 of the Limitation Act

(b) That the suit being of the nature described in paragraph (a) above, the conditions laid down in paragraph 4 have no relevancy and cannot bar plaintiff's right to compensation even if such condition were not complied with

(c) That even if it be held that the suit is one falling under Sec 72 of the Indian Railways Act, 1890, the plaintiffs are entitled to succeed inasmuch as—

(i) Condition No 4 of page 3 is unreasonable and ultra vires See *Jalim Singh Kotary v Secretary of State for India*⁽³⁾

(ii) Plaintiff duly complied with the condition when he furnished the District Traffic Superintendent of the East Indian Railway with a list of the contents of

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the non-delivered packages (reference is made to *Periannan Ohetty v The South Indian Railway Company*,⁽¹⁾ *The Secretary of State for India in Council v. Dip Chand Poddar*⁽²⁾ in support of this argument but it is admitted that in *The East Indian Railway Company v Jethu Mall Ramanand*⁽³⁾ a contrary view was taken), and

- (iii) The plaintiff shortly after the institution of the suit furnished the District Traffic Superintendent of the defendant Company with a detailed list of the articles

Mr Norton for Respondent joins issues with the petitioner's counsel on all these points, but both learned counsels are agreed that the question involved are of such importance that an authoritative decision of a Division Bench is called for. I quite agree and I accordingly refer the case to a Division Bench.

The Judgment of the Division Bench was delivered by Johnstone, J.—Plaintiff in this case travelled from Colaba to Delhi on 29th April 1905. He took certain articles with him in the carriage and handed others to the guard after duly booking them and paying for their carriage. The receipt given to him showed that the packages with the guard numbered 7, and I take this as settled, though it was contended below by the defendant, the Bombay, Baroda and Central Indian Railway Company, that only 6 packages were so handed over. The Lower Court has found the packages were 7, and in revision I do not think defendant has shown sufficient reason for our interfering with this finding.

The Lower Court (Small Cause Court, Delhi) came to a curious conclusion. Having held that plaintiff gave 7 packages to the Guard, and received back only 6, it ruled that he had not proved to what damages he was entitled and so dismissed the suit, but without costs.

The revision filed by the plaintiff came before a Judge in Chamber (Hon. Mr. Justice Rattray), who pointed out the illogical nature of the Lower Court's decision and also held that plaintiff has sufficiently proved loss to the extent of Rs. 34, and in this finding I fully agree, for the reasons given by the learned Judge, who thereupon remanded the case for enquiry and report upon the issues.—

(1) 1 L.R. 22 Mad. 13

(2) 1 L.J., 24 Cal. 30

(3) 1 L.R. 26 B. m. 60

(a) Whether plaintiff complied with the provisions of Sec 77 and Sec. 140 of Act IX of 1890 ?

(b) Whether plaintiff complied with the condition 4 of the conditions on the back of the Railway Receipt aforesaid ?

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Ry.

In the Court below defendant's pleader admitted that Secs 77 & 140 had been complied with, and

4 That all claims against the Railway Company for loss or damage to goods must be made to the clerk in charge of the station to which they have been booked before delivery is taken, and that a written statement of the description and contents of the articles missed or of the damage received must be sent forthwith to the Traffic Superintendent of the District in which the forwarding or receiving station is situated otherwise the Railway Company will be freed from responsibility

thus the only question remaining is really whether question (b) should be answered affirmative, and if not, what is the effect of the default. It is proved that notice of the loss was given to the clerk at Delhi. When the case was again laid before Mr. RATTIGAN, J, he saw that the opinion of the Court below was that plaintiff had not complied

with the aforesaid condition 1, and then he took into consideration the arguments of plaintiff's Counsel —

1 That the claim being for damages for non-delivery for of goods and not for loss or injury to goods, was a claim under the Indian Contract Act, 1872, and not under Act IX of 1890, and so the defendant was in the position not merely of bailor, Sec 72, Act IX of 1890, but of insurer, cf *Chenga Mall v The Bengal and N-W Railway Company*(1) and *Motiram v East Indian Railway Company*(2)

2 That the conditions on back of Railway Receipt are therefore irrelevant and do not govern the case,

3 That even if Sec 72, Act IX of 1890, does apply, plaintiff is entitled to succeed inasmuch as—

(i) Condition 4 of the receipt is unreasonable and *ultra vires*, *Jahm Singh Kotary v Secretary of State for India*(3)

(ii) In any case plaintiff, when he sent the list required by condition 4 to the East Indian Railway complied with the condition,

(iii) Plaintiff soon after institution of suit sent the required list to the District Traffic Superintendent, defendant Company

The points raised being, in view of the authorities, difficult and doubtful, the learned Judge referred the case to a Division

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Bench, and we have now heard arguments and arrived at a conclusion

I have no hesitation in ruling that plaintiff has not complied with condition 1. He certainly did not forthwith send to the District Traffic Superintendent of the Defendant Company "a written statement of the description and contents of the articles missing," and it seems to me futile to argue that the sending of such a statement to the East Indian Railway Company, even if done forthwith, was a compliance with condition, for it cannot have the intention of the framers of the condition, that the sending of the required statement to the Company not to be held liable and not sued would suffice.

To proceed in my opinion, the case is governed by the Railways Act, and not by the Contract Act. No doubt, in *Oleaga Mall v. The Bengal and N.W. Railway Company*(1) it was ruled that negligent misdelivery to the wrong person is not "loss," and so a suit based on such misdelivery is not affected by the 6 months rule in Sec 77, Act IX of 1890. But in the present case there has been loss, and no proof is given or allegation made of misdelivery. Equally, in my opinion *Mitran v. East Indian Railway Company*(2), does not show that the case is governed by the Contract Act. I am unable to see in that ruling any dictum that has any real bearing on the point.

The only question remaining then is whether condition 1 aforesaid is enforceable or not. It is a rule or bye-law duly sanctioned by the Governor General in Council, and published in the Gazette made under Sec 51(3) of the Railways Act, which runs thus — "Subject to the control of the Governor General in Council a Railway administration may impose conditions, not inconsistent with this Act or with any general rule thereunder with respect to the receiving, forwarding or delivery of animals or goods." Sec 77 of the Act runs thus —

"A person shall not be entitled to compensation for the loss or destruction or deterioration of animals or goods delivered to be so carried, unless his claim to compensation has been preferred in writing by him or on his behalf to the Railway Administration within 6 months from the date of the delivery of the animals or goods for carriage by Railway."

It seems to me on a comparison of these two sections that in making the bye-law under consideration the Railway Administration

posed a condition inconsistent with the Act. Under the Act itself the only condition precedent to the successful claiming of compensation for loss of goods made over to a Railway for carriage, is a written submission of claim within 6 months of delivery to the Railway. By making the bye-law the Railway says to the public: "Even if you make your claim in writing within 6 months, you can get no compensation unless you have forthwith, i.e., immediately upon the loss sent a detailed list of the contents and so forth to the District Traffic Superintendent." In my opinion this amounts to a repeal of Sec 77 and the substitution of an inconsistent provision in its place. It is easy to understand the motive and the purpose of the bye-law. Had it been incorporated in Sec 77 by the Legislature, no one could have said it was unfair or unreasonable, provided always "forthwith" be taken to mean "within a reasonable time" for it is obvious that Sec 77 by itself is no sufficient safeguard against concocted claims, but to my mind it is clear that Sec 54(1) of the Act does not authorise the framing of such a bye-law as this.

If another part of Sec 54 (1) be looked to the matter becomes still clearer. The conditions that may be imposed by bye-law are conditions with respect to the "receiving, forwarding or delivering" of articles. Can it be said that a bye-law prescribing what the consignor or the consignee is to do *after the goods are lost* comes within the words? Certainly not.

In connection with the general question of the meaning of Sec 54 (1) and Sec 47 of the Railways Act, the latter being a section authorising the making of rules consistent with the Act for various purposes the authority *Jatm Singh Kotary v Secretary of State for India*(1) mentioned above has my concurrence and approval. The question for decision there was the enforceability of the first of the conditions or bye-laws under Sec 54(1) in regard to liability of the Railway to a consignor. It was held that it was unreasonable that the Railway should receive goods for carriage, but not be liable unless and until it had given a receipt to the consignor, and that it was *ultra vires* of the Railway to make a rule under which in an unreasonable way the Railway's duties as bullock were qualified and limited. In the present case I do not see that the bye-law (4) is *per se* unreasonable but I find it *ultra vires* on another ground. The ruling in the *East Indian Railway Company v Jeth Mall Ramanand*(2)

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(1) I L R., 31 Cal., 951

(2) I L R., 26 Bom., 669

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referred to by defendant Company's Pleader does not seem to be at all in point. It was found there that no sufficient notice under Sec. 77 and Sec. 110 of the Act had been given, and the natural result followed.

I would rule, then, that condition 4 aforesaid is illegal and unenforceable and I would accept the Revision and give plaintiff a decree for Rs. 349 with costs throughout (I can find no proof of the additional Rs. 28 asked for and would leave it out)

Application allowed

**The Indian Law Reports, Vol XXXI. (Bombay)
Series, Page 534.**

APPELLATE CIVIL.

*Before Mr. Justice Russell, Acting Chief Justice, and
Mr. Justice Batty.*

**THE AGENT, G. I. P. RAILWAY COMPANY,
(ORIGINAL DEFENDANT), APPLICANT**

v.

**DEWASI VERSEE AND OTHERS (ORIGINAL PLAINTIFFS),
OPONENTS ***

1907
July, 16

*Indian Railways Act (IX of 1890), Secs 77 & 110—Refund of an overcharge—
Notice—Letter—Manner of Service—Statement of fact not a proof of fact*

Plaintiffs who were merchants residing at Poona, entered into an agreement with the G. I. P. Railway Company that the latter should deliver consignments of goods despatched from Wadi at Poona at a certain rate. Several consignments were accordingly delivered by the Railway Company at Poona and they were paid for according to the agreed rate. At the time of the delivery of the last consignment, the Railway Company refused to deliver it unless all the consignments, including those already delivered and paid for, were paid for at a higher rate. The plaintiffs thereupon paid the higher rate under protest and sued the Railway Company in the Court of Small Causes at Poona for the recovery of the overcharges claimed and received by the defendants. The defendant contended that the suit was not maintainable inasmuch as no notice of the claim was served by the plaintiffs according to Sec. 77 of the Indian Railways Act (IX of 1890). The Judge overruled the defendant's contention and allowed the claim holding that a notice under Sec. 77 of the Act was not necessary because the section contemplated overcharges recovered before the delivery of the goods to the consignee and not to overcharges recovered after the delivery as was the present case. He further held that

* Application No. 333 of 1906 under the Extraordinary Jurisdiction.

if notice was necessary it was given by the plaintiff inasmuch as there was an allegation that a notice has been sent in a letter addressed to the Agent of the Company, care of the Station Master Poona by the plaintiffs

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The defendant having appealed under Revisional Jurisdiction

Held that notice was necessary The overcharge referred to in the Section is not confined in its meaning to an overcharge recovered before the delivery of the goods to the consignee at their destination

Held further that the delivery of a letter under Sec 140 of the Act must be in exact compliance with the terms of the section and it must be delivered to the Agent at his office

The statement of a fact in a letter is no proof of the fact itself

APPLICATION under the Extraordinary Jurisdiction (Section 25 of the Provincial Small Cause Courts Act, IX of 1887) against the decision of P V GURTA, Judge of the Court of Small Causes, Poona, in suit No 1482 of 1905

The plaintiffs, who traded at Poona, sued the defendant Railway Company for the recovery of Rs 829-13-9 on account of overcharges claimed and received by the defendant in respect of certain consignments of goods delivered to them at Poona. The plaintiffs alleged that according to an understanding between them and the defendant, the latter charged the plaintiffs 4 annas and 9 pies per Railway maund and subsequently claimed and received under protest on plaintiffs' part 7 annas and 10 pies per Railway maund. They therefore sought to recover Rs 655-11-0 paid for the overcharges and interest by way of damages, namely, Rs 174 2-9, in all Rs 829-13-9

The defendant contended, *inter alia*, that the suit was not maintainable inasmuch as no notice of the claim was served by the plaintiffs under the terms of Section 77 of the Indian Railways Act (IX of 1890). The Judge overruled the defendant's contention on the ground that a notice under the section was not necessary because the section contemplated overcharges recovered before the delivery of the goods to the consignee and not overcharges recovered after the delivery as was the present case. He further held that, assuming that notice was necessary, it was given by the plaintiffs to the defendant and that the defendant being entitled to charge the plaintiffs at the lower rate only was liable to the plaintiffs' claim. He passed a decree accordingly.

The defendant preferred an application under the extraordinary jurisdiction under Sec. 25 of the Provincial Small

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Courts Act (IX of 1887) and a *rule nisi* was issued by JENKINS, C J, and BEAMAN, J, requiring the plaintiffs "to show cause why the decree should not be set aside on the ground that it was obligatory on the plaintiff to prefer his claim in writing under Sec 77 of Act IX of 1890 and that the terms of Sec 140 of that Act have not been complied with"

Raikes (acting Advocate General with *Little & Co*) appeared for the Applicant (defendant) in support of the rule — Two points arise in the case, namely, (1) whether it was necessary for the plaintiffs to give him notice under Sec 77 of the Indian Railways Act, and (2) whether the notice was duly given. The Judge held that notice was not necessary because according to him the term overcharge in the section means an overcharge levied and recovered before the delivery of the goods to the consignee. But the construction adopted by the Judge necessitates the introduction of additional words in the section which by itself is quite clear in its meaning. The Judge says that it would be absurd to hold that the section would apply to the claim of the defendant Company made six months after the goods were delivered for carriage.

In connection with the second point, the Judge finds that notice was duly given. But there is no evidence to support the finding. There is a recital of the notice in a letter. If a man writes a letter and alleges therein that he gave a notice to his opponent, how can this circumstance be evidence against the opponent? The plaintiff says that he sent a registered letter to the defendant. But he has not produced the postal receipt for the registered letter. It should be noted that the plaintiff in his examination never referred to this registered letter. What he relied upon was a letter addressed to the Agent, care of the Station Master at Poona. Such a letter does not meet with the requirements of Sec 140 of the Indian Railways Act.

Robertson (with *D A Khare* and *B V Vidians*) appeared for the Opponents (plaintiffs) to show cause — The *rule nisi* calling on them to show cause consists of two parts. The second part relates to Sec 140 of the Indian Railways Act, and to the question whether the terms of that section have been complied with. Therefore, on this point no argument can be addressed which is not covered by the wording of the rule.

As regards the first part relating to the notice, the Judge has found as a fact that the plaintiffs had given notice to the Agent

of the Company This is a finding of fact and cannot be interfered with in the present revisional application The Judge relies upon a letter written by one of the plaintiffs to the Agent along with the other evidence in the case therefore, the finding of the Judge on this point is unimpeachable Under Sec 25 of the Provincial Small Cause Courts Act the High Court can interfere if there is any error in law committed by the Lower Court The defendant at first alleged that the correspondence between the parties was destroyed and then at his leisure produced the letter which speaks of the notice which they had sent to the Agent The defendant never denied the receipt of the notice All these circumstances and the conduct of the defendant justified the Judge in drawing the inference that notice duly reached the Agent

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The crucial question in the case is whether notice was necessary before the action? We submit that it was not necessary. The defendant contracted to carry eleven consignments of goods from Wadi to Poonu at the rate of 4 annas and 9 pies per Railway maund and did carry and deliver 10 consignments which were duly paid for at the above rate After the lapse of some time they demanded a higher rate on the ten consignments already delivered and paid for and detained on that account the eleventh, that is, the last consignment They then paid the higher rate under protest and brought the present suit to recover the excess Under these circumstances they contend that Section 77 of the Indian Railways Act cannot apply The excess amount which the defendant has recovered from them cannot be called an overcharge The natural meaning of the term overcharge in the section is the charge which, as a fact, is higher than what is warranted owing to the class of the goods, their weight or measurement and which the Company puts down against the goods in the receipt given at the time of the consignment Such a charge may either be prepaid at the time the goods are sent or paid at the time of delivery to the consignee Section 77 does not contemplate that the defendant can at any time after the performance of the contract revise the terms of the agreement The defendant demanded a higher rate than was agreed upon Such a case does not fall under Section 77 The construction which is sought to be put by the defendant upon the section would infringe upon the rights of the public in favour of the defendant The section must, therefore, be strictly construed We submit that the term overcharge means a charge

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which, as a matter of fact, is higher than is proper and for which the defendant agrees to carry goods. It cannot mean a higher charge which the defendant may afterwards choose to impose. Any other construction of the term would inflict great hardship. If the excess amount recovered in this case be held to be an overcharge, then the defendant can by recovering the alleged overcharge six months after the delivery of the goods for carriage, make it impossible for the sender to give notice within time.

RUSSELL, Ag. C.J.—In the year 1902 the plaintiffs herein had a grain shop at Poona and the defendants are the G. I. P. Railway. During May 1902 the plaintiffs' Agent went to Wadi to buy grain which he sent to Poona for sale there. The plaintiffs sue to recover from the defendants Rs. 655 11 0 and interest thereon as damages amounting to Rs. 174 2 9, in all Rs. 829 13 9. The sum of Rs. 655 11 0 is in the plaint sought to be recovered as the excess amount claimed and received by the Railway Company at Poona in respect of various parcels of grain sent from Wadi to Poona on different dates in June and July 1902, the details of which are set out in the plaint. The dates of the excess amounts being received are as follow:—

| | | | |
|--------|----|---|-------------------------|
| Rs 187 | 5 | 0 | received 12th July 1902 |
| , 62 | 6 | 0 | , 16th " |
| , 406 | 0 | 0 | , 25th " |
| <hr/> | | | |
| Rs 655 | 11 | 0 | |

The plaint was filed on 10th July 1905.

The learned Judge of the Small Cause Court at Poona raised the following preliminary issue: Whether the suit was not maintainable for want of notice under Secs. 77 and 140 of Act IX of 1890 (The Indian Railways Act)?

The proper form of this issue would be whether the suit is maintainable in the absence of notice, &c.

Mr. Haikes, Advocate General, for Defendants, said he would argue the two points only:

(a) Whether notice was necessary?

(b) Whether notice was given in time?

Before we deal with these two points it is desirable that we should state shortly what was proved at the hearing as to the fixing up the rates in question.

It appears that prior to February 1902 the rate for grain and seeds between Wadi and Poona had been 7 annas and 10 pies per Railway maund

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By Circular No 13, dated 18th February 1902, it was reduced to 4 annas 9 pies from 20th February 1902. But by a subsequent Circular No 25, dated 14th May 1902 the reduced rate was cancelled and the former rate restored from 1st June 1902. But this subsequent Circular had not been posted or affixed at Wadi station or made known to the public there or at Poona before the grain in question herein was sent from Wadi to Poona. Nor were the Railway people at Wadi and Poona aware of the subsequent Circular otherwise they would not have entered the reduced rate in the Railway Receipt at Wadi and allowed delivery of the grain (except the last consignment Invoice No 6) to the consignee at Poona on payment of the reduced rate. It was not till the last consignment had reached Poona that the enhanced rate was demanded. Further the plaintiffs' Agent at Wadi inquired of the then goods clerk there what was the rate and was told the reduced rate.

As to the first question then the learned Judge held that notice as above was not necessary.

His reasoning is set out in his judgment pages 17 and 18, as follows —“ The amount recovered by the defendant from the plaintiff on account of the alleged undercharges was charged and recovered, in some cases, not before, but some days after, the goods in respect of which the amount was recovered, were delivered to the plaintiff (the consignee) at their destination. I am of opinion that Section 77 of the Railways Act (IX of 1890) does not apply to such a case. The section provides that “a person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the Railway Administration within 6 months from the date of the delivery of the animals or goods for carriage by Railway.” Having regard to the time from which the period of six months is to be computed, it seems that the “overcharge” referred to in the section means an overcharge charged and recovered before the delivery of the goods to the consignee at their destination, and that it does not include an overcharge which is charged and

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recovered after the delivery of the goods to the consignee at their destination. Suppose an amount is charged and recovered on account of undercharges more than six months after the goods were delivered for carriage by railway would the section apply to such a case? Certainly not. It would be simply absurd to hold that the section would apply to such a case. It thus necessarily follows from this that the "overcharge" referred to in the section does not include an overcharge which is charged and recovered after the goods were delivered to the consignee at their destination."

But it appears to us that this is to read into the section words which are not there.

Section 77 is plain

77 A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by Railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the Railway Administration within six months from the date of the delivery of the animals or goods for carriage by Railway.

Section 140 is as follows —

140 Any notice or other document required or authorised by this Act to be served on a Railway Administration may be served in the case of a Railway administered by the Government or a native State on the Manager and in the case of a Railway administered by a Railway Company on the Agent in India of the Railway Company

- (a) By delivering the notice or other document to the Manager or Agent or
- (b) By leaving it at his office or
- (c) By forwarding it by post in a prepaid letter addressed to the Manager or Agent at his office and registered under Part III of the Indian Post Office Act 1866

In the American and English Encyclopedia "overcharge" is defined as 'a charge of more than is permitted by law, citing *Woodman v Rio Grande* (1). That a charge such as the present is not "permitted by law" is apparent from case of *Winkfield v Packington* (2). There, it was held that if before sending goods by a carrier the sender applies at his wharf to know at what price certain goods will be carried and he is told by a clerk who is doing the business there 2s 6d per cwt and on the faith of this he sends the goods, the carrier cannot

charge more, although it be proved that the carrier had previously ordered his clerks to charge all goods according to a printed book of rates in which 3s 6d. per cwt. was set down for the goods of the sort in question. Lord Lenterden's remarks in that case are very strong. They are.—

"If a person goes to the office of a Carrier, and asks what a thing will be done for, and he is told by a clerk or servant who is transacting the business there, that it will be done for a certain sum, the master can charge no more."

This case is cited in Angell on Carriers, Section 127, as being still the law.

Again, the words in Section 77 "*in respect of animals or goods*," are as wide as they can be.

Further, as a matter of practice the difficulty suggested by the learned Judge is not likely to arise for in the Forms of Consignment-note sanctioned by the Governor General (see page 272, Bayley on the Indian Railway Act) "the freight on all goods must be paid either previously or at the time of delivery," and it is in the highest degree improbable that a Railway Company if freight were not paid previously or on delivery would allow anything like so long as six months to elapse before they demanded payment of the freight. And by Section 55 of the Act payment must be made "on demand."

In our opinion we must read Section 77 in its plain and ordinary sense and bearing in mind the mischief at which it was aimed viz., stale claims against Railway Companies in India. We, therefore, think the judgment on this point is wrong and should be reversed.

The next question is: was notice under Section 140 in fact given or rather seeing that we are dealing with this case under Section 25 of the Provincial Small Cause Courts Act, was there evidence upon the consideration of which the learned Judge was justified in finding that due notice had been given?

The learned Judge deals with this part of the case as follows —

Assuming (but not holding) that the section does apply to a case like the present, the plaintiff in the present case did prefer his claim in writing to the defendant's Agent at Bombay by registered post within 6 months from the date of the delivery of the goods for carriage by Railway, as will be seen from the plaintiffs' letter to the General Traffic Manager, dated 11th August 1903 and produced by the defendant. In paragraph 1 of that letter, it is distinctly stated that the plaintiff did prefer

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his claim to the Agent by a registered letter No 103, dated 14th October 1902. This registered letter as well as some other correspondence relating to the subject matter of this suit is not forthcoming. The plaintiff has tried his best to procure their production. But the defendant's servants in their evidence state that the correspondence of 1902 has been destroyed according to the rules of the defendant Company. In none of the subsequent correspondence of 1903 does the receipt of the said registered letter of 14th October 1902 appear to have been denied. The goods in respect of which the undercharges were recovered were delivered at the Wadi Station to the defendant Company in the months of June and July 1902, as will be seen from the Invoices produced by the plaintiff. The above mentioned registered letter was sent to the Agent within six months from the date of the delivery of the goods to the defendant Company.

The passage in the letter, Exhibit O, to which he refers is as follows —

"I respectfully beg to point out that you are entirely wrong in stating my claim was not preferred within six months of the date of delivery, although (*sic*) my first registered letter No 103 was addressed to your Agent, dated 14th October 1902 and for which he acknowledged receipt." The learned Judge has inferred from the fact of there being no denial by the defendants of that statement that therefore the fact of the delivery of the letter of 14th October 1902 is proved.

But in our opinion this is not so. The statement of a fact in a letter cannot be accepted as proof of the fact itself. Nothing could have been easier than for the plaintiff then to prove that such a letter had been written and posted. The alleged receipt for the letter is not produced and no reason given for its non production. On the contrary, Dewasi Versee says "We then sent letters to the Agent through the Poona Station Master for refund of the amount." The letter he refers to is dated 24th July 1902 and runs thus —

To

The Station Master,
G I P Railway,
Poona

Dear Sir,

In reply to your letter of the 18th July I beg to state that you are not entitled to the undercharges mentioned in your letter

No. 4700 under the 55th Galt of the Railway Act IX of 1890
 You refer to empower you to demand The same in any way
 I shall only pay the sum under protest and if you accept them so

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Yours Sincerely,

SHAN NARSI VARJUNG

(in Gujarati)

The witness is evidently trying to make out that this is the letter sent in compliance with Sections 77 and 140 Of course it is not, for Section 140 requires letters to be addressed as therein set forth The witness does not refer to the alleged letter of 14th October 1902 at all

Further, even assuming the learned Judge was right in the view he took of the letter of 11th August 1903 still that does not show that all the requirements of Section 140 were complied with It does not say that the letter was delivered to the Agent at his office as required by Section 140 *non constat* that it was not addressed to him c/o the Station Master at Poona as the letter of the 24th July 1902 had been which was not in compliance with Section 140, exact compliance with which is necessary, *Great Indian Peninsula Railway Company v Olandra Bai* (1)

For the above reasons (it not being necessary to go into the other issues decided by the learned Judge) we would allow this application But looking at the extreme hardship of the case upon the plaintiff, we direct that each party do pay their own costs throughout

Application allowed

(1) (1906) 28 All 553

The Calcutta Weekly Notes, Vol. XII. Page 165.

CIVIL REVISIONAL JURISDICTION.

Before Rampini, C.J., and Sharfuddin, J.

TILAK CHAND LAHUTHY, PETITIONER,

v.

THE EAST INDIAN RAILWAY COMPANY,

OPPOSITE PARTY.

RULE No. 1829 OF 1907.

1907
August, 27.

Railways Act (IX of 1890), Secs 77 and 140—Goods lost in transit—Notice of claim—Sufficient notice

Notice of claim for goods lost in transit given to Railway Company A, with whom they were originally booked is not sufficient notice within Sections 77 and 140 of the Railways Act to Railway Company B, on whose line the goods were subsequently lost

The East Indian Railway Company v Jethmull Ramanand (1) followed
APPLICATION for revision of an order of the Subordinate Judge of Dinajpur, exercising the powers of a Court of Small Causes, dated the 16th of March, 1907.

The facts of the case material to this report appear from the judgment.

Babu Munindra Nath Bhattacharjee for the Appellant

Babus Lal Mohan Das and Mahendra Coomar Mitra for the Opposite Party.

The judgment of the Court was as follows:—

This is a rule, calling upon the opposite party to show cause why the decree of the Subordinate Judge of Dinajpur, passed in the exercise of his powers of a Court of Small Causes and dated the 16th March 1907, should not be set aside on the ground that the notice to the defendant, opposite party, was in accordance with the provisions of Section 77 of the Indian Railways Act.

The facts are as follows —It appears that certain goods were booked on the 13th February 1906, from Station Jaipur on the Rajputna Malwa Railway These goods were to be delivered to

the plaintiff at Dinajpur Station on the Eastern Bengal Railway, but they never reached the petitioner. The petitioner therefore applied to the Rajputana Malwa Railway Company and carried on for sometime correspondence with them. Ultimately the East Indian Railway Company on being referred to admitted that the goods had been received by them on the 14th February 1902, but that they had gone astray.

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The petitioner then sued the East Indian Railway Company who defended the suit on the ground that no notice of claim was ever given to them under the provisions of Sections 77 and 140 of the Indian Railways Act. The Small Cause Court Judge held that as the notice of claim must be given within six months and as no such notice was given, the suit was barred by the special law of limitation and it accordingly dismissed the suit.

The plaintiff has obtained this rule to show cause why the decree of the Small Cause Court should not be set aside. He contends that the notice given to the Rajputana Malwa Railway was sufficient and that the suit is accordingly not barred by limitation and, furthermore that the East Indian Railway Company admitted that they received the goods.

We think, however, that we must hold on the authority of the case of *The East Indian Railway Company v. Jethumull Ramchand*(1), that the notice of the Rajputana Railway Company was not sufficient notice of claim to the East Indian Railway Company under Sections 77 and 140 of the Railways Act and that although the East Indian Railway Company admits the receipt of the goods and that they went astray on their line, the suit being barred by limitation, there can be no decree given against them.

The rule is discharged with costs, two gold mohurs.

Rule discharged

The Indian Law Reports, Vol. XXXV. (Calcutta)
Series, Page 194.

CIVIL RULE

Before Mr. Justice Mitra and Mr. Justice Caspersz

NADIAR CHAND SHAHA

v

WOODS *

1907
Nov, 26

Railway Company—Notice of claim 'may be directed'—Indian Railways Act (IX of 1890)—Ss 77, 140—Claim against Railway administered by a Railway Company

A notice of claim for short delivery was served upon the Traffic Manager of a Railway administered by a Railway Company and not on the Agent —

Held that such a notice was not a sufficient compliance with the provisions of Sections 77 and 140 of the Indian Railways Act

Secretary of State for India v. Dip Chand Poddar⁽¹⁾ referred to

The word *may* in Section 140 of Indian Railways Act means that if a plaintiff is desirous of serving an effective notice of claim the notice must be directed to the Manager or Agent as the case may be

Great Indian Peninsula Railway Company v. Chandrasekhar⁽²⁾ followed
Periannan Chetti v. South Indian Railway Company⁽³⁾ dissented from.

RULE obtained by the plaintiff, Nadiar Chand Shaha, under S 25 of the Provincial Small Cause Courts Act

The plaintiff sued Mr Wood, the Agent of the Assam-Bengal Railway Company to recover damages for non delivery of goods His allegation was that he consigned certain goods from Calcutta and Dacca for conveyance to Chittagong, but they were short-delivered He also stated that one of the consignments was not delivered at all

The defendant Company pleaded, *inter alia*, that the suit was not maintainable, and that no notice was served according to the Railways Act

* Civil Rule No 2751 of 1907, Fee No 3539 of 1907

(1) (1896) 1 L R 21 Cal 308

(2) (1907) 1 L R 29 All, 552

(3) (1898) 1 L R 22 Mad, 137

The learned Small Cause Court Judge having found that the notices were served on the Traffic Manager, and not on the Agent of the Railway Company, held that they were insufficient in law, and dismissed the plaintiff's suit

Nadhar Chand
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v
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Against this decision the plaintiff moved the High Court and obtained the Rule

Babu Sharat Chandra Basak for the Petitioner The question is whether the notice which was given in this case to the Traffic Manager was a sufficient notice under the Railways Act Section 140 of the Act speaks of the persons upon whom notice is to be served, the section is not exhaustive, and a notice on the Traffic Manager is a sufficient compliance with the provisions of the Act The case of *Periannan Chetti v South Indian Railway Company*(1) and the judgment of Mr Justice TRAYNOR in the case of *East Indian Railway Company v Jethmul Ramanand*(2) which was not reversed on the point that the Traffic Manager was the proper person to serve notice upon, support my contention I also rely upon S. 229 of the Contract Act

Mr Garth (Babu Jay Gopal Gosha with him), for the Opposite Party was not called upon

MITEA AND CASPERSZ, JJ—This is an application in a suit instituted in the Court of Small Causes at Chittagong by the plaintiff for recovery of damages from the Assam-Bengal Railway Company for short delivery, on different dates, of goods carried by the Railway Company under risk notes

The plaint is extremely imperfect It does not state the date or dates on which the notices of non delivery were given to the defendant, it does not also state to whom the notices were given, and when and how they were served The plaint is also silent as to the dates when the delivery in each case was expected

The defendant, who is the Agent of the Assam Bengal Railway Company, denied the receipt of proper notices and also denied the liability of the Company even if the notices were duly served

The learned Small Cause Court Judge came to the conclusion that the alleged notices of claim were insufficient, they admittedly having been served on the Traffic Manager and not on the Agent of the Railway Company

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The main question argued before us in this rule is whether the notice to the Traffic Manager was a sufficient compliance with the provisions of Secs 77 and 140 of Act IX of 1890

Sec 77 of the Act requires that before a person can sue for refund for loss or non delivery of goods or for short delivery, he must prefer in writing a claim within six months from the due date of delivery by the Railway Company. Sec 140 speaks of the mode of service of notices and the person to whom the notices are to be directed. It says "any notice or other documents required or authorised by this Act to be served on a Railway Administration may be served, in the case of a Railway administered by the Government or a Native State, on the Manager and, in the case of a Railway administered by a Railway Company, on the Agent in India of the Railway Company." The present case is one of a Railway Company not administered by Government or any Native State, and the Section requires that the notice shall be served on the Agent in India. Admittedly the notice or notices in this case were served on the Traffic Manager.

The authorities in this Court as well as in the Bombay High Court are to the effect that the service of notice under Sec 77 of the Act must, in order to be effective, be served in the form and manner indicated in the Act itself, i.e. Sec 140 of the Act. In the case of *The East Indian Railway Company v Jethmal Ramanand* (1) Mr Justice TRAYNI held that Sec 140 of the Act was merely an enabling section and that the service of notice on the Traffic Superintendent or a person of that character would be sufficient. The Court of appeal, however, consisting of JENKINS, C J, and CROWE, J, held that the formalities required by the legislature could not be dispensed with and they came to the conclusion that a notice in strict accordance with the provisions of the Act must be served before an action could be brought. The learned Judges were of opinion that the fact that the East Indian Railway Company knew of the claim of the plaintiff and that intimation of the notice which in that case was served on the Bengal-Nagpur Railway Company had been given to the East Indian Railway Company were not sufficient, and they followed the decision of that Court in *Ganga Prasad v The Agent, Bengal North-Western Railway Company* (2).

(1) 1 L. R., 26 Bom., 660 (1900-)

(2) See article p 373

In the case of *The Secretary of State for India in Council v Dip Chand Poddar*(1) this Court held that Sec 77 of the Railways Act required that the claim should be preferred to the Railway Administration and that the words Railway Administration mean, having regard to the provisions of Sec 3 of the Act, the Manager in the case of a State Railway and that the service of notice to the Traffic Manager was not sufficient. The case of *The Secretary of State for India in Council v Dipchand*(2) was one against a State Railway, but the principle of construction adopted by this Court was that the directions in Sec 140 must be strictly followed, and the word "may" in that section must be construed as meaning "must" if a plaintiff desires to make a claim.

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Similar interpretation has been put on similar clauses in other enactments in which directions are given that notices should be served on a particular person in a particular manner. The case of notices under Sec 424 C P C on *The Secretary of State for India in Council* may be cited as an illustration of this principle of construction.

We cannot agree with LADJI, J, or the learned Judges of the Madras High Court who decided the case of *Periannan Chetti v The South Indian Railway Company*(3) in the view they have taken as to the effect of the word "may" in Sec 140. In our opinion, the word "may" in this section means that, if a plaintiff is desirous of serving an effective notice of claim, the notice must be directed to the Manager or Agent as the case may be. This is also the view taken in *Great Indian Peninsula Railway v Chandra Bai*(4) in which all the earlier cases have been cited and followed.

We are, therefore, of opinion that the Judgment of the Small Cause Court Judge is correct and that this rule must be discharged.

The learned Vakil for the petitioner has contended that the case should be sent back to the Lower Court for a finding on the question whether the Traffic Manager was authorised by the Agent of the Assam Bengal Railway Company to receive notices, but the question does not arise on the pleadings and there is no evidence in the record on the point.

The rule is accordingly discharged with costs, five gold mohurs.

Rule discharged

(1) I L R, 24 Cal 506 (1896) (2) I I R, 2, Mad, 137 (1898)

(3) I L R 29 All, 55^a (1906)

The Madras Law Times, Vol. VI. Page 427.

In the High Court of Judicature at Fort William in Bengal.

APPELLATE CIVIL JURISDICTION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

V. WOODS, (AGENT TO THE ASSAM BENGAL
RAILWAY COMPANY) PETITIONER,

v.

MEHAR ALI BEPARI, OPPOSITE PARTY

RULE No 2003 OF 1908.

1908
July, 31

Indian Railways Act (IX of 1890), Secs 77, 140—Claim for compensation for short delivery—Notice of claim on whom to be served—Service on Traffic Manager

The notice of claim under Sec 77, Railways Act, must be served under Sec 140 of the Act on the Agent of the Company. But the law does not require that the notice should be physically thrust in the Agent's hand. It is sufficient if it appears from the findings that the Agent has had full knowledge and notice of the claim.

Where from the rules of the Railway Company it appeared that the Traffic Manager in the claims department settles all such claims and the Agent also refers to him claims for disposal.

Held, that the notice to the Traffic Manager was sufficient.

This was a rule granted on the 8th of June 1908, against the Judgment and decree of Babu Narendra Nath Ghosh, Mansiff, 1st Court at Poni, District Noakhali, dated the 24th of February 1908, passed in the exercise of powers of a Court of Small Causes.

The matter arose out of a suit for Rs. 40 as compensation for 4 bags of rice which defendant Company failed to deliver.

The defendant denied liability *inter alia* on the ground that there was no valid service of the notice of claim on the Company, as the notice was served on the Traffic Manager and not on the Agent, and also contested plaintiff's ownership of the consignment.

The Calcutta Weekly Notes, Vol XIV Page 888.

CIVIL REVISIONAL JURISDICTION

Before Chatterjee, J and Vincent, J

MARTIN & Co, MANAGING AGENTS,

BAKHTIARPORE BEHAR LIGHT RAILWAY Co, LTD

(DEFENDANTS) PETITIONERS

2

FAHIR CHAND SAHU AND OTHERS, (PLAINTIFFS),

OPPOSITE PARTY

RULE No 1118 of 1910

Railways Act (IX of 1890) Secs 77 140—Notice of claim sent through post but not Registered—Post Office Act (XIV of 1866) Part III

1910
May 5

Notice of a claim of damages for short delivery sent through the post but not registered under Part III of the Indian Post Office Act was not service in any of the modes provided by Sec 140 of Railways Act

Nadhar Chand v. Wood(1) relied on

This was a rule issued on the 11th of March 1910, against the decree and judgment passed by the Munsiff of Behar in the District of Patna, on the 13th of December 1909, calling on the opposite party to show cause why the above decree and judgment should not be set aside

The material facts appear from the judgment

Babu Narendra Kumar Bose for the Petitioners

Babu Shiba Prasanna Bhattacharjee for the Opposite Party

The judgment of the Court was as follows —

This case arises out of a suit for damages for short delivery against a Railway Company. Section 77 of the Railways Act IX of 1890 provides that no such claim shall be allowed unless the claim has been preferred in writing to the Railway Administration within 6 months from the date of the delivery of the goods. In the present case such a claim seems to have been

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plied with, and on the ground that the suit by the plaintiff was otherwise not maintainable.

It is now too late and we have no desire to differ from a long course of decisions in which it has been held that in a case of Railway Company the notice under Section 77 which is served under Section 140 must be on the Agent of the Company. But we think that a notice on an individual be he the Agent of a Railway Company or be he the Secretary of State, need not be physically thrust in the Agent's hands. It is sufficient if the finding of fact are such that it must be inferred that the Agent had full knowledge and notice of the claim. Now in this case there was too very strong reasons for inducing us to believe that the Agent and his office are saddled with full knowledge. The first is that the Traffic Manager whose duty it would have been to bring to the notice of the Agent if there was any hitch in the matter, on the 30th May long within the period of six months wrote to the plaintiff that the matter was being enquired into and allaying the plaintiff's natural anxiety about his loss. If the Agent did not know anything about this and if the Traffic Manager knew that the Agent knew nothing about it the only possible conclusion would be that the Traffic Manager was an exceedingly dishonest man. Be that as it may, there is a further finding by the learned Munsiff at the end of his judgment which seems to us to conclude the matter. He says there were Rules of the Company put before him and he says in these Rules the Agent and the Traffic Manager contract with the public. It is clear that the Traffic Manager in the Claims Department settles all such claims and the Agent also refers to him claims for disposal. That being so, we think that there is no doubt that in this case on the findings of fact the Small Cause Court Judge was justified in decreeing the plaintiffs claim. In any case in the exercise of our powers under Section 25 of the Small Cause Court Act we certainly are not disposed to pass any order in respect to this case which would have the effect of defeating the plaintiffs apparently just claim.

For these reasons the Rule will be discharged with costs, one gold mohur.

Rule discharged

The Calcutta Weekly Notes, Vol. XVI. Page 356.

CIVIL APPELLATE JURISDICTION

Before Jenkins, C.J. and N R Chatterjee, J.

JANAKI DAS AND OTHERS, (PLAINIFFS), APPELLANTS

v.

THE BENGAL-NAGPUR RAILWAY COMPANY,
(DEFENDANTS) RESPONDENT

APPEAL FROM APPELLATE DECREE No 988 OF 1909 *

Railways Act (IX of 1890), Secs 77 140—Notice of claim to Goods Superintendent if sufficient—Irregular sale of left goods if conversion—Damage 1912
January 19

Held, that the notice of claim for loss of goods despatched by rail given in this case to the Goods Superintendent did not comply with the requirements of Sections 77 and 140 of the Railways Act

Quære—Whether a failure to observe the provisions prescribed in the Railways Act with regard to sales of articles of which no delivery has been taken would make the sale an act of conversion by the Railway

This was an appeal preferred on the 15th of May 1909, against the decree of Mr P ROE, District Judge of Zillah 24-Pergunnahs, dated the 10th of February 1909, affirming the decree of BALU RAJ KRISHNA BANERJEE, Subordinate Judge of Alipore, dated the 10th of August 1908.

The plaintiffs instituted this suit against the defendant Company for the recovery of 580 mannds of rice together with 290 bags in which the rice had been packed or in the alternative for the price thereof. The goods in question had been despatched from Raigarh for delivery at Shahmar and the plaintiffs' case was that out of the 290 bags only 288 arrived at the last mentioned railway station, that Bhagat Ram, their servant, when he went to take delivery of the bags, found two bags missing and others partly empty, that he asked the goods clerk to re-weigh the goods and to grant him a shortage certificate, but this request was disregarded and the goods were wrongfully sold by the Company for Rs 1,498, wherefrom the Company deducted

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Rs 413-12 for wharfage and Rs 329-4 for freight and remitted the balance Rs 755 to the plaintiff's solicitors

The defendant Company *inter alia* objected that the suit was barred by limitation under Section 77 of the Railways Act the goods having been delivered at Raigarh on the 11th January 1907, whereas the notice to the Agent was not given till the 12th September 1907. The plaintiffs, however, relied on a notice given by them to the Goods Superintendent on the 15th March which concluded as follows —“Unless you forthwith comply with the request contained herein, our clients will hold the Railway Company liable for all loss which they may sustain for such non delivery and they will not be liable to pay any demurrage for the goods owing to the default on the part of the Railway Company” The Subordinate Judge held that the Company was not bound to re weigh the goods and give a shortage certificate, that Section 77 of the Railways Act was a bar to the suit as regards the two missing bags and the shortage in the other bags As regards the sale, he found that it was not held after full 15 days' notice but he did not consider the irregularity to be of sufficient importance, and moreover found that the price fetched at the sale was not inadequate. In this view he dismissed the suit On appeal the District Judge held that the letter to the Goods Superintendent was sufficient notice under section 77, Rail ways Act On this point he observed —

I take it that the Agent is not required to receive every such notice with his own hand and to sign receipt himself for every such notice It is sufficient, if the notice is received by an officer of the Company whose duty it will be to lay the matter before the Agent Under Rule 57 of the Goods Tariff published by the Bengal-Nagpur Railway, we find that written claims must be made to the Goods Superintendent Throughout the correspondence, we find the Goods Superintendent writing for the Company, offering terms for the Company, and finally on behalf of the Company making payments to the Appellants of the sum which he as the representative of the Company considers to be due Surely, the Company have placed themselves in the position that they cannot deny that the Goods Superintendent is the person, who will receive on behalf of the Agent claims and notice of suits upon claims, and that for the purpose of all claims to compensation for damage and loss the Goods Superintendent is the representative of the Agent

On the other points he affirmed the findings of the Subordinate Judge and in the result dismissed the appeal

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The plaintiffs preferred this second appeal

Mr Hyam and Babu Probodh Chandra Roy for the Appellants

Mr S P Sinha and Babu Monmatha Nath Mukherjee for the Respondent.

The Judgment of the Court was as follows —

JENKINS, C J — On the 11th January 1907, the plaintiffs delivered to the defendant Company 290 bags of rice, weighing 580 maunds for carriage from Raigarh to Shalimar. The goods have not been delivered, and the plaintiffs now claim either delivery of the goods or Rs 2,280-10 by way of damages.

The Subordinate Judge dismissed the suit and his decree was confirmed by the District Court. From this confirming decree the present appeal has been preferred.

As the case comes before us by way of appeal from appellate decree, it is necessary to see what the facts are as found by the Lower Appellate Court, for by its findings we are bound.

It is common ground that of the 290 bags all but 2 reached Shalimar, and these 2 were lost.

The plaintiffs' case is that the 288 bags that arrived were partly empty and according to the District Judge "their only real complaint is that the goods clerk refused to re-weigh the goods and issue a short-certificate. And the learned Judge goes on to say "On this we must find that the facts were that when the Appellant went to take delivery of the goods demurrage was due and that they refused to take delivery without re-weighment and also refused to pay demurrage. Clearly on such a finding the Railway Company were not bound to deliver the goods." Later in his judgment the District Judge says of the plaintiffs "They refused to take delivery of the goods which were consigned to them except on certain conditions with which the Railway were not required by law to comply. They demanded a re-weighment and a certificate of shortage. The Railway is not required by law either to re-weigh or to certify shortage."

The result then is that of the 290 bags, 2 were not delivered because they were lost, and non-delivery of the rest was due to the fact that the plaintiffs would only take delivery on a condition they were not entitled to impose.

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I will first deal with the two lost bags

Where a Railway Administration fails to deliver goods entrusted to it for carriage it may be shown that the goods were lost and then the provisions of Ch VII of the Indian Railways Act, 1890, apply. Among these provisions is that contained in Sec 77, which enacts that "a person shall not be entitled to compensation for the loss of goods delivered to be so carried unless his claim to the compensation has been preferred in writing by him or on his behalf to the Railway Administration within 6 months from the date of the delivery of the goods for carriage by Railway." By Sec 140 it is provided "any notice or other document required or authorized by this Act to be served on a Railway Administration may be served, in the case of a Railway administered by the Government or Native State, on the Manager and, in the case of a Railway administered by a Railway Company, on the Agent in India of the Railway Company (a) by delivering the notice or other document to the Manager or Agent, or (b) by leaving it at his office or (c) by forwarding it by post in prepaid letters addressed to the Manager or Agent at his Office and registered under Part III of the Indian Post Office Act, 1866." The method of service permitted by this section has not been followed, nor has it been shown that the claim has been otherwise preferred to the Railway Administration so as to satisfy the requirements of Sec 77.

The correspondence with the Goods Superintendent was manifestly insufficient for that purpose and on this point I accept the view of the Subordinate Judge in preference to that of the District Judge.

The suit therefore as to the two lost bags must fail on this ground.

The position as to the 288 bags is different. The inference suggested by receipt, Ex 1, is that each bag at the time of delivery to the Railway administrators, contained 2 maunds and the discussion before us has proceeded on that footing.

Now it is no one's case that these 288 bags were lost, on the contrary they have been sold by the Railway Company. But though they were sold the weight of the rice sold was only 427 maunds and not 576 maunds, as it should have been. How this difference in weight has not been clearly explained nor is there any definite finding by the Lower Appellate Court on the point. There is, however, no suggestion that the Railway Administration is in possession of the goods or that it has been

guilty of wilful misfeasance in regard to them and the only inference appears to be that the difference in weight represents goods, which have been lost or destroyed

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The position then would seem to be that the suit must fail either for failure to comply with the provisions of Sec 77 of the Indian Railways Act or because the goods were at the plaintiffs' risk by reason of their failure to take delivery

As to the rest of the goods, that is to say the 127 mounds, the position is this. The goods were sold by the Railway Company as the plaintiffs failed to take delivery, but in so selling the Railway Company failed to observe the provisions prescribed by the Indian Railways Act. The sale was therefore not in accordance with law

But, even if it be treated as a conversion, what is the consequence? The plaintiffs would be entitled to damages. But according to the findings of the lower Appellate Court no damages have been suffered

Then it is objected by the plaintiffs that the Railway Company was not entitled to deduct wharfage. This rests on their contention that the notification of the 3rd July 1902 was of no legal effect. But the plaintiffs cannot be allowed to advance this argument at this stage for the first time seeing that it depends on proof of facts

It clearly was not taken before the Subordinate Judge, it is not to be found in the grounds of appeal to the District Court, and there is no reference to it in the judgment of that Court

The result then is that the decree of the Lower Appellate Court must be confirmed with costs

N R. CHATTERJEE, J—I agree

Appeal dismissed.

The Indian Law Reports, Vol. III. (Madras) Series,
Page 240

ORIGINAL CIVIL

Before Mr Justice Kindersley

KALU RAM MAIGRAJ (PLAINTIFF)

v.

THE MADRAS RAILWAY COMPANY (DEPENDANTS) *

1891
July 18

*Rail way Companies interchange of traffic between—Agency—Limitation : in
suit against carrier for loss of goods*

When two Railway Companies interchange traffic goods, and passengers with through tickets rates and invoices payment being made at either end and profits shared by mileage the receiving Company by granting a receipt note for goods to be carried over and delivered at a station of the delivering Company's line does not thereby contract with the consignor of the goods as agent of the delivering Company

An action against a Railway Company for loss of goods when there is no contract is governed by Schedule II Clause 30, of the Limitation Act

Haji Mohamed Isack v B I S N Co (1) followed

The facts of this case sufficiently appear in the judgment

Mr Grant for Plaintiff

The case of *Gill v The Manchester, Sheffield, and Lincolnshire Railway Company* (2) shows that when Railway Companies enter into an arrangement such as exists between these Companies, the receiving Company becomes the agent of the delivering Company to contract with the consignor of goods. After the arrival of the goods at Bellary the Madras Company became warehousemen and liable as bailees under an implied contract to take good care of the goods which were stored in an open yard (Section 151 of the Contract Act) *Surutram Bhatta v G I P Ry Co* (3) Section 49 or Section 115 of Schedule II of the Limitation Act, and not Sections 30 and 31, is applicable to this case.

* Civil Suit No 335 of 1890 in the High Court of Madras

(1) I L R, 3 Ma L, 107

(2) L R 2 Q B, 18

(3) I L R. 3 Bom., 91.

We applied for our goods within a reasonable time and could not get them

The Advocate General (*Hon P O Sullivan*) and Mr Wedderburn for the Defendants

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In *Gill's* case there was an elaborate arrangement amounting to a partnership agreement between the Companies. Nothing of the sort has been proved here. The contract was one and entire with the receiving Company to deliver it *Bharj Mu charip v Lancaster and Preston Junction Railway Co* (1). *Wiley v West Cornwall Railway Co* (2). *Mjil n v M Hanl Railway Co* (3), *Collins v Bristol and Exeter Railway Co* (4).

There being no contract with us the suit is barred *Haji Mahon v East v B I S N Co* (5).

The loss of the goods was not due to any negligence of the defendants. The Company's servants did what they could under the circumstances, and the plaintiff's agent did not apply promptly, as he should have done considering the enormous traffic in grain.

KINDERLEY, J—This suit has been brought against the *Madras Railway Company*, the plaintiff alleging that on the 6th September 1877 he consigned from *Sahamul*, a station on the *Oudh and Rohilkhand Railway*, to himself at *Bellary* 218 bags of gram, that he contracted with the defendants as carriers through their agents the *Oudh and Rohilkhand Railway Company*, to pay the defendants, on delivery of the goods at *Bellary*, and that the defendants, by the said agents, agreed to convey the goods safely to *Bellary* and to deliver them to the plaintiff there within a reasonable time, taking care of them in the meantime. The plaintiff further charges that the goods arrived safely at the defendants' station at *Bellary*, where, owing to the defendants' negligence and want of proper care, they were damaged by rain and were afterwards destroyed by order of a Magistrate. The plaintiff, therefore, claims compensation for breach of contract and for loss of his goods.

The defendants denied that they had entered into any contract with the plaintiff. They stated that the goods arrived at *Bellary* about the 25th September, but that the plaintiff having failed to

(1) 8 M and W 41

(2) 2 H and N 703

(3) 4 H and N 615

(4) 11 Ex 700; SC 1 H and N, 527 and 7 H L, 194.

(5) 1 L R, 3 Mad, 107

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apply for delivery of the goods within a reasonable time after their arrival, the goods were wetted and spoiled by the rain without any negligence or want of proper care on their part. The defendants also stated that if they had been guilty of negligence, they would not be liable to the plaintiff, as they held the goods merely as agents for the *Oudh and Rohilkhand Railway Company*, and made no contract with the plaintiff. They further contended that the suit was barred by the Act for Limitation of Suits.

The plaintiff's *Gumasta*, *Ramasahai*, has given evidence to the effect that in the month *Bhadrapad* (September-October) 1877, he went to *Bellary*, and presenting the receipt note given by the *Oudh and Rohilkhand Railway Company*, demanded delivery of the grain, but was told by one of the native officials, to whom consignees were presenting receipt notes, that the good had not arrived. He remained at *Bellary* for twenty days, making repeated applications at the station for delivery of the goods, but was always told that they had not arrived. On two occasions he searched in the yard for his master's bags, but could not find them. When he had been at *Bellary* about four days, one of the officials of the railway, *Murugasa Mulali*, marked the date on his receipt note 12 10 77. Therefore the plaintiff may have arrived at *Bellary* about the 8th of October.

Now it has been proved by officials who were employed in superintending the unloading of goods at *Bellary* at that time, and who refer to books kept in the course of business, that the wagons containing the plaintiff's grain arrived at *Bellary* on the 24th of September, and were unloaded on the following day. The delivery book does not show that they were ever delivered to any one. Heavy rain fell in the latter part of September. Prices fell, and many of the consignees neglected to remove their goods. The result was an accumulation of grain in the yard. The goods shed being full, it was necessary to keep the greater part of the grain in the yard. There was not enough tarpaulin to cover it all. Heavy rain fell in the latter part of September and in the beginning of October, and the greater part of the grain which was in the yard was damaged and had to be destroyed. Even that which was covered with tarpaulins did not escape. The witness *Murugasa Mulali* states that, when the receipt note was brought to him as goods delivery clerk at *Bellary* Station on the 12th of October, he pointed the bags out to the man who produced the receipt

note He said he would come in the evening and pay for them The bags were then lying in the yard, they were already damaged by the rain They were never removed or paid for they were probably destroyed a few days afterwards with the other goods which had been damaged His witness's account appears to be probably true The railway servants were anxious to have the goods removed It was equally natural that, with a falling market and the goods already damaged, the plaintiff's Gumastah would not care to accept delivery At the same time it is probable that he would profess himself ready to take delivery When the grain began to swell the bags burst The good grain was then separated from that which was rotten The rotten grain was sent away by order of a Magistrate and what was saved was sold I do not find that the bags of grain were damaged from any negligence or want of proper care on the part of the defendants or their servants Consignees did not readily take delivery after the rain commenced Grain accumulated in very large quantities The goods shed would only hold a small portion of it there was no cover for the rest The officials covered as many bags as they could with tarpaulins and date mats, but many even of such bags were damaged The true cause of the plaintiff's loss was that he did not apply for delivery within a reasonable time after the arrival of the bags at Bellary The defendants have not been shown to have been guilty of negligence

At the hearing it was contended for the defence that the defendants entered into no contract with the plaintiff, that the *Oudh and Rohilkhand Railway Company* did not act as agents for the defendants, but the defendants acted as agents for the *Oudh and Rohilkhand Railway Company*, and that therefore, the suit would not lie against these defendants upon the contract which the plaintiff made with the *Oudh and Rohilkhand Railway Company* It was further contended that if the suit were founded in tort independently of contract, the suit was barred by the *Act of Limitations*, Schedule II, Section 30

Upon the evidence before me, I cannot find that there was any contract between the plaintiff and the defendants The receipt-note filed by the plaintiff is evidence of a contract between the plaintiff and the *Oudh and Rohilkhand Railway Company* It does not shew that the Company acted as the agents of the *Madras Railway Company* It is merely evidence of an agreement between

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the plaintiff and the *Oudh and Rohilkhand Railway Company* that the latter would convey the goods to *Bellary*, and that the plaintiff would pay a certain sum on delivery. It may, indeed, have been understood that the Company with whom the contract was made would perform it through the agency of other Companies, but that, in entering into the contract, the *Oudh and Rohilkhand Railway Company* were themselves acting as agents of the defendants has not been shown. Mr Grant has referred me to the case of *Gill v The Manchester, Sheffield, and Lincolnshire Railway Company*.⁽¹⁾ There the defendant Company had entered into a very complicated convention with another Railway Company, not only for a full and complete system of interchange of traffic, but that the two Companies should aid and assist each other in every possible way, as if the whole concerns of both Companies were amalgamated, and that every possible facility should be given by either party to develop and increase the traffic of both. Except for purposes of repairs, the stock was to be considered as one stock. A joint board of directors was to have charge of the working of the agreement. It was held that, by virtue of this agreement, the forwarding Company became the agents of the delivering Company. That any such convention exists between the defendants and the *Oudh and Rohilkhand Railway Company* has not been shown, but only an interchange of traffic, trucks running through, with through invoices, fares paid or to pay, and divided, not as in the other case in pursuance of the agreement, but according to the miles actually travelled on each line. The learned Advocate General has referred me to the following cases, which show that a contract made with a Railway Company for the delivery of goods at a station on some other line of railway has been regarded in England as an entire contract made with the first Company alone, and not with that Company as the agent of the Company to whose station the goods were to be sent. *Muschamp v. Lancaster and Preston Junction Railway Company*,⁽²⁾ *Wilby v. West Cornwall Railway Company*,⁽³⁾ *Mytton v. Midland Railway Company*,⁽⁴⁾ *Collins v. Bristol and Exeter Railway Company*,⁽⁵⁾ I think that each case must be decided upon the evidence given us to the contract made. The *Madras Railway Company* might have entered into an agreement with the *Oudh and Rohilkhand Railway Company*, which would in effect have constituted the

(1) 1 R., 2 Q. B. 180.

(3) 2 H. and N. 703.

(5) 11 Ex., 790, 8 C. 1 H. and N., 517 and 7 H. L., 194.

(2) 8 M. and W. 421.

(4) 4 H. and N. 515.

latter their agents for receiving goods. But it has not been shown that they did so. Nor has it been shown that the *Oudh and Rohilkhand Railway Company* in this case received the plaintiff's goods as the agents of the *Madras Railway Company*.

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Railway

Then, as it has not been shown that there was any contract between the plaintiff and defendants, I must hold, following the decision of this Court in *Haji Mahomed Isack v British India Steam Navigation Company*,⁽¹⁾ that the suit, so far as it is founded not on contract, but upon the alleged negligence or want of proper care on the part of the defendants, is barred by the *Limitation Act*, Section 30 of Schedule II. As to costs, it must be remembered that, if the defendants may possibly have saved some of the plaintiff's grain, which is not distinctly proved, they have lost their freight, and the fault is clearly shown to have been on the side of the plaintiff. This suit is therefore dismissed with costs.

Attorneys for Plaintiff, *Messrs Grant and Lamy*

Attorneys for Defendants, *Messrs Barclay and Morgan*

Note.—See *GIP Ry Co v Radhakisan Ahstaldas* (I L R, 5 Bom 31)

**The Indian Law Reports, Vol. V. (Madras) Series
Page 388.**

APPELLATE CIVIL

*Before Mr Justice Innes, Officiating Chief Justice, and
Mr Justice Tarrant*

HASSAJI AND ANOTHER (PLAINTIFFS), APPELLANTS

v

EAST INDIA RAILWAY COMPANY

(DEFENDANTS), RESPONDENTS *

*Limitation Act 1877 Schedule II, Article 90 II.—Suit by consignee against
Railway Company for non delivery*

1881
August 18
1882
August, 3

Where a suit is brought against a Railway Company by the consignee of goods (not sent on sample or for approval) for compensation for

(1) I L R., 3 Mad., 107

* S A 176 of 1881 against the decree of J O Hightson, Acting District Judge of Bellary, modifying the decree of P T Ramala Rao, District Munsif of Bellary, dated 29th November 1880

Ha. saj
E I Ry

non delivery, the period of limitation is not two years (Article 30), but three years (Article 115, Schedule II of the Limitation Act 1877), inasmuch as the consignor contracts with the Company as agent for the consignee and the property in the goods passes to the consignee on delivery to the Company.

The facts of this case sufficiently appear for the purpose of this report from the judgment of the Court.

Mr Grant for Appellants

The District Judge has held that the plaintiff's claim is barred as to 28 bags not delivered, the suit having been instituted more than two years after the loss of the bags. But the suit is founded on a contract to deliver, so the period is three years. *The British India Steam Navigation Company v Hajee Mahomed Esack and Company* (1). Even if non-delivery is treated as a tort the suit is in time as the time would not begin to run till the 2nd October 1877 when the plaintiff got a "gate pass" to remove his goods and the 28 bags were not forthcoming.

Mr Norton for Respondents

The entry of the loss in the defendants' books is September 28. The contract was between the consignor and the Company. There is no evidence of any contract with the plaintiff. Article 30 of Schedule II of the *Limitation Act* is applicable.

The judgment of the Court (INNES, OFFICIATING C J, and TARPANT J) was delivered by

INNES, Officiating C J.—This appeal arises in a suit in which the plaintiffs seek compensation for goods belonging to them carried by the *East India Railway* for delivery to them and not delivered. The consignment consisted of 220 bags of grain, out of which plaintiffs received all but 93. Of these 28 were lost and 65 bags, after arrival, were damaged (as is found upon the evidence by the Courts below) by a complication of causes against which it was impossible for the defendants to provide, and had to be destroyed under orders of the Magistrate. As to the 65 bags, therefore, the defendants cannot be held answerable.

In regard to the 28 bags the Company are undoubtedly liable unless the claim is, as contended, barred. The loss occurred on the 28th September 1877 at latest, as it was discovered on that date, and if the question of the period of limitation be governed

by Article 30 of the Second Schedule of Act XV of 1877, this suit is undoubtedly barred as it was not instituted till the 2nd October 1879, and exceeded the period allowed (two years) by some days. That Article applies to cases where goods are lost or injured

It is contended, however, that Article 115 is the Article applicable. That Article applies to cases where compensation is sought for breach of contract, and the time three years runs from the breach of the contract. This contention implies that there was a privity of contract between the plaintiffs and the defendants, otherwise, it is asked, how could the plaintiffs have a right to sue? The contract was entered into between the consignor and the defendants. But the goods were not sent on sample or for approval, and the property passed at once to the consignees on delivery to the defendants, and, therefore, the consignor in contracting with defendants acted as agent of the consignees, the plaintiffs, who can maintain an action for breach of contract for loss or injury to their goods. *Daves v. Peck*(1) We think Article 115 of the Limitation Act properly applies. This allows three years from the breach, a period which had not elapsed when the suit was brought. We, therefore, consider that plaintiffs are not barred as to their claim to the value of the 28 bags. The appeal must be allowed to this extent with proportionate costs throughout.

**The Indian Law Reports, Vol. VII. (Bombay) Series,
Page 478.**

Before Mr. Justice West and Mr. Justice Nanubhai Haridas.

MOHANSING CHAWAN (ORIGINAL PLAINTIFFS), APPELLANT

v.

HENRY CONDOR, GENERAL TRAFFIC MANAGER,

G. I. P. RAILWAY COMPANY, AND ANOTHER.

(ORIGINAL DEFENDANTS), RESPONDENTS *

Limitation Act XV of 1877, Sch. II, Arts 30, 19 and 115—Carrier by Railway—Loss—Non-delivery of goods—Onus of proof

1883
August, 7

53 bags of grain were made over to the defendants at Cawnpur and Nagpur for carriage to Sholapur. All that was proved was that the defend-

Mohansing
Chawan
v
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Conder

ants delivered to the plaintiff the owner of the grain, 512 bags only, having previously obtained from his agent receipts for the full number as arrived at Sholapur. In a suit by the plaintiff to recover the price of the bags not delivered brought after more than two but within three years of the time when the rest of the goods were delivered, the defendants claimed that the suit was barred by the provisions of Article 30 of Schedule II of Act XV of 1877, as not having been brought within two years of the time when the loss occurred.

Held that mere non delivery of the bags was no proof of their loss the onus of proving which as an affirmative fact lay on the defendants before they could claim the benefit of the special limitation of two years provided in Article 30 of Schedule II of Act XV of 1877, and that the suit therefore was in time.

THIS was a second appeal from the decision of G. DATTI, Assistant Judge of Poona at Sholapur, reversing the decree of RAV SAHEB NAPO MAHADEV, Subordinate Judge of Sholapur. The plaintiff's firm about January, 1877, made over to the defendants, the Great Indian Peninsula and East Indian Railway Companies, 563 bags of wheat for delivery at Sholapur. They were in three lots: the first one consisted of 101 bags, and was given in charge of the East Indian Railway Company at Cawnpur, the second consisted of 408 bags, and was given to the same Company, also at Cawnpur, and the third, of 54 bags was given to the Great Indian Peninsula Railway Company at Nigpur. The consignments were in the name of one Ram Narayan, but it was not disputed that the plaintiff was the owner of all the grain. When the plaintiff's agent went to the Railway Station at Sholapur to take delivery, the Station Master took from him receipts for the full number of bags as having arrived at their destination, but gave delivery of only 512 bags. The plaintiff, therefore, sued the Managers of the two Companies and the Station Master of the Sholapur Railway Station to recover from them the price of the remaining 51 bags, which he alleged the defendants had wrongfully detained. The suit was brought in 1879—that is, after more than two, but within three, years of the time when the rest of the goods were delivered.

The defendants contended that the suit was one to which the special limitation of two years, provided by Article 30 of Schedule II of Act XV of 1877, applied, and that the suit was, therefore, barred.

The Subordinate Judge as well as the Assistant Judge found in favour of the plaintiff on the merits. The former Judge held

the claim not barred and made a decree in favor of the plaintiff, but the latter Judge, holding the claim barred, reversed that decree

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The plaintiff appealed to the High Court

Shantaram Narayan for the Appellant—The only question is one of limitation. We contend that the limitation of three years contained in Article 49 or 115 of Schedule II of Act XV of 1877 applies. Article 30 does not apply, as it lay on the defendants to adduce evidence to show when the alleged loss of the bags occurred, and they failed to disprove themselves. *That one*. No intimation whatever was given to the plaintiff of any loss. On the contrary he was put off from time to time under promise of payment.

Farran (instructed by Messrs *Cleland, Little, and Hean*) appeared for the Respondents—A loss by misdelivery by a carrier is within the meaning of Article 30—*Miller v. Brash* (1) *Morrill v. North Eastern Railway Company* (2)

The Judgment of the Court was delivered by

West, J.—The Railway Company in this case were bound to deliver the particular bags which they received from the plaintiff's firm for carriage. They did not deliver them, nor did they, so far as the evidence goes, announce their inability to deliver them on account of having lost them either in transit or by misdelivery to some one not entitled. On the other hand they took from the plaintiff's agent receipts for the full number of bags as arrived at their destination, and gave gate passes for delivery. The natural presumption under such circumstances is that all the goods arrived, and that the Railway Company was in a position to deliver them. We are asked to infer from the mere non delivery that they could not be delivered, because they were lost. but that is an affirmative fact of which the Company ought to have given evidence. *Prima facie*, the responsibility rested on the Company and the non delivery of the goods might arise from other causes than loss. Had the Company announced to the plaintiff that his goods were lost, that might have helped the defendants' case, but no such announcement was made, and the plaintiff could only tell that goods received and carried for him were not delivered. Under those circumstances we do not think that a loss never intimated, and not in any way proved, can be gathered by infer-

(1) 1 R. 8 Q B D. 30

(2) L R. 1 Q B D. 30

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once from mere probability, so as to make Article 30 of Schedule II of the Limitation Act bar the plaintiff's suit. We, therefore, reverse the decree of the District Court and restore that of the Subordinate Judge, with all costs on respondents, adding six per cent interest *per annum* on award of Subordinate Judge from date of his judgment till satisfaction of this decree.

Decree reversed

In the Chief Court of the Punjab.

FULL BENCH CIVIL REFERENCE

*Before Mr Justice Chatterjee, Mr Justice Kensington, and
Mr Justice Chetty*

MOTI RAM (PLAINTIFF)

v

EAST INDIAN RAILWAY COMPANY (DEPENDANT)

CASE No 46 of 1905

*Suit for non delivery of goods—Limitation Act XV of 1877, Sch II Art
31—Limitation*

In a suit against a Railway Company for non delivery of goods it was contended that the claim was barred under Article 31 of the Indian Limitation Act XV of 1877 as amended by Act X of 1899.

Held that the words *Non delivery of* were added to Article 30 of the Amended Act that the period of limitation was reduced to one year from two and that the suit was thereby barred.

CASE referred under Section 617, Civil Procedure Code, by KUN SAHIB MAULVI MOHAMMAD HUSSAIN, M A, Judge, Small Cause Court, Delhi, with his No 710-S, dated the 13th July 1905, for orders of the Chief Court.

Babu K C Chatterjee, Pleader, for Plaintiff

Mr Shelverson, Advocate, for Defendant

ORDER OF REFERENCE TO FULL BENCH

CHATTERJEE, J.—The material facts are given in the order of the Judge, Small Cause Court, referring the case to this Court under Section 617, Civil Procedure Code.

The defendants, the East Indian Railway Company, pleaded limitation and contended that the claim was barred under Article

1906
May, 14

31 of the Indian Limitation Act 1877. The reply was that Article 115 applies, and an unpublished judgment of the learned Chief Judge in Civil Revision No. 135 of 1904 was cited in the Lower Court to show that the latter, and not the former Article governs the suit. The Judge below was of opinion that Article 115 is applicable, but on the ruling of the Chief Court and down the contrary, has refused the case to this Court. Another reply to the plea of limitation was that there were acknowledgments of the right in plaintiff's favour contained in defendant's letters, dated 10th March and 24th November 1901 which saved the claim from being barred. The Judge thought the acknowledgments sufficient but as it was matter not free from doubt he has referred that point also.

The Judge might well have followed the Chief Judge's ruling, but as he has made the reference, we think it right to dispose of the points referred. With regard to Article 31 we find that the learned Chief Judge has followed certain decisions of the Madras and Calcutta High Courts which are quoted in his Judgment. These decisions were given before the amendment of Articles 30 and 31 by Act X of 1899, which added the words "for non delivery of" to the latter Article. It is doubtful whether this amendment was brought to the notice of the learned Chief Judge and its effect considered. We find that in the fifth edition of Rivaz's Limitation Act by Buckland published in 1903, the Article is given as it stood before the amendment. This is very misleading and the error was discovered by us in the course of the argument in this case. Mr. Stirling's opinion on the amendment is that the old rulings are no longer applicable. There is great force in this view, which is supported by a dictum of the Bombay High Court in I L R, 26 Bom, 562 at p. 570. As the point is of general importance, we think it right to refer it to a Full Bench and with it the case itself to save time. The points for the Full Bench are —

- (1) Whether Article 31 applies to the suit?
- (2) Whether the acknowledgments relied on by the plaintiff are sufficient to bring the claim within limitation.

KENINGTON, J. — I agree to the reference to the Full Bench and only desire to add that as at present advised, I am disposed to answer the first point referred to in the affirmative and the second in the negative.

Mot Ram
F I Ry
—

Moti Ram

v
F I Ry

JUDGMENT OF FULL BENCH

CHITIA, J.—This is a reference to a Full Bench of two questions, submitted for the decision of the Chief Court under Section 617, Civil Procedure Code, by the Judge of the Court of Small Causes at Delhi. The facts of the case appear from the statement of the Small Cause Court Judge, and the referring order need not be repeated. Two dates should however be stated to make the position clear. The goods in question arrived at Sabzi Mandi Station, Delhi, on 25th November 1903. The suit was filed on 1st May, 1905. The suit was to recover Rs. 176 as compensation for the non-delivery of the goods. The two questions before us are—

- (1) Whether Article 31 of Schedule II of the Limitation Act, 1877 (as amended by Act X of 1899) applies to the suit?
- (2) Whether the letters of 10th March 1904, and 21st November 1904, or either of them contain an acknowledgment of liability sufficient to give rise to a new period of limitation?

The first question is one of general importance. The second though relating only to the present suit, has for convenience been included in this reference.

As to the first question it was no doubt laid down many years ago by the Madras and Calcutta High Courts that Article 30 and presumably also Article 31, as it then stood, applied only to suits for compensation arising out of malfeasance, misfeasance, or non-feasance independent of Contract. See *B I S A Co v. Hajee Mulammad*,⁽¹⁾ *Kalu Ram v. Madras Railway Co*,⁽²⁾ and *Danial v. B I S N Company* ⁽³⁾ But this opinion was dissented from, even before the amendment of the Act by the Bombay High Court in *G I P. Ry Co v. Russell* ⁽⁴⁾ It is there pointed out, and we entirely agree that no deduction can be drawn from the position of the Article in the Second Schedule. The Limitation Act is a general Act applying to all suits, and in the Second Schedule the suits are classified, not so much by their nature, as by the period of limitation assigned to them. We thus find suits founded on contract mixed up with those founded upon tort. Where the words of

(1) I L R 3 Mad 217

(2) I I P 12 Cal 477

(3) I I I 13 Mad 241

(4) I I R 10 Bom 10

M. J. Ram
v
E. I. Ry

an Article itself too wide enough to include suits of both descriptions, we do not think that it should be confined to suits of one particular class, unless there is some clear indication there or elsewhere that that was the intention of the Legislature. Subsequent to the ruling of the Bombay High Court just referred to Article 31 was amended by the Act X of 1899, and now runs "against a carrier for compensation for non-delivery of or delay in delivering goods one year from the date when the goods ought to be delivered." The words "non delivery of, or" were added and period reduced to one year from two. The words apply exactly to the present case *etc.*, that of non delivery, and we are of opinion that they cover a suit for compensation for non-delivery whether the failure to deliver was tortious or was due to a breach of contract. We may point out that this is also the view taken by the Bombay High Court in a case decided since the amendment of 1899 see *Hajee Ajam Goolam Hossein v B P S N Co* (1). Taking this view we are reluctantly compelled to dissent from the ruling of the learned Chief Judge in Civil Revision 125 of 1904, where he followed the decisions of the Madras and Calcutta High Courts above referred to. If, as we think, Article 31 applies, it is unnecessary to deal with the arguments of plaintiff's pleader as to the applicability of Article 49 or Article 62. As to the former there was no wrongful conversion by the Railway Co., in this case, as the course which they adopted of selling the goods is expressly authorised by Section 55 of the Railways Act, 1890. The balance of sale proceeds the plaintiff may yet recover from the Company and, if compelled to do so by suit, such a suit might be governed by Article 62, but with that we are at present not concerned. Our answer to the first question must be in the affirmative.

The second presents little or no difficulty. The first letter of 10th March 1904, contains no acknowledgment but on the contrary a distinct repudiation of liability. The words are clear "In regard to your claim for compensation, I regret the Railway is in no way responsible in this case." It may also be pointed out that even if this letter could be regarded as an acknowledgment, it would not assist the plaintiff, inasmuch as the suit was not filed till considerably more than a year after the letter was written.

The second letter contains no statement that could by any ingenuity be twisted into an acknowledgment of liability. It

Moti Ram
E I Ry.
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simply notifies the sale by auction of the goods in question and states that the matter having been fully explained, the Railway Company had nothing further to add in the matter.

It is clear that neither letter can assist the plaintiff, and we accordingly answer the second question in the negative.

As the reference from the Delhi Small Cause Court has been transferred to this Full Bench for disposal we order that the case be sent back to that Court with a copy of this Judgment for disposal in conformity therewith. Costs of this reference to be costs in the case.

The Allahabad Law Journal, Vol. VIII. Page 543.

APPELLATE CIVIL

Before Stanley, C. J. and Banerji, J.

THE GREAT INDIAN PENINSULA RAILWAY

v.

GANPAT RAI

1911
March 13
—

Railways Act (IX of 1900) Section 77—Notice, Failure to give—Offer by another Party to pay loss—Whether right to notice waived—Limitation Act IX of (1908), Schedule I Article 31—Suit more than one year after the article was to be delivered—Limitation

On 24th March 1908 plaintiff's agent at Bombay consigned certain goods to plaintiff at Ghazipur. The goods were lost on the Great Indian Peninsula Railway. On 9th August 1909, the present suit was brought for damages without giving the notice required by Section 77 of the Railways Act. On the back of the Railway receipt was printed a condition (No. 4) that in case of loss or damage to goods, the claim should be made to the clerk in charge of the station to which they were booked and a description of the articles lost &c., should be sent to the Traffic Superintendent. This followed a condition (No. 5), requiring notice under Section 77 of the Act to be given. *Held*, that it was not the intention of the Company to relieve any party from the necessity of giving notice under section 77, Railways Act and that service of notice was necessary to entitle the plaintiff to maintain the suit.

The Assistant Traffic Superintendent of the East Indian Railway on behalf of the Great Indian Peninsula Railway had offered the plaintiff a certain amount for the damages which the plaintiff refused to accept. There was no proof that the Great Indian Peninsula Railway had given

any authority to the East Indian Railway to make such an offer *Held* G I P By that there was no waiver of notice *v* Ganpat Rai

Held—Further that the suit having been brought more than a year after the date when the goods ought to have been delivered the suit was barred by the provisions of Article 31 Limitation Act

SECOND APPEAL from a decree of Pandit Srilal, District Judge of Ghazipur, reversing a decree of Bihu Baijnath Doss, Munsiff of Ghazipur

Suit for damages

The facts shortly stated are as follows —

The plaintiff's Agent at Bombay sent him some goods at Ghazipur. The goods never reached their destination, and ultimately it was found that they had been stolen while in the custody of the defendant Company on the 1st of April, 1908

On the 9th of August, 1909, plaintiff filed this suit against the Company for price of goods lost and for damages. The suit was defended on the grounds that no proper notice had been given and that the suit was barred by limitation. The Munsiff dismissed the suit holding that under Section 77 of the Railways Act IX of 1890, no notice had been served on the defendants. The Judge decreed part of the claim holding that a letter of the Acting Traffic Manager of the East Indian Railway saying that he had been authorised by the Deputy Traffic Superintendent of the Appellant Company to pay the plaintiff the actual value of the goods was sufficient acknowledgment of notice and that the suit could not be contested on that ground.

Defendants' appeal

Ladli Prasad Zutshi, for the Appellant

The suit should have been filed within the period prescribed by the Articles 30 and 31 of the Limitation Act. The Lower Court decided this issue against the appellant relying on

The British India Steam Navigation Co., Ltd., v. Hajee Mohamed Eassack and Co (1)

Hassaji v. East India Railway Co (2)

Mohan Singh Chauhan v. Henry Conder, General Traffic Manager, C I P Railway Company (3)

Danmull v. British India Steam Navigation Co (4)

(1) (1881) I L R 3 Mad 107

(3) (1883) I L R, 7 Bom 178

(2) (1882) I L R 5 Mad 389

(4) (1886) I L R 12 Cal, 477.

Moti Ram
F I Ry.

simply notifies the sale by auction of the goods in question and states that the matter having been fully explained, the Railway Company had nothing further to add in the matter.

It is clear that neither letter can assist the plaintiff, and we accordingly answer the second question in the negative.

As the reference from the Delhi Small Cause Court has been transferred to this Full Bench for disposal we order that the case be sent back to that Court with a copy of this Judgment for disposal in conformity therewith. Costs of this reference to be costs in the case.

The Allahabad Law Journal, Vol. VIII. Page 543.

APPELLATE CIVIL

Before Stanley, C. J. and Banerji, J.

THE GREAT INDIAN PENINSULA RAILWAY

v.

GANPAT RAI *

1911
March 13

Railways Act (IX of 1900) Section 77—Notice, Failure to give—Offer by owner of Railway to pay loss—Whether right to notice waived—Limitation Act IX of (1908) Schedule I Article 31—Suit more than one year after the article was to be delivered—Limitation.

On 26th March 1908 plaintiff's agent at Bombay consigned certain goods to plaintiff at Calcutta. The goods were lost on the Great Indian Peninsula Railway. On 9th August 1909, the present suit was brought for damages without giving the notice required by Section 77 of the Railways Act. On the back of the Railway receipt was printed a condition (No. 4) that in case of loss or damage to goods, the claim should be made to the clerk in charge of the station to which they were booked and a description of the articles lost &c, should be sent to the Traffic Superintendent. Then followed a condition (No. 5), requiring notice under Section 77 of the Act to be given. *Held*, that it was not the intention of the Company to relieve any party from the necessity of giving notice under section 77, Railways Act and that service of notice was necessary to entitle the plaintiff to maintain the suit.

The Assistant Traffic Superintendent of the Great Indian Peninsula Railway had offered the plaintiff a certain amount for the damages which the plaintiff refused to accept. There was no proof that the Great Indian Peninsula Railway had given

any authority to the East Indian Railway to make such an offer *Held* G I P By
that there was no waiver of notice *v*
Ganpat Rai

Held—Further that the suit having been brought more than a year after the date when the goods ought to have been delivered the suit was barred by the provisions of Article 31, Limitation Act

SECOND APPEAL from a decree of Pandit Srilal, District Judge of Ghazipur, reversing a decree of Babu Baijnath Doss, Munsiff of Ghazipur

Suit for damages

The facts shortly stated are as follows —

The plaintiff's Agent at Bombay sent him some goods at Ghazipur. The goods never reached their destination, and ultimately it was found that they had been stolen while in the custody of the defendant Company on the 1st of April, 1908

On the 9th of August, 1909, plaintiff filed this suit against the Company for price of goods lost and for damages. The suit was defended on the grounds that no proper notice had been given and that the suit was barred by limitation. The Munsiff dismissed the suit holding that under Section 77 of the Railways Act IX of 1890, no notice had been served on the defendants. The Judge decreed part of the claim holding that a letter of the Acting Traffic Manager of the East Indian Railway saying that he had been authorised by the Deputy Traffic Superintendent of the Appellant Company to pay the plaintiff the actual value of the goods was sufficient acknowledgment of notice and that the suit could not be contested on that ground.

Defendants' appeal

Ladli Prasad Zutshi, for the Appellant

The suit should have been filed within the period prescribed by the Articles 30 and 31 of the Limitation Act. The Lower Court decided this issue against the appellant relying on

The British India Steam Navigation Co., Ltd., v. Hajee Mohammed Eassack and Co (1)

Hassaji v. East India Railway Co (2)

Mohan Singh Chawan v. Henry Conder, General Traffic Manager, G. I. P. Railway Company (3)

Danmull v. British India Steam Navigation Co (4)

(1) (1881) 1 L R, 3 Mad 107

(2) (1882) 1 L R 5 Mad 388

(3) (1893) 1 L R, 7 Bom 178

(4) (1885) 1 L R 12 Cal, 477.

Moti Ram
E I Ry.
—

simply notifies the sale by auction of the goods in question and states that the matter having been fully explained, the Railway Company had nothing further to add in the matter.

It is clear that neither letter can assist the plaintiff, and we accordingly answer the second question in the negative.

As the reference from the Delhi Small Cause Court has been transferred to this Full Bench for disposal we order that the case be sent back to that Court with a copy of this Judgment for disposal in conformity therewith. Costs of this reference to be costs in the case.

The Allahabad Law Journal, Vol. VIII, Page 543.

APPELLATE CIVIL.

Before Stanley, C. J. and Banerji, J.

THE GREAT INDIAN PENINSULA RAILWAY

v.

GANPAT RAO

1911
March 13
—

Hashes Act (IX of 1880) Section 77—Notice, Plaintiff to give—Order by another Plaintiff pay loss—Whether right to notice waived—Limitation Act IX of (1908) Schedule I Article 21—Suit more than one year after the article was to be delivered—Limitation.

On 20th March 1908 plaintiff's agent at Bombay consigned certain goods to plaintiff at Chuzapur. The goods were lost on the Great Indian Peninsula Railway. On 20th August 1909, the present suit was brought for damages without giving the notice required by Section 77 of the Railways Act. On the back of the Railway receipt was printed a condition (No. 4) that in case of loss or damage to goods, the claim should be made to the clerk in charge of the station to which they were booked and a description of the articles lost &c, should be sent to the Traffic Superintendent. Then followed a condition (No. 5), requiring notice under Section 77 of the Act to be given. *Held* that it was not the intention of the Company to relieve any party from the necessity of giving notice under section 77, Railways Act and that service of notice was necessary to enable the plaintiff to maintain the suit.

The Assistant Traffic Superintendent of the Great Indian Railway on behalf of the Great Indian Peninsula Railway had offered the plaintiff a certain amount for the damages which the plaintiff refused to accept. There was no proof that the Great Indian Peninsula Railway had given

any authority to the East Indian Railway to make such an offer *Held* G I P By that there was no waiver of notice *v* Ganpat Rai

Held—Further that the suit having been brought more than a year after the date when the goods ought to have been delivered the suit was barred by the provisions of Article 31 Limitation Act

SECOND APPEAL from a decree of Pandit Srilal, District Judge of Ghazipur, reversing a decree of Babu Baijnath Doss, Munsiff of Ghazipur

Suit for damages

The facts shortly stated are as follows —

The plaintiff's Agent at Bombay sent him some goods at Ghazipur. The goods never reached their destination, and ultimately it was found that they had been stolen while in the custody of the defendant Company on the 1st of April, 1908

On the 9th of August, 1909, plaintiff filed this suit against the Company for price of goods lost and for damages. The suit was defended on the grounds that no proper notice had been given and that the suit was barred by limitation. The Munsiff dismissed the suit holding that under Section 77 of the Railways Act IX of 1890, no notice had been served on the defendants. The Judge decreed part of the claim holding that a letter of the Acting Traffic Manager of the East Indian Railway saying that he had been authorised by the Deputy Traffic Superintendent of the Appellant Company to pay the plaintiff the actual value of the goods was sufficient acknowledgment of notice and that the suit could not be contested on that ground.

Defendants' appeal

Ladli Prasad Zutshi, for the Appellant

The suit should have been filed within the period prescribed by the Articles 30 and 31 of the Limitation Act. The Lower Court decided this issue against the appellant relying on

The British India Steam Navigation Co., Ltd., v. Hajee Mohamed Easack and Co (1)

Hassaji v. East India Railway Co (2)

Mohan Singh Chawan v. Henry Conder, General Traffic Manager, G I P Railway Company (3)

Danmull v. British India Steam Navigation Co (4)

(1) (1881) I L R, 3 Mad. 107

(2) (1887) I L R, 5 Mad. 388

(3) (1883) I L R 7 Bom. 178

(4) (1886) I L R 12 Cal., 477.

G I P Ry
Ganpat Rai

Articles 30 and 31 were amended by Act X of 1899, and all the above rulings were no longer applicable. Further, there was no acknowledgment which took the case out of the statute of limitation. The acknowledgment relied on was a letter from the Assistant Traffic Manager, East Indian Railway, in which he stated that he was authorised by the Deputy Traffic Manager of the G I P Railway, to offer to the plaintiff Rs 499 7 3, being the amount to which "he the plaintiff was actually entitled according to the sender's *Bejuk*." The Deputy Traffic Manager, G I P. Railway, "emphatically denied" this fact. There was no evidence on the record to show that the Assistant Traffic Manager had any authority to make this offer. Even if it be assumed that the Assistant Traffic Manager had authority from the G I P Railway to make an offer, such an offer would be without prejudice to their right to the notice, and the offer not having been accepted, the plaintiff was not entitled to rely upon this letter as an acknowledgment.

It was admitted that no notice was given to the Agent of the G I P Railway, under Section 77 of the Railways Act within six months from the date of the delivery of goods for carriage by the Railway. The learned District Judge held that under Paragraph 4 of the printed notice at the back of the Railway receipt, the claim was to be made to the Superintendent of the receiving station, and therefore the Railway was to be deemed to have waived its right under Section 77 of the Railways Act. Condition 5 of the Railway receipt, drew attention to Section 77 of the Railways Act. Para 4 must be read with Para 5 and reading the two paragraphs together it was obvious that it was not intended by Para 4 to relieve the plaintiff of his liability of giving notice required by Section 77 of the Railways Act.

G I P Ry. Co., v. Clondra Bai(1)

Ahmed Koreem for the Respondent submitted, that the suit was not barred by limitation as the period should be computed from the last letter sent by the E I Railway after consultation with the G I P Ry. The letter in which the latter Company expressed their willingness to pay the actual price of the goods sent but not the damages claimed. He referred to Section 19 of Limitation Act.

Further, that it was inequitable that the suit having been delayed by the admission of liability by the Company, the latter should now be allowed to set up the defence of limitation

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As regards the rulings cited on the question of notice, he submitted that in none of them was the question of admission by the Railway Company, or the directions printed at the back of the Railway receipt brought to the notice of the Court. The 4th Para. of these directions had been put in to facilitate the work of the Agent by allowing the notice to be given to the Assistant Traffic Manager. There was a clear distinction between this paragraph and the next which reproduced the wording of the Railways Act. He submitted that the right of an Agent to receive notice had been delegated by him to the subordinate staff, and this form had the sanction of the Government of India. Therefore, if the notice came to the knowledge of the Assistant Traffic Superintendent which was sufficient notice within the Act

Acknowledgment amounted to a waiver of notice

Periannan Chetty v S I Railway Company,⁽¹⁾ also saved limitation

Besides it had not been shown that the appellants had been prejudiced in any way

The following judgment of the Court was delivered by

BANERJI J.—This appeal arises out of a suit for damages for non delivery of a bale of goods consisting of gauze which was consigned by the plaintiffs Agents in Bombay to him at Ghazi pur on the 26th of March, 1908. The goods were lost on the G I P Ry and it is stated that they were stolen in transit, and that a thief was tried and convicted of the theft. Amongst the defences filed by the G I P Ry Co. was one based on Section 77 of the Indian Railways Act, namely, that no notice of action as required by law was given to that Company.

The Court of first instance found that no notice was given and dismissed the plaintiff's suit.

An appeal was preferred by the plaintiffs with the result that the lower appellate Court held that the notice required by the Act had been waived by the defendant Company, and also in view of the fact that an offer had been made to the plaintiff for payment of a sum of Rs 499 7 3 in satisfaction of his claim, the

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Further, that it was inequitable that the suit having been delayed by the admission of liability by the Company, the latter should now be allowed to set up the defence of limitation

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Acknowledgment amounted to a waiver of notice

Periannan Chetty v S I Railway Company, (1) also saved limitation

Besides it had not been shown that the appellants had been prejudiced in any way

The following judgment of the Court was delivered by

BANERJI, J.—This appeal arises out of a suit for damages for non delivery of a bale of goods consisting of gauze which was consigned by the plaintiffs' Agents in Bombay to him at Ghazipur on the 20th of March, 1908. The goods were lost on the G I P Ry and it is stated that they were stolen in transit, and that a thief was tried and convicted of the theft. Amongst the defences filed by the G I P Ry Co., was one based on Section 77 of the Indian Railways Act, namely, that no notice of action as required by law was given to that Company

The Court of first instance found that no notice was given and dismissed the plaintiff's suit.

An appeal was preferred by the plaintiffs with the result that the lower appellate Court held that the notice required by the Act had been waived by the defendant Company, and also in view of the fact that an offer had been made to the plaintiff for payment of a sum of Rs 499-7-3 in satisfaction of his claim, the

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Company could not now be allowed to go behind this offer and set up the technical ground of defence that no notice of the claim had been served within the meaning of the section above referred to. Accordingly that Court reversed the decision of the Court below, so far as regards the Great Indian Peninsula Railway Company and allowed the plaintiffs' claim as against that Company, but dismissed it as regards the East Indian Railway Company.

From the decree of this Court the present appeal has been preferred and the main grounds of appeal are two *first*, that no notice having been served within the meaning of Section 77 of the Indian Railways Act, the suit was bound to fail as against the Great Indian Peninsula Railway that there was no waiver of the requisite notice and that the Court below was therefore wrong in allowing the plaintiffs' claim. There is a further ground of appeal namely that the suit is barred by limitation, not having been brought within one year from the date on which the goods ought to have been delivered.

As regards the first question, it is not disputed that notice was not served upon the Great Indian Peninsula Railway Company pursuant to the provisions of Section 77 of the Indian Railways Act. That section provides that 'a person shall not be entitled to compensation for the loss of goods delivered to be carried by railway unless his claim to compensation has been preferred in writing by him or on his behalf to the Railway Administration within six months from the date of the delivery of the goods for carriage by railway'. Under Section 140 of the same Act a notice or other document required or authorised by the Act to be served on a Railway Administration 'may be served in the case of a Railway administered by a Railway Company as is the Great Indian Peninsula Railway Company on the Agent in India of the Railway Company by delivering the notice or other document to the Agent or by leaving it at his office or by forwarding it by post in a prepaid letter addressed to the Agent at his office and registered under Part III of the Indian Local Office Act of 1866'. The mode of service upon the Great Indian Peninsula Railway Company would ordinarily in the absence of a provision such as this be effected by service upon the Company at their Head Office in London. This mode of service has been prescribed no doubt for the purpose of saving delay and the expence which would attend service in London. In the

case no service either under Section 140 or directly upon the defendant Company in London was effected. Consequently it would seem that the learned Munsiff was right in holding that the suit could not be maintained. The learned District Judge, however, was of opinion that Section 140 was not exhaustive and that a mode of service was prescribed by a condition which appears on the back of the receipt form in use on the Great Indian Peninsula Railway on the consignment of goods to them for carriage. This condition runs as follows —

That all claims against the Railway for loss or damage to goods must be made to the clerk in charge of the station to which they have been booked before delivery is taken and that a written statement of the description and contents of the articles missing or of the damage received must be sent forthwith to the Traffic Superintendent of the District or Goods Superintendent at Bombay Wadi Bandar in which the forwarding or receiving station is situated otherwise the Railway will be freed from responsibility.

The learned Judge observes that "this paragraph lays down the procedure to be followed by the consignors in case of loss of goods and it forms part of the legal contract between the Great Indian Peninsula Railway Company and the consignor." He held that where a consignor sends in a claim in accordance with the provisions of the said paragraph, the Railway Company is bound to treat as a proper notification of his claim to compensation within the meaning of Section 77, and that it is not then necessary to serve a notice in any of the ways mentioned in Section 140 or otherwise. He found upon the evidence that the plaintiff did prefer his claim in writing to the Traffic Superintendent of the district in which the receiving station is situated and that the Assistant to the Traffic Manager, East Indian Railway, after communicating with the Great Indian Peninsula Railway entertained the plaintiff's claim and offered to pay him Rs. 499 7-3 the value of the goods lost. He therefore held that the notice which was given by the plaintiff was sufficient notice within the meaning of Section 77. He further found that by the offer of the Assistant Traffic Manager of the East Indian Railway to pay Rs. 499 odd damages, the Great Indian Peninsula Railway must be taken to have waived their right to the notice required by law. We are unable to agree with the learned District Judge in the view which he formed. If the learned Judge had read the condition on the receipt form following the one upon which he relied, he would have found that it was not the intention of the Company that the provision

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G I P Ry. upon which he relied should relieve the plaintiff from the
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 Ganpat Rai. necessity of complying with Section 77 of the Indian Railways Act. Condition 3 provides that by Section 77 of the Indian Railways Act 1890, "a person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway, or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried unless his claim to the refund or compensation has been proffered in writing by him or on his behalf to the Railway Company within six months from the date of the delivery of the animals or goods for carriage by the Railway."

This condition gave notice to the consignors that Section 77 of the Railways Act must be complied with. Para 4 must be read in connection with it and reading the two conditions together, it is obvious that it was not intended by Condition 4 to get rid of the obligation which lay upon the plaintiff of giving notice of action as required by Section 77 of the Indian Railways Act. This was expressly decided in the case of *The Great Indian Peninsula Railway Company v Chandra Bai* (1) by a Bench of which one of us was a member. In that case the provisions of Section 77 were considered, and also of Section 140. It was pointed out that the notification of a claim prescribed by Section 77 may be given either to the Railway Administration as defined in Section 3, Sub section (6), or in any of the ways mentioned in Section 140, that it was necessary for the plaintiff to prove service of notice of his claim upon the Great Indian Peninsula Railway Company at their office in London or else in any of the ways prescribed in Section 140, and that there having been no proof of any such service, and the time of such service having expired the suit was not maintainable. The learned District Judge referring to this and other rulings observes that these rulings were in his opinion not applicable to the present case, as in none of the cases which resulted in these rulings, did the defendant Railway Company, ever admit the claim of the plaintiff or offer to settle it out of Court. Moreover, the question whether compliance with the directions contained in Para 4 of the notice mentioned heretofore meets the requirements of Section 77 and renders the service of notice under Section 110 unnecessary was never raised in those cases. As we have pointed out the directions contained in Para 4

obviously do not avail the plaintiff in view of the fact that in the subsequent paragraph the necessity for the observance of Section 77 is expressly stated. It appears to us that the learned District Judge must have overlooked Para 5 which succeeds the paragraph upon which he relied.

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Then as to waiver it is said that the Assistant Traffic Manager of the East Indian Railway stated that he had authority from the Deputy Traffic Manager of the Great Indian Peninsula Railway Company to offer to the plaintiff Rs 499 7-3 compensation, and it is contended that this amounted to a waiver of notice on the part of the Great Indian Peninsula Railway Company. We are unable to hold that there was any waiver. In the first place the Deputy Traffic Manager of the Great Indian Peninsula Railway Company repudiated the allegation that he gave any authority for the making of any offer to the plaintiff. The Assistant Traffic Manager was not summoned to prove the letter of authority which he alleged he had received. There is nothing to show that the Great Indian Peninsula Railway Company ever waived their right to notice of the claim. On the contrary they in their written statement relied upon the absence of notice, and there is nothing upon the record to justify us in holding that they waived their rights in this respect. Even if it be assumed that the Great Indian Peninsula Railway Company authorised the Assistant Traffic Superintendent of the East Indian Railway Company to make an offer, such an offer would be without prejudice to their rights, and the offer not having been accepted it could not be held that they were not entitled to rely upon the pleas which they had set up in their defence. Upon this point, therefore, we think that the learned District Judge was wrong in reversing the decision of the Court of the first instance.

There is, besides this, another ground of defence which appears to us to be fatal to the plaintiffs' claim and that is the plea based on the statute of limitation. Article 31 of the Limitation Act (Act IX of 1908), prescribes the period of limitation for a suit for compensation for non delivery of goods. In this Article the former Article of limitation was modified and certain words introduced, so as to adapt the Article to the case of a claim such as the present one for damages or compensation for non-delivery of goods. The Article is as follows — "Against a carrier for compensation for non-delivery of or delay in delivering goods,

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one year from the time when the goods ought to be delivered ' The goods, as we have said, were consigned to the plaintiffs on the 26th of March 1908, and the suit was not instituted until the 9th of August 1909. The period within which the goods in this case ought to have been delivered would not exceed a fortnight, or at the outside three weeks from the time when the goods were consigned at Bombay. Several months over and above one year from this time, therefore, had elapsed before the suit was instituted. As an answer to this plea, it is contended that there was an acknowledgment which took the case out of the statute of limitation. That acknowledgment is the letter from the Assistant Traffic Superintendent of the East Indian Railway Company offering to pay the sum of Rs 499-7-3, in full satisfaction of the plaintiffs' claim. There is no evidence before the Court which would justify us in holding that the Great Indian Peninsula Railway Company ever gave authority to the Assistant Traffic Superintendent of the East Indian Railway Company to make this offer. There is no evidence that the Great Indian Peninsula Railway Company ever admitted liability in respect of this sum. We, therefore, are unable to say that there was any such acknowledgment by the Great Indian Peninsula Railway Company such as would prevent the operation in their favour of the statute of limitation.

Upon these two main points which have been taken by the learned Vakil for the defendant Railway Company, we think that the appeal should be allowed, and we must set aside the decree of the Lower Appellate Court, so far as regards the Great Indian Peninsula Railway Company. We, accordingly, allow the appeal of the Company, set aside the decree of the Lower Appellate Court and restore the decree of the Court of first instance. Under the circumstances we make no order as to the costs of this appeal or as to the costs in the Lower Appellate Court.

Appeal decreed

The Indian Law Reports, Vol. I. (Madras) Series,
Page 375.

APPELLATE CIVIL

Before Mr. Justice Keenan and Mr. Justice Kindersley

MUHAMMAD ABDUL KADAR AND ANOTHER

(PLAINTIFFS), APPELLANTS,

v

THE EAST INDIAN RAILWAY COMPANY

(DEFENDANTS), RESPONDENTS *

Contract to deliver, Breach of—Cause of action—Jurisdiction

Plaintiffs contracted at Cawnpore with the East Indian Railway Company to deliver goods in Madras. The East Indian Railway does not run into the Jurisdiction of the Madras High Court. The Railway Company made default in delivery of the goods and the plaintiffs sued them in the Madras High Court for damages for the breach of contract. No leave to sue (under Section 12 of the Letters Patent) was obtained. The Court of First Instance dismissed the suit for want of jurisdiction. Held on appeal following *Gopikrishna Iyassami v. Nilkomul Banerjee* (1) and *Vaughan v. Weldon* (2) that the breach of contract having taken place at Madras the cause of action had wholly arisen within the jurisdiction of the High Court.

1878
April 15

PLAINTIFFS brought the suit to recover the sum of Rupees 1,800, being damages sustained by them by reason of the neglect and default of the defendants in carrying and delivering for the plaintiffs within a reasonable time, at Madras, certain goods delivered by plaintiffs to defendants at Cawnpore for carriage to Madras.

The defendants denied their liability and alleged that no delay in the transmission of the said goods took place whilst the same were on the defendants' railway. It appeared that the East Indian Railway extends only to Jabulpore, at which station the goods had to be transferred to the G I P line which conveyed them to Raichore from whence the Madras Railway took them to their destination.

* Appeal No. 2 of 1878 from the decree of S R W MORGAN, C J dated 11th December 1877.

(1) 13 Ben L R, 461

(2) L R, 10 C P, 47.

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v. I Ry

The case came on for final disposal before Sir W. Morrey, C.J., on the 11th December 1877, and was by him dismissed on the ground that the Court had no jurisdiction.

The plaintiffs appealed on the ground that the decree dismissing the suit was contrary to law in that the whole cause of action (the non-delivery in Madras of the goods in the plaint mentioned) having arisen within the ordinary Original Civil Jurisdiction of the High Court at Madras, that Court had jurisdiction in the matter.

Mr Gould and Mr Handley for the Appellants

Mr Johnstone for the Respondents

The Court delivered the following judgments —

KERNEY J.—The contract was made in Cawnpore to deliver goods in Madras.

The defendants' Railway Company does not run into this jurisdiction.

The Chief Justice, without going into the merits, dismissed the suit, holding that the cause of action did not arise within the jurisdiction. It is argued that, as part of the cause of action, the making of the contract, appears on the pleading to have occurred outside the jurisdiction, therefore, the whole cause of action did not arise within it and as no leave was obtained to sue, there is no jurisdiction to try the case. For many years the Courts in England and in India have been called upon to consider similar questions. It has been recently held in Bengal, (1) after review of all authorities on the subject, that the action may be brought either in the place of the making of the contract or in the place of its performance, and that, in either place, a cause of action arises wholly. With this decision we quite agree, and look upon the question as being satisfactorily settled by that decision. Section 12 of the Letters Patent applies to cases in which the cause of action arises partly outside the jurisdiction, e.g., if the contract of the Company in this case had been to deliver a portion of the goods, say, at Arkonam, outside the jurisdiction, and a portion in Madras, and if the action was brought all gone, as breach, non-delivery at both places. In such cases, the cause of action could not be said to have arisen wholly in Madras, and leave should be obtained. Numerous cases of the like kind might be put, where leave should be obtained under Section 12, part of the cause of action having arisen outside the jurisdiction.

Here we consider the cause of action has arisen wholly within the jurisdiction. We, therefore, reverse the decree of the Chief Justice with costs, and direct the case to be tried on the issues.

Muhammad
Abd ul Kadar
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L I Ry

KRIDEPSLEY, J.—I agree generally in the judgment of Mr Justice Kernan. Section 12 of the Letters Patent gives jurisdiction to this Court, if the cause of action has arisen either wholly, or if leave shall have been first obtained in part within the local limits of the ordinary original civil jurisdiction. In this case leave was not obtained. The question, therefore, is, whether the cause of action has arisen wholly within this jurisdiction. If we take the cause of action to include all those circumstances which together give a right of action, including, in the present case, the contract and the breach, it is conceded that the contract was made at Cawnpore. But it appears to me that the words "wholly or in part" are not based upon such an analysis of the cause of action. I think they rather relate to cases of several causes of action continued in one and the same suit, some of which has arisen out of the jurisdiction. Here the contract was to deliver skins at Madras, the performance was to be at Madras, and the breach was, therefore, at Madras, and until such breach occurred, the plaintiffs had no cause of action.

Our attention was drawn to the controversy in the English cases terminating in *Vaughan v Weldon*,⁽¹⁾ in which all the Judges agreed upon the construction of the 18th Section of the C L Pro Act, 1852, that it was sufficient if the breach of contract arose within the jurisdiction. The words in that section are "a cause of action which arose within the jurisdiction, or a breach of a contract made within the jurisdiction." But I think we shall be safe in following this and the Bengal decision,⁽²⁾ and in holding that, the breach of contract having arisen at Madras, the cause of action has wholly arisen within this jurisdiction.

Appeal allowed

Attorneys for the Plaintiffs —Messrs Branson and Branson

Attorneys for the Defendants —Messrs Barclay and Morgan

(1) L R., 10 C P., 47

(2) 13 Beng L R. 461

In the High Court of Judicature for the N. W. P.

CIVIL JURISDICTION.

*Before The Hon'ble Sir John Edge, Knight, Chief Justice,
and The Hon'ble S. Mahmod. J.*

AMOLAK RAM AND OTHERS, (PLAINTIFFS), PETITIONERS,
v.

BOMBAY, BARODA AND CENTRAL INDIA RAILWAY,

INCLUDING RAJPUTANA-MALWA RAILWAY, BY THE TRAFFIC

SUPERINTENDENT (DEFENDANT), OPPOSITE PARTY.

CASE No. 228 OF 1887.

1888
January, 9

*Railway Company—Overcharges Suit for recovery of—Jurisdiction of
Courts*

In a suit against the Bombay Baroda and Central India Railway Company for the recovery of overcharges paid by the plaintiffs at Bombay in respect of certain goods booked by them at Agra to their address at Bombay it was held that the cause of action arose at Bombay where the overcharges were levied and not at Agra where receipt was granted for freight charges and that the Small Cause Court Judge at Agra had no Jurisdiction to entertain the claim.

The plaintiff brought this action against the defendant Company in the Small Cause Court at Agra. The cause of action alleged was that the plaintiff had paid at Bombay monies alleged to be overcharges on the freight of certain goods consigned by the plaintiffs at Agra to themselves at Bombay. The Small Cause Court Judge dismissed the plaintiffs' suit on grounds which it is not necessary for us now to consider. The plaintiffs applied to us to exercise our powers in revision and to pass an order setting aside the decree of the Small Cause Court Judge and to order a new trial. Many questions of law have been argued in this case but as our judgment solely turns on the question of jurisdiction we need not express any opinion as to the other points. It is admitted that the principal office of the Company in British India is within the meaning of the Example 2 of Section 17 of the Code of Civil Procedure is at Bombay and not at Agra. That being so, this act on should not have been brought at Agra unless the cause of action arose there, even assuming that there was at Agra

a Subordinate Office of the defendant Company What is the cause? It is alleged to have arisen from the payment at Bombay of alleged overcharges and from the refusal of the defendant Company to repay said alleged overcharges and to be within Section 72 of the Indian Contract Act 1872 We do not know the facts under which the payments were made at Bombay so as to see whether the plaintiffs can prove that the payments were made under mistake or under coercion within the meaning of Section 72 of the Indian Contract Act IX, 1872, and do not express any opinion on that question So far as we understand the case, if the plaintiffs case be a true one as to which we express no opinion, it is one similar to that put in illustration (b) to Section 72 The Small Cause Court Judge thought on the question of Jurisdiction that the overcharges had been made at Agra It is true that the Railway receipt which was prepared at Agra stated the amount of freight to be paid at Bombay The mere statement in the receipt of the amount of that freight assuming that that freight was illegally excessive would not of itself give any cause of action If the freight mentioned in the receipt note was illegally excessive, the plaintiffs on the arrival of the goods at Bombay could have tendered the correct charges and demanded delivery of the goods If the Railway Company had declined to deliver the goods on the tender of the proper amount, the Railway Company would have rendered themselves liable to an action In this case the money alleged to be an overcharge was paid at Bombay and nowhere else We have no doubt that the cause of action sued on here arose at Bombay and not elsewhere Under the circumstances, as the case falls within Section 17 of the Code of Civil Procedure the Small Cause Court Judge at Agra had no jurisdiction to entertain this claim Under Section 622 of the Code of Civil Procedure we pass an order setting aside the decree in this case on the ground that the Judge had no jurisdiction to entertain the claim inasmuch as the plaintiff brought this action in a Court which had no jurisdiction We order the plaintiffs to pay the costs below and here

Amolak Ram
v
B B & C L
Ry

The Indian Law Reports, Vol. XVIII. (Bombay) Series,
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ORIGINAL CIVIL

Before Mr Justice Parsons.

BOMBAY, BARODA AND CENTRAL INDIA RAILWAY
COMPANY, PLAINTIFFS,

v.

JACOB ELIAS SASSOON AND OTHERS, DEFENDANTS *

1873
Sept. 12

Interlocutory—*Civil Procedure Code (XIV of 1882), Secs. 170-171*—*Cases of plaintiffs*—*Claims by plaintiffs against goods in respect of which suit brought*

In May 1869, one Sadanand Ramnarmall (defendant No 1), a resident at Hissar in the Punjab, consigned 600 bags of rapeseed to one Khimji Kanji of Bombay and delivered them to the plaintiffs for carriage to Bombay. While the goods were in transit to Bombay, Sadanand the consignor ordered the plaintiffs to deliver them to his agent Ramgopal Fulchand instead of to the consignee, and on the 18th May, Ramgopal requested delivery from the plaintiffs. Before the goods could be delivered however, the firm of E D Sassoon & Co (defendants Nos 1, 2 and 3) claimed them, alleging that they had been assigned to them by Khimji Kanji for valuable consideration. The plaintiffs thereupon filed the suit praying that the defendants should be required to interplead, and that they should be restrained from suing them (the plaintiffs) in respect of the said goods. The plaintiffs claimed to charge the goods with payment of freight, wharfage and demurrage and their costs of suit.

Held—

(1) that the suit was properly instituted by the plaintiffs as an interpleader suit so as to entitle them to their costs,

(2) that the fourth defendant was entitled to the goods subject to the plaintiffs' charge for freight and costs,

(3) that the plaintiffs' charge for wharfage and demurrage could not be allowed. The goods remained in the plaintiffs' possession not by reason of any neglect or default of the owner to take delivery of them but by the act of the plaintiffs themselves who kept and refused to deliver them for their own protection and benefit. All that they could presumptively be entitled to, was a reasonable warehouse rent, which, however, they had not claimed.

INTERPLEADER SUIT The plaint prayed for an injunction restraining the defendants and each of them from taking proceedings against the plaintiffs in respect of certain goods which had been delivered to them for carriage, and that the defendants should be directed to interplead together concerning their respective claims to the said goods, &c

B B & C I
Ry
v
Jacob El as
Sassoon

The first three defendants were partners in the firm of E D Sassoon & Co, which carried on business in Bombay The fourth defendant was one Sadanand Ramsarnall who resided at Hissar in the Punjab and carried on business in Bombay by his *munim*

The plaint stated that in May, 1893, the fourth defendant (Sadanand) at Hissar, in the Punjab, consigned 600 bags of rapeseed to one Khumji Kanji at Bombay in three lots, and delivered the same to the plaintiffs for carriage to Bombay The plaintiffs passed three railway receipts, in the usual form, to the consignor (Sadanand), dated, respectively, the 9th, 11th and 12th May, 1893

While the goods were in transit to Bombay the consignor (defendant No 4) ordered the plaintiffs to deliver them to one Ramgopal Fulchand instead of to the consignee Khumji Kanji The order was conveyed to the plaintiffs' Traffic Manager at Bombay by a telegraphic message dated the 15th May On the 18th May, Ramgopal Fulchand requested delivery of the goods from the plaintiffs.

Before the goods could be delivered, the firm of E D Sassoon & Co (defendants Nos 1, 2 and 3) claimed them, alleging that they had been assigned to them by Khumji Kanji for valuable consideration, and shortly afterwards the fourth defendant, the consignor (Sadanand), claimed them, alleging that Ramgopal Fulchand was his agent to receive them

The following are the concluding paragraphs of the plaint —

6 The plaintiffs have given the usual directions for detaining the said rapeseed (whereon they will rely) and the same is now in the keeping of the plaintiffs and demurrage and other charges are duly being incurred in respect thereof The plaintiffs fear that a suit will be filed against them in respect of the said rapeseed

7 The plaintiff Company is ignorant of the respective rights of the parties claiming the said goods

8 The plaintiff Company has no interest in the goods so claimed as aforesaid otherwise than their due and proper charges for freight, unloading &c, and subject thereto is ready and willing to deliver the same to such person or persons as this Honourable Court shall direct.

B B & C I

Rv

Jacob Elias
Sassoon

"9 The suit is not brought by collusion with the defendants or any of them."

The plaintiff prayed (a) for an injunction restraining the defendants from suing the plaintiffs, (b) that the defendants should be required to interplead, (c) that upon delivering the said goods to such person or persons as the Court should direct, subject to the plaintiffs' claim thereon for freight, demurrage and charges and the costs incurred by the plaintiffs in this suit, the plaintiffs should be discharged from all liability to the defendants, or any of them in respect of the same, (d) that the said rapeseed should be directed to be sold by the plaintiffs, and the net proceeds thereof, less freight, demurrage, charges and costs, as aforesaid, be paid into Court to await the decision of this suit.

The fourth defendant (Sadnanend Ramsarmall) was the only one who filed a written statement. He stated that he sold the said 600 bags of rapeseed (with other goods) to Khumji Kanji, but that Khumji having dishonoured the *hundis* drawn against the said goods while the said goods were in transit, he (Sadnanend) had given notice to the plaintiffs not to deliver the goods to Khumji Kanji, but to deliver them to his (Sadnanend's) agent, Mr. Ramgopal Fulehand. He claimed the goods and denied that the firm of E D Sassoon & Co., had any title to them, and prayed for his costs either against the plaintiffs or the other defendants.

Before the trial came on, the goods had been sold, and the proceeds were lodged in Court subject to the decision of this suit.

The following issues were raised at the hearing —

1 Whether the suit was properly instituted as an interpleader suit so as to entitle the plaintiffs to their costs?

2. Whether the fourth defendant (Sadnanend) was entitled to the proceeds of the sale of the 600 bags of rapeseed free of any charges on the part of the plaintiffs?

3 Whether the fourth defendant was entitled to his costs from the plaintiffs or the other defendants, or both of them?

4 Whether plaintiffs were entitled to recover any and what charges in respect of the said goods, and if so, whether from the first three defendants or the fourth defendant?

Macpherson and Scott, for Plaintiffs, argued that they were entitled to their costs and charges in respect of the carriage of the said goods. They referred to Section 470 of the Civil Procedure

Code (XIV of 1882), *Martinius v Helmuth*,⁽¹⁾ *Mason v Hamilton*,⁽²⁾ *Cotter v Bank of England* (3) *Attenborough v St Katharine's Dock Company*,⁽⁴⁾ *Dadoba v Krishna*,⁽⁵⁾ *Martin v Lawrence* (6) They claimed Rs 1,672-5 for freight, and alleged a lien on the proceeds to that extent They referred to the Indian Contract Act (IX of 1872), Section 170, and Section 55 of Act IX of 1890 They also claimed wharfage and demurrage amounting to Rs 6,698-4

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Lang (Acting Advocate General) for defendants Nos 1, 2 and 3 (E D Sassoon & Co) —The cases cited for the plaintiffs do not apply The Court is bound by the Code of Civil Procedure (XIV of 1882) Under Sections 470 473 a person filing an interpleader suit must be a mere stake holder and must hand the property over unreservedly See also the form 104 in Schedule IV The plaintiffs have kept the goods, and now make enormous charges against them, which amount to more than the value of the goods The suit should be dismissed with costs

Interarity and *Russell* for the fourth defendant —This is not a proper interpleader suit See paragraphs 6 and 8 of the plaint Paragraph (a) of the plaint asks for personal relief—*Mitchell v Hayne*(7), *Bignold v Audland*(8). The plaintiffs have not complied with Section 472 of the Civil Procedure Code, and are, therefore, not entitled to any order We asked for the goods and offered an indemnity. The value of the goods is Rs 5,800 The plaintiffs' charges now amount to Rs 7,770-0 The plaintiffs are entitled to charge for freight, but are not entitled to demurrage or wharfage, and we should be allowed to set off our costs against the charge for freight

PARSONS, J —I think that, on the authorities cited by the learned counsel for the plaintiffs, this is a properly constituted interpleader suit In *Mason v Hamilton*(2) the bill filed stated that the plaintiff had no interest in the goods except his lien for wharfage and warehouse rent, and Sir L Shadwell, the Vice Chancellor, said that the bill stated a plain case of interpleader

The case of *Mitchell v Hayne*(7) is discussed in *Bignold v Audland*,⁽⁸⁾ and the result is said to be this "Where a plaintiff represents not merely that he has a lien with respect to which two

(1) Cooper & Rej, 24.

(4) 3 C P D 468

(7) 5 S m and St 63

(2) 5 S m 19

(5) I L R 7 Bom 36

(8) 11 S m 23

(3) a Moore and Scott 150

(6) I L R 4 Cal., 450

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other persons have adverse rights, but that there is a further question to be litigated adversely between himself and one of them, that is not a case of interpleader." In *Cotter v Bank of England*(1) it was held that the bank, who retained a lien on certain bullion in respect of freight and charges, had no interest in the subject-matter of the suit within the meaning of those words in Statute 1 and 2 William IV, c 58. In *Attenborough v St Katharine's Dock Co*, (2) the defendants claimed no interest in the wines, the subject matter of the suit, other than the usual dock rents and charges, Bramwell, L J, said "Defendants do not claim any interest in the subject matter of the suit, for the alleged right of lien is not an interest in the wine," and it was held that the case fell within the Interpleader Act, and the defendants' costs and charges were made a first charge on the fund. The language of Sections 470 and 471 of the Code of Civil Procedure (XIV of 1882) is almost identical with that of Statute 1 and 2 William IV, c 58, and the above rulings clearly apply. The personal relief asked for is nothing more than an injunction restraining the defendants from suing the plaintiffs, and that is contained in the form of plaint in an interpleader suit given in the form No 104 of the 4th Schedule to the Civil Procedure Code. I find the first issue in the affirmative.

Strictly speaking, in my opinion, so much of the second and fourth issues as relates to the amount of the charges has been improperly raised in this suit, in which the title only to the thing claimed has to be adjudicated. No doubt a lien can be declared for charges, but the amount of those charges, if disputed, ought, I think, to form the subject of a separate proceeding between the adjudicated owner and the person who seeks to make the goods liable. As, however, here the parties interested have gone to trial on those issues without an objection on the part of any of them, I will proceed to determine them.

The charge for freight comes to Rs 1,072 5, and this is admitted to be correct and due. The plaintiffs, however, seek further, to charge the goods with the amount of Rs 6,698-4 for wharfage and demurrage, and this charge is disputed. The rules of the said Company allow of such a charge being made when goods are not taken delivery of by their owners within a certain time after notice of arrival, the rates charged being exceedingly high that they may act as a kind of penalty so as to ensure the speedy

removal of goods The present is not a case of that kind The goods remained on the plaintiffs' premises not by reason of any neglect or default of their owner to take delivery of them, but by the act of the plaintiffs themselves, who kept and refused to deliver them for their own protection and benefit They did not even place them in the custody of the Court, as they could have done under the provisions of Section 472 All that they could possibly be entitled to, would be a reasonable warehouse rent for the time the goods remained with them, and I might have been able to have awarded them that had they claimed it, and given evidence in proof of the amount They do not, however, do this, and I think, the claim they have made is inadmissible and unproved

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I find on the second and fourth issues that the fourth defendant is entitled to the proceeds of the sale of the 600 bags, and that the plaintiffs are entitled to recover the freight claimed only from him

I find on the third issue that the fourth defendant is entitled to his costs from the defendants Nos 1 to 3, since it is their action that has caused the whole litigation

I decree as asked for in paragraph (a) of the prayer of the plaint, and declare that the fourth defendant is entitled to the fund in Court, and that he be paid the same after deducting therefrom the plaintiffs' charge for freight, viz Rs 1,072 5, and their costs, which are made a first charge on the fund and are to be paid to them out of it, and I order that the defendants Nos 1 to 3 pay the defendant No 4 his costs, and reimburse him the costs of the plaintiffs that he may have to pay

Attorneys for the Plaintiffs — *Messrs Crawford, Burder and Co*

Attorneys for the Defendants — *Messrs Pestany, Rustim and Kola, and Messrs Payne, Gilbert and Sayan*

In the Chief Court of the Punjab

Before Smyth and Barkley, J. J.

H M PLOWDEN (PLAINTIFF)

v.

THE S P. AND D RAILWAY COMPANY,
(DEFENDANTS)

CASE No. 7 OF 1882

1882
May, 15

Liability of Railway Company—Injury to horse—Act IV of 1879, Sec 10—Negligence—Act IX of 1872, Secs 151 and 152—Rules and Regulations

A horse was carried by S P and D Railway Company from Amballa to Lahore While in transit it suffered injury having been thrown down from the train which went off the line The plaintiff sued the defendant Company for compensation for the value of the horse Upon a reference made by the Court of Small Cause under S 617 of the Civil Procedure Code for the opinion of the Chief Court

Held (1) That the defendant Company did not take as much care of the horse entrusted to them for carriage as required by Sec 151 of the Contract Act, IX of 1872, as the horse was loaded in an unsuitable wagon and the burden of proving that they exercised the amount of care and diligence which a prudent man would exercise in his own case rested upon the defendants, which they however failed to discharge

(2) That the rule, that all claims for loss of or damage to goods should immediately be made to the Station Master and a statement showing the particulars of the claim should be sent to the Traffic Manager within 48 hours after such consignment had arrived at its destination, had no force of law and was not binding upon the plaintiff inasmuch as it was not framed and published as required by the Railways Act

(3) That the plaintiff not having been required by the defendants to sign an agreement as prescribed by Sec 10 of Act IV of 1879, nor to make any declaration of the value of the horse, and the horse was received without such declaration, and the rate demanded by the defendants servants was paid the defendant Company could not absolve themselves from their liability to the claim of the plaintiff.

CASE referred by Judge, Small Cause Court, Lahore, under Sec 617 of the Civil Procedure Code.

Spectra for Plaintiff.

Gouldsbury for Defendants.

The facts of this case fully appear from the following Judgments —

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SIMTH, J — This case comes before us in a very inconvenient form as the Judge, instead of drawing up a statement of the facts and the points on which he entertained doubt, is required by Sec 617, Civil Procedure Code, has merely forwarded a copy of his Judgment in the case, the concluding paragraph of which is as follows — “As defendant presses the matter on the ground that general principles are involved, my order will be contingent on the decision of the Chief Court on questions 1, 3, 4, and 5 Decree for Rs 200 without costs

The result of this procedure is that we have had to peruse the Judgment to ascertain what facts have been found by the Judge, and on what points he entertained doubt, and these (especially the latter) are not altogether clear

The suit was brought by the plaintiff against the Scinde Punjab and Delhi Railway Company to recover Rs 250 as compensation for injuries sustained by a horse while being carried by the defendants' railway from Amballa City Station to Lahore. The material allegations in the plaint are that in November 1880 the defendants contracted with the plaintiff to convey the horse from Amballa City to Lahore for reward, and that owing to the negligence and unskilfulness of their servants the horse was thrown down and injured while being carried as aforesaid, and was badly cut in the knees and shoulders

The defendants pleaded (1) that the plaintiff was not entitled to bring the suit because (a) there was no contract between him and the defendants, and (b) he was not the owner of the horse, (2) that the defendants were not liable (a) because there was a special contract whereby all risks of carriage were undertaken by the sender, and (b) because under the general regulations of the Company, which were duly notified to the public, the Company are not liable for damages to any horse of the value of Rs 500 (sic) or upwards, unless the value has been declared and an insurance rate paid, which was not done, in the present case, (3) that the plaintiff is not entitled to recover damages in the present case by reason of his delay in preferring his claim, the general regulations of the Company requiring all claims to be notified to the Company within 24 (sic) hours after the receipt of the goods, while in the present case nearly six months elapsed before the plaintiff gave notice,

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(4) that the horse was not injured, while being carried on the railway or if so injured, was not injured in consequence of any neglect or default of the defendant Company, (5) that in any case the defendants would not be responsible for more than the limit of Rs 500, fixed by the general regulations, and as the plaintiff admitted that he sold the horse for Rs 450, he is not entitled to more than Rs 50 as damages under any circumstances, (6) that the damages claimed are excessive

The plaintiff rejoined (1) that the contract was made with the plaintiff's agent, and that the ownership of the horse was immaterial, as the plaintiff can sue though not the owner, (2) that the special contract referred to is not binding, as it was not signed by the plaintiff or his agent and is moreover not in a form sanctioned by the Governor General in Council, (3) that the Company's regulations have no effect on the claim, (4) that the claim being within limitation, the Company cannot plead a special limitation of their own

The Court fixed the following issues —

- (i) Is the plaintiff entitled to sue?
- (ii) Was the horse injured or not, while being conveyed by the defendant Company by railway?
- (iii) Was such injury caused by neglect or default of the defendant Company's servants?
- (iv) Is the defendant Company absolved from liability by special contract or by the general regulations of the Company in whole or in part?
- (v) To what damages if any is the plaintiff entitled?

The Court held on the first issue, that the plaintiff as bailee of the horse was entitled to bring the suit, citing in support of this view Story on Bailments §§ 93 (d), 93 (f), 94, and 280

On the second issue, it held that the horse was injured while being conveyed on the defendant's Railway.

The Court divided the third issue into two, viz., (a) was the accident to the train in which the horse was carried due to negligence, and (b) did the carrying of the horse in a converted horsewagon instead of a horse box amount to negligence?

In regard to (a) the Court found that the defendants had discharged the onus cast on them by law of showing that they exercised due care and took all necessary precautions for the safe

passage of the train The cause of the train running off the line was a mystery The question therefore resolved itself into this given the fact that a train runs off the line, that the Railway Company is unable to explain the cause but shows that all necessary precautions were taken, can it be said that the absence of any assignable cause for the train running off the line is of itself evidence of negligence? The Judge held that it was not

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With reference to (b) the Judge found that the conveying of the horse in a converted horse wagon instead of a horse box was an act of negligence, and he gave reasons in support of this finding

On the 4th issue, the Judge found that the special contract set up by the defendants was not signed by the plaintiff's agent Moreover it was not in a form approved by the Governor General in Council On both grounds, therefore, it was ineffectual with reference to Section 10, Act IV of 1879, to limit the ordinary liability of the Company The pleas founded on the general regulations of the Company were, in the opinion of the Judge, of no force because they were not rules which the Company had power under Section 8, Act IV of 1879, to frame and they could not therefore be allowed to operate to limit the ordinary liability of the Company

On the 5th issue, the Judge assessed the damages at Rs 200 on the ground that the plaintiff purchased the horse for Rs 650 and sold it for Rs 450

As already stated the Judge made a decree in plaintiff's favour for Rs 200 without costs, contingent on the decision of this Court on questions 1, 3, 4, and 5

Neither of the learned Counsel who argued the case before us touched upon the 1st or 5th issues, and we may assume therefore that the questions raised by those issues are no longer in controversy between the parties

There remain the questions raised by the 3rd and 4th issues

As regards the 3rd issue, which raises the question of negligence on the part of the defendants or their servants, the first point which arises is how far, or rather under what circumstances, the defendants are liable for loss of or damages to property delivered to them as carriers for hire That point was very fully considered by the Bombay High Court in the case of *Kuterya Tulcidas v The G I P. Railway Company* (1) which was

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instituted in 1878 and the conclusion arrived at by the Court was that under the law then in force the liability of the defendants, as carriers, for loss of or damage to goods entrusted to them in cases not met by the special provisions of the Railway Act and the Carriers Act (III of 1865), is prescribed by Section 151 and 152 of the Indian Contract Act (IX of 1872). Since that case was decided the former Railway Acts have been repealed, and their place has been taken by Act IV of 1879. The Second Section of that Act provides that nothing in the Carrier's Act 1865 shall apply to carriers by Railway. The liability of a Railway Company for loss of or damage to property is now therefore regulated by the Indian Contract Act (IX of 1872), and the Indian Railway Act (IV of 1879).

The material sections of the Contract Act bearing on the present case are 151 and 152. Section 151 is as follows: "In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk quality and value as the goods bailed." Section 152 provides that "the bailee in the absence of any special contract is not responsible for the loss, destruction or deterioration of the thing bailed if he has taken the amount of care of it described in Section 151." It was pleaded that there was in the present case a special contract between the parties which relieved the defendants from all liability for the injuries to the horse, but that contention was ultimately abandoned by the defendants and indeed could not be maintained with reference to the provision of Section 10, Act IV of 1879 which enacts "that every agreement purporting to limit the obligation or responsibility imposed on a carrier by Railway by the Indian Contract Act 1872, Sections 151 and 152 in the case of loss, destruction or deterioration of or damage to property shall, in so far as it purports to limit such obligation or responsibility be void unless (a) it is in writing signed by or on behalf of the person sending or delivering such property, and (b) is otherwise in a form approved by the Governor General in Council." It was admitted for the defence that the agreement or special contract on which they relied did not satisfy the requirements of the above section.

The question of the liability of the defendants to make compensation to the plaintiff for the injuries sustained by the horse turns, therefore, under Section 152, Act IX of 1872, upon whether the defendants took as much care in respect of the horse

as a man of ordinary prudence would, under the circumstances, which we have in this case, have taken of a horse of his own of equal value. The onus of proving that they took this amount of care is on the defendants, for Section 13 of Act IV of 1879 provides that "in any suit against a carrier by railway for compensation for loss of or damage to property delivered to a Railway servant, it shall not be necessary for the plaintiff to prove in what manner such loss or damage was caused."

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The Judge held that the defendants had so far discharged the onus thus cast upon them as to show that the accident to the train did not arise from any want of care or precaution on the part of them or their servants. But he held that the defendants failed to use due care when they sent the horse in a converted wagon. Whether a converted wagon was a suitable or proper vehicle for the conveyance of a single horse and whether the use of it contributed to the infliction of the injuries in the case are questions of fact which it was within the province of the Judge to decide, and there are no grounds on which it would be competent to us to question his finding upon them in this reference as he found the first of these questions in the negative and second in the affirmative.

There was evidence to support these findings. It is shown that the Company never sent officers' chargers in such wagons but always in horse boxes. The Judge was of opinion that while a wagon might be used with comparative safety for the conveyance of 6 or 8 horses, as was often the case during the late war the risk of injury was enhanced when, as in the present case only one horse was placed in the wagon.

The Judge having found, under the 3rd issue, that there was want of due care on the part of the defendants' servants in that they used an unsuitable vehicle for the conveyance of the horse, and that this contributed to the injuries sustained by the animal, this of itself was sufficient to render the defendants liable to make compensation (unless they can show as they allege that they are exempt from liability on some special grounds), and it is therefore unnecessary to consider whether the Judge was right in holding that the fact of the train having run off the line was not of itself sufficient to warrant a finding of negligence on the part of the Company when they had shown that they had used every reasonable precaution for the safe passage of the train. I observe however, that in a case cited at page 58 of

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S P & D Ry v Macpherson's Law of Indian Railways Lord DEYMAN, Chief Justice, told the Jury that it having been shown that the exclusive management both of the Railway and machinery was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced, which explanation the plaintiff not having the means of knowledge could not reasonably be expected to give. It is unnecessary, as already stated, to consider this point of the case further, as the Judges' decree is based upon another ground, on which it is sustainable.

I come now to the 4th issue. The part of this issue which raises the question of a special contract has been disposed of already in the foregoing remarks. There remain the two general regulations of the Company which have been relied on as a defence. The first regulation is in the following terms—All claims against the Railway Company for loss of or damage to any consignment of goods must immediately be made to the Station Master or clerk in charge of the Station to which they have been hooked, and also a written statement of the nature of the damage received and contents of the articles missing, must be forwarded to the Traffic Manager Lahore within 48 hours after such consignment has arrived at its destination, otherwise the Railway Company will not hold themselves responsible."

It is obvious that this regulation, if viewed simply as a public notice to persons sending goods by Railway, cannot operate to relieve the Company from liability for loss of or damage to the goods when the terms of the notice have not been complied with. At most it could only be relied on as evidence of an implied agreement and any such agreement would be void, under Section 10, Act IV of 1879 for the purpose of limiting the obligation or responsibility of the Railway Company.

This view is in accordance with the construction put by the House of Lords upon Section 7 of the Railway and Canal Traffic Act of 1844, which enacts that carriers by railway and canal may make special contract limiting their liability provided such contracts are in writing and signed by the sender of the goods; otherwise any contract of the kind is void. The Lord Chancellor said, "I take it to be equivalent to a simple enactment that a general notice given by a Railway or Canal Company shall be valid in law for the purpose of limiting the common liability of the Company. Such liability may be limited by such conditions."

as the Court or Judge shall determine to be just and reasonable but with this proviso, that any such condition so limiting the liability of the Company shall be embodied in a special contract in writing between the Company and the owner or person delivering the goods to the Company, and which contract in writing shall be signed by such owner or person' (Macpherson's law of Indian Railways, page 36) Here in India the fact that the special contract must be in a form approved by the Governor-General in Council relieves the Courts of the duties of determining whether the conditions are just and reasonable but in other respects the law as above declared is applicable to the powers of a Railway Company in India to limit its ordinary liability for loss of or damage to property

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The only way in which the defendants could successfully set up the regulation as an answer to the suit would be by showing that it was made in pursuance of a power given to them by the legislature and that it therefore had the force of law. Now the only powers given to the Company to frame general rules are, as far as I have been able to discover those given by Section 8 of Act IV of 1879 which authorises the Company to make general rules for the purpose among other things of "regulating the travelling upon, and the use, working and management of the railway." It seems to me that the rule now relied upon by the defendants does not come within the scope of this power. A power to make a rule for the use or management of the railway does not, in my opinion, import authority to make a rule limiting the ordinary liability imposed by law on the Company in the case of loss of or damage to property. Such a rule would moreover be inconsistent with the provisions of Section 10 of the Railway Act, which shows in what manner the Company may limit its ordinary liability. I hold, therefore, that the rule in question, viewed as a rule under Section 8 of the Railway Act is of no legal force and fails as an answer to the present suit.

The next rule relied on is one of those which regulate the Traffic, and is in the following terms —

"Horses—One syce free with each animal. An insurance rate of $\frac{1}{4}$ per cent per hundred miles or portion of hundred miles, will be charged on all horses of the declared value of Rs. 400 and upwards, and a form of conditions under which the Railway Company undertake to carry horses must be signed by the sender or his agent."

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Macpherson's Law of Indian Railways Lord DENMAN, Chief Justice, told the Jury that it having been shown that the exclusive management both of the Railway and machinery was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced, which explanation the plaintiff not bringing the means of knowledge could not reasonably be expected to give. It is unnecessary, as already stated, to consider this point of the case further, as the Judge's decree is based upon another ground, on which it is sustainable.

I come now to the 4th issue. The part of this issue which raises the question of a special contract has been disposed of already in the foregoing remarks. There remain the two general regulations of the Company which have been relied on as a defence. The first regulation is in the following terms—"All claims against the Railway Company for loss of or damage to any consignment of goods must immediately be made to the Station Master or clerk in charge of the Station to which they have been booked, and also a written statement of the nature of the damage received and contents of the articles missing, must be forwarded to the Traffic Manager, Lahore, within 48 hours after such consignment has arrived at its destination, otherwise the Railway Company will not hold themselves responsible."

It is obvious that this regulation, if viewed simply as a public notice to persons sending goods by Railway, cannot operate to relieve the Company from liability for loss of or damage to the goods when the terms of the notice have not been complied with. At most it could only be relied on as evidence of an implied agreement, and any such agreement would be void, under Section 10, Act IV of 1879 for the purpose of limiting the obligation or responsibility of the Railway Company.

This view is in accordance with the construction put by the House of Lords upon Section 7 of the Railway and Canal Traffic Act of 1844, which enacts that carriers by railway and canal may make special contract limiting their liability provided such contracts are in writing and signed by the sender of the property, otherwise any contract of the kind is void. The Lord Chancellor said, "I take it to be equivalent to a simple enactment that no general notice given by a Railway or Canal Company shall be valid in law for the purpose of limiting the common liability of the Company. Such liability may be limited by such conditions

as the Court or Judge shall determine to be just and reasonable but with this proviso, that any such condition so limiting the liability of the Company shall be embodied in a special contract in writing between the Company and the owner or person delivering the goods to the Company, and which contract in writing shall be signed by such owner or person" (Macpherson's law of Indian Railways, page 36). Here in India the fact that the special contract must be in a form approved by the Governor-General in Council relieves the Courts of the duties of determining whether the conditions are just and reasonable, but in other respects the law as above declared is applicable to the powers of a Railway Company in India to limit its ordinary liability for loss of or damage to property.

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The only way in which the defendants could successfully set up the regulation as an answer to the suit would be by showing that it was made in pursuance of a power given to them by the legislature and that it therefore had the force of law. Now the only powers given to the Company to frame general rules are as far as I have been able to discover, those given by Section 8 of Act IV of 1879, which authorises the Company to make general rules for the purpose among other things of "regulating the travelling upon, and the use, working and management of the railway." It seems to me that the rule now relied upon by the defendants does not come within the scope of this power. A power to make a rule for the use or management of the railway does not, in my opinion, import authority to make a rule limiting the ordinary liability imposed by law on the Company in the case of loss of or damage to property. Such a rule would, moreover, be inconsistent with the provisions of Section 10 of the Railway Act, which shows in what manner the Company may limit its ordinary liability. I hold, therefore, that the rule in question, viewed as a rule under Section 8 of the Railway Act is of no legal force and fails as an answer to the present suit.

The next rule relied on is one of those which regulate the Traffic, and is in the following terms —

"Horses — One syce free with each animal. An insurance rate of $\frac{1}{4}$ per cent per hundred miles or portion of hundred miles, will be charged on all horses of the declared value of Rs 400 and upwards, and a form of conditions under which the Railway Company undertake to carry horses must be signed by the sender or his agent."

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It is unnecessary to consider the latter part of the rule which really makes provision for a special contract in such cases, and as already stated, that is a matter which is regulated by Section 10 of the Railway Act, and there was no contract in the present case sufficient to satisfy the requirements of that section.

It is argued, however, for the defendants that the plaintiff should, under the above rule, have declared the value of the horse and having been paid an insurance rate, and that not having done so he is not entitled to value the horse at more than Rs 400 in any question of the loss of or damage to the horse arising between him and the Company. In my opinion this contention cannot be maintained. The rule (I mean the first part of it) does not seem to me to be open to objection as a rule for regulating the rate to be paid for the carriage of horses though it might perhaps be framed in more appropriate terms, and viewed as a rule of that kind it would seem to be within the scope of the power to frame rules given to the Company by Section 8 of the Railway Act.

It may be also (though it is unnecessary to decide this in the present case) that if the sender had made a declaration as to the value of the horse and had paid a rate accordingly, he would not in an action against the Company for compensation for the loss of or damage to the horse be allowed to show that the horse was worth more than the declared value. But here there is nothing to show that the sender was ever required to declare the value of the horse or to pay a higher rate than was actually paid, except indeed that the above rule is endorsed on the horse ticket, but this being in English could hardly have given much information to the syce. But under the circumstances of the present case a mere notice to the sender of the existence of the rule in question was not in my opinion, sufficient with reference to the provisions of Section 10 of the Railway Act, to limit the ordinary liability of the Company imposed by the Contract Act. The proper course for the Company to have adopted was that prescribed by the above section, i.e. to require the sender to sign an agreement, taking care that the agreement was in a form approved by the Governor General in Council. Here not only was there no such agreement but there was no declaration as to the value of the horse. The horse having been received without such declaration, and the rate demanded by the defendant servants having been paid, I do not see upon what ground the

defendants can claim to be absolved from liability to make compensation to the full extent for the injuries shown to have been caused to the horse by the want of due care on the part of their servants.

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I accordingly consider that the decree of the Lower Court should be confirmed, and that the defendants should pay the costs of this reference

BARKLEY, J.—I concur generally in the foregoing Judgment. I have only to add, with reference to the saving in Section 2 of Act IV of 1879 of rules made under repealed Acts, so far as consistent with that Act, that the general rules relied on, though sanctioned by the Government of India in 1872, do not purport to be rules made under the authority of any Act. Section 26 of Act XVIII of 1854, as amended by Act XXV of 1871 provided for the making of "general rules and regulations for the use, working, and general management of the Railway," but such rules were required to "be submitted to the Governor-General in Council for sanction, and when sanctioned," to "be published in the *Gazette of India*." The rules now relied upon, even if they were sanctioned by the Governor-General in Council, which does not appear, and if they could be regarded as falling under the description of the rules, the making of which was provided for by Section 26 of Act XVIII of 1854 as amended, or admitted never to have been published in the *Gazette of India*, and therefore cannot be considered as made under the power given by Section 26. Section 10 of Act XVIII of 1854, moreover, provides that the liability of Railway Companies for loss of or injury to any articles carried by them other than those specially provided for by that Act should not be limited or in any way affected by any public notice given, and it is clear that no rule inconsistent with this provision could have been made under Section 26.

Further, the rule as to claims, which is relied upon, appears under the heading of general rules, etc., for the conveyance of goods, cattle, minerals, etc., by merchandise trains. These rules do not relate to horses carried by passenger trains. This is provided for in the Time and Fare Table under the head of "Coaching Fares, Rates and Regulations" and under this head no rule as to claims appears. The only rule as to claims in the general regulations published in the Time and Fare Table has reference to claims for loss of or damage to parcels or luggage.

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It is unnecessary to consider the latter part of the rule which really makes provision for a special contract in such cases, and as already stated that is a matter which is regulated by Section 10 of the Railway Act and there was no contract in the present case sufficient to satisfy the requirements of that section

It is argued, however, for the defendants that the plaintiff should, under the above rule, have declared the value of the horse and having been paid an insurance rate, and that not having done so he is not entitled to value the horse at more than Rs 100 in any question of the loss of or damage to the horse arising between him and the Company. In my opinion this contention cannot be maintained. The rule (I mean the first part of it) does not seem to me to be open to objection as a rule for regulating the rate to be paid for the carriage of horses though it might perhaps be framed in more appropriate terms and viewed as a rule of that kind it would seem to be within the scope of the power to frame rules given to the Company by Section 8 of the Railway Act.

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defendants can claim to be absolved from liability to make compensation to the full extent for the injuries shown to have been caused to the horse by the want of due care on the part of their servants

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I accordingly consider that the decree of the Lower Court should be confirmed and that the defendants should pay the costs of this reference

BAKLEY, J —I concur generally in the foregoing Judgment. I have only to add, with reference to the saving in Section 2 of Act IV of 1879 of rules made under repealed Acts, so far as consistent with that Act that the general rules relied on, though sanctioned by the Government of India in 1872, do not purport to be rules made under the authority of any Act. Section 26 of Act XVIII of 1854, as amended by Act XXV of 1871 provided for the making of "general rules and regulations for the use, working, and general management of the Railway," but such rules were required to 'be submitted to the Governor-General in Council for sanction, and when sanctioned," to "be published in the *Gazette of India*" The rules now relied upon, even if they were sanctioned by the Governor General in Council, which does not appear, and if they could be regarded as falling under the description of the rules, the making of which was provided for by Section 26 of Act XVIII of 1854 as amended, or admitted never to have been published in the *Gazette of India*, and therefore cannot be considered as made under the power given by Section 26. Section 10 of Act XVIII of 1854, moreover, provides that the liability of Railway Companies for loss of or injury to any articles carried by them other than those specially provided for by that Act should not be limited or in any way affected by any public notice given, and it is clear that no rule inconsistent with this provision could have been made under Section 26.

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Before H V Drake-Brockman, Esquire, I.C.S., Judicial Commissioner, Central Provinces

BABU HARIDOSS (PLAINTIFF), APPELLANT,

v

**THE AGENT or MANAGER OF THE B B & C I
RAILWAY, INCLUDING R M RAILWAY
(DEFENDANT), RESPONDENT**

1906
Nov, 20

The defendant Company carried in one of its horse boxes a horse belonging to the plaintiff. The animal was not carried at the owner's risk, nor was it insured. It was injured on the journey and died 3 days later. The plaintiff sued the Company for damages on the allegation that the accident was due to the defective state of the horse box in which it occurred. His suit was dismissed on the ground that he had failed to prove his allegation.

Held—That under Section 76 of the Indian Railways Act, 1890 the burden lay on the defendant Company to prove that it had discharged the duty of a bailee under Section 151 of the Indian Contract Act, 1872 which Section 76 of the Railways Act imposes. Such burden was not affected by the plaintiff's failure to establish his theory of the accident. It could only be discharged by proof that the horse box was in all respects sufficiently fitted and adequately secured and that on the journey, such precautions as ordinary prudence dictates were taken by the Company's servants.

SECOND Appeal by plaintiff Babu Haridas

In the case out of which this second appeal arises, two mares belonging to the plaintiff were carried by the defendant Railway Company from Indore to Khandwa on the 19th April 1903. Their carriage was not at the owner's risk, nor was either animal insured. The journey lasted from 4-45 P.M. to 11-30 P.M. and it is common ground that in the course of it one of the animals got a hind leg over the partition dividing its box from the next box, and while struggling in that position injured itself. According to the plaintiff, the effective cause of the accident was the defective state of a fixture called a "cross bar" the function of which is to keep the partition in its place. The plaintiff further alleged that the Company's servants at Khandwa negligently

delayed unloading the injured animal, which died on the 22nd April in spite of careful treatment. The Company denied that there was any defect in the horse box and attributed the accident to restiveness on the part of the mare and to the negligence of the plaintiff's servants deputed to travel with her. As to unloading, the defence was that it was effected as soon as the Station Master was set free from more pressing duties. The issues framed were as follows —

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- (1) Was the cross-bar of the horse box in which the plaintiff's mare was carried not in working order?
- (2) Were the injuries caused by the disordered cross bar, or were they due to the negligence of the plaintiff's servants or the mare's restiveness?
- (3) Did the syce travel with the mare in the box?
- (4) Was there negligence and carelessness on the part of the defendant's servants in the delay in obtaining delivery in Khandwa? Did this delay cause further injuries to the mare?
- (5) Did the mare die of injuries received on the journey by rail? Was due care and treatment undertaken to save its life?
- (6) What was the value of the mare on the day she was booted to travel?

The Subordinate Judge, relying on Section 76 of the Indian Railways Act, 1890, throw on the Company "the onus of proving that there was no carelessness or negligence on its part and that the cross-bar of the horse box was in absolutely good working order." He found that the cross bar—or to use the correct technical term the "head stall post"—was duly fixed and in good order, that the accident was due to vicious kicking on the part of the mare, that it was unnecessary to decide whether the plaintiff's syce travelled with the animal or not, that there was no unreasonable delay in unloading, that with proper treatment the animal might have recovered, but that such treatment though available, was not resorted to. At the close of his judgment the Subordinate Judge went back on his dictum that the defendant Company was bound to prove absence of negligence generally on the part of its servants. He regarded the plaintiff as having narrowed the issue as to negligence by attributing the accident to a defective cross-bar, and gave reasons for thinking

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that by "cross bar" the plaintiff originally meant not the head stall post but the partition. In the result the claim was dismissed with costs.

The plaintiff appealed to the District Judge impeaching all the conclusions above set out. The Lower Appellate Court on the authority of *Lakshmi Bhai v Hari*,⁽¹⁾ applied the general rule that a party must be limited to the case put forward in the plaint and refused to require of the Company proof that there had been no negligence whatever on its part. The only point fully dealt with was whether the so called "cross-bar" was or was not in good order and properly fixed, and this was decided in the Company's favour. Then followed a finding that the plaintiff's syco left his seat during the journey and that the mare was restive. The Appeal, however, was dismissed solely on the ground that the accident was shown not to have been due to the cause alleged in the plaint.

In Second Appeal, it is contended—and I think rightly contended—that the burden of the proof determined by Section 76 of the Railways Act cannot be affected by the fact that the plaintiff has put forward and failed to make good a theory of his own to account for the accident. In the case cited by the District Judge, the plaintiff sued as a lessor to object his lessee, he failed to prove the lease and was not allowed to fall back on his general title. The view there taken is not in accord with that which now obtains in this Court—see *Dulieland v Lallah* (2). Moreover, assuming that the plaintiff suing on a lease cannot be permitted to fall back on his general title, it is clear that the burden of proof is upon him from the outset if the lease is denied, as it was in the Bombay case. In the present case, the Company has negatived only one possible defect which might have led to the accident. Thus it would have had to negative, if the plaintiff had volunteered no theory to account for the accident. What the Company has to prove is that it discharged the duty of a bailee under Section 151 of the Indian Contract Act, which Section 72 of the Railways Act imposes. The burden would be discharged only by proof that the horse box was in all respects sufficiently fitted and adequately secured and that on the journey such precautions as ordinary prudence dictates were taken by the Company's servants—see *The Great Western Railway Company v*

(1) 9 Bom H C, R L.

(2) 1 N L R, 4

Blouet(1), *Nanlu Ram v The Indian Midland Railway Company* (2) That the Company was prepared to establish all this appears from the defence put in by its Agent, Mr Macgregor. If, however, there is room for contention that evidence was shut out by the form of the issues, the position can be met by recasting them in a more generous form and allowing both sides to adduce further evidence.

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The decision of the District Judge falls very far short of dealing completely with the plaintiff's appeal. His decree is accordingly set aside. The case is remanded to the Lower Appellate Court with directions to re-admit the appeal under its original number in the register and to determine it afresh. The usual certificate for the refund of the Court fee is granted, other costs incurred in this Court will follow the event.

Counsel for the Appellant—*Mr J C Mitra, Bar-at-Law*

Do for Respondent—*Mr V R Pandit, Bar-at-Law, and
Mr Habibulla, Pleader*

In the Chief Court of the Punjab

APPELLATE CIVIL

Before Mr. Justice C A Roe and Mr. Justice J. Frydelle.

ELAHI BUKSH (PLAINTIFF), APPELLANT,

v

SECRETARY OF STATE FOR INDIA IN COUNCIL

(DEFENDANT), RESPONDENT

North Western Railway—Claim for damages on account of injuries sustained in a collision

1895
February, 26

In a suit against the N W Railway for damages alleged to have been sustained by the plaintiff on account of injuries alleged to have been received in a collision of two trains between Okara and Sitghara Stations on 5th December 1891, the Lower Court dismissed the suit on the ground that plaintiff had failed to prove that the injuries he had received were due to the accident and suggested that they might be the result of the

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fall from his berth which was proved after the accident. On appeal the judgment of the Lower Court was set aside and Rs 20,000 was awarded as damages to the plaintiff.

Holding that on the facts of the medical evidence set forth, it has been proved that the plaintiff could have received serious special injury by mere lateral motion as he lay on his berth and that if he had been lying on his side with his back near the ventilators of the carriage the bruise on the neck might have been caused by his being thrown against the side.

For Appellant — *The Hon'ble Sir William Rattigan and Mr H A B Rattigan*

For Respondent — *Mr Henderson* on special duty and *Mr Sinclair*, Government Advocate

The following Judgment was delivered by the Lower Court in the above case —

This is a suit for recovery of Rs 2,70,000 against the Secretary of State on account of damages alleged to have been sustained by the plaintiff in a railway collision on the North Western Railway at 2 A.M. on the morning of the 5th December, 1891. The No 3 Down Mail train from Lahore and the No 1 Up Mail from Karachi collided at a spot between the Stations of Okara and Satgarha on the Lahore Karachi line. Some carriages were smashed up and some passengers killed and wounded. The plaintiff, a native gentleman of Hoshiarpur, in the Punjab, practising at the Bar as a Pleader, was travelling in the No 3 Down Mail to Montgomery, to appear in a case in one of the Courts there when the collision occurred.

He estimates his damages thus — Rs 73,000 on account of damages, suffering, etc., Rs 1,93,000 as compensation for loss of income, etc., and Rs 5,000 on account of expenses of medical aid already incurred and to be incurred in the future.

The gist of the defence is that the plaintiff was not injured in the collision at all, though he was a passenger in the No 3 Down Mail, that he is suffering now in no way from the results of any shock which he could have received at the time, that, if his health is bad, it is bad from other causes, that he is now grossly exaggerating his present state of bad health, that he is older than he states himself to be, and that the compensation claimed by him is preposterous in amount.

There were sundry preliminary objections raised at the first hearing, which were disposed of by preliminary orders, and I

need not further refer to them, except by noting that the objection raised by the defendant to the validity of service of the notice under Section 124, Criminal Procedure Code, cannot be sustained. The same method of delivery of the notice under Section 424, Criminal Procedure Code, has been held by the Judges of the Chief Court in another case to be a valid notice, and complete.

This case was first instituted in the Court of the Subordinate Judge of Montgomery district, within the local jurisdiction of which Court the accident occurred.

It was by order of the Chief Court transferred to the District Court at Lahore. After issues had been drawn up, a date for the trial at Lahore was fixed, and I was specially deputed from Simla to try it. The trial lasted nearly three weeks, and after the oral evidence on both sides was recorded, the case was, by consent of parties, transferred to the District Court of Simla and completed there.

The issues in the case were drawn up by the Subordinate Judge of Montgomery and are needlessly complicated. They could have been framed in a simpler and clearer manner. The defendant's counsel applied to me to alter them when I took over the case at Lahore on the 25th July, but plaintiff's Counsel objected, and I refused to do this as it might have led to applications for postponement of the trial which, as there were very many persons in attendance as witnesses, was very undesirable.

These issues are —

- (1) Was the state of plaintiff's health at the time of the collision such that he could have continued to work as a Pleader for the time and with an income set forth in the plaint?
- (2) If so, did the accident partly or wholly unfit him for that work temporarily or permanently?
- (3) What was the average annual income of the plaintiff at the time of the collision, and has he suffered permanently or temporarily in the cessation of any other source of income also on account of the accident? If so, what is the measure of damages?
- (4) Is plaintiff entitled to any amount on account of fees for the medical aid, past and future? If so, what amount?

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- (5) Is the plaintiff entitled to any damages for the bodily pains and sufferings on account of the accident? If so, what amount?
- (6) Is the plaintiff's state of health subsequent to the collision caused wholly by the accident or by his previous bad health, as well as the accident? If by both, what is the proportion of contribution by each of these causes?
- (7) To what relief is the plaintiff entitled in view of the decision of the above issues?

I or the purposes of decision of the suit a finding on only two of the issues is necessary, viz. (2) and (7), but as the whole evidence on both sides is on the record, I shall make some remarks on the other points involved in the issues.

The trial of the case was a lengthy one—lasting about three weeks or a month—the plaintiff produced in Court and got examined, by commission, some 65 witnesses, and defendant, 25 witnesses, there was some documentary evidence put in also. The plaintiff's exhibits are marked with letters and defendant's with numbers for easy identification. I had the plaintiff's fee books and case books examined by a Commissioner and we have his report on the file. The defendant's Counsel also put in sundry medical treatises by well known authors.

It was a very peculiar and significant fact that the plaintiff did not offer himself as a witness in the case. It was stated that his health was not such that he could undergo cross examination either in Court or before a Commissioner. His Counsel never questioned the many medical witnesses called as to plaintiff's fitness for examination, and I supposed that he would of course be called in support of his case, so did not question the witnesses either. Dr Cunningham is of opinion that the plaintiff is fit to give evidence and the opinion is corroborated by the fact that plaintiff can write a perfectly sensible and coherent letter (*vide* Exhibit 22). This shows that he has fairly recovered if he ever lost, his proper mental condition.

I have stated above that it was a very peculiar and significant fact that plaintiff was not called, and I think that this expression is justified. There were, at the time of the collision, only three passengers, including the plaintiff himself, in the back compartment of the Railway carriage, and one of these has died since

then, consequently the whole superstructure of plaintiff's case rests on the evidence of a single witness (Jashu Ram) now that plaintiff has refused to come forward. Under such circumstances I consider that the plaintiff *ought* to have offered himself as a witness, and his not doing so, in the absence of clear medical testimony that he is unfit, leads one to draw the very worst conclusions as to his reasons for not supporting his case by his own evidence.

The plaintiff is alleged to have received, while lying in an upper berth of the railway carriage, a severe blow on the back of the neck in the region of the seventh cervical vertebra, which caused concussion of the spine and hemorrhage in the spinal column, producing paralysis, and that he is now suffering from the secondary effects of this injury. The medical evidence was therefore important and plentiful. Drs. Perry, Evans, Drury, Crossley, Cunningham and Assistant Surgeons Amir Shah and Dabp Singh, were all called. With the exception of Dr. Cunningham all were for the plaintiff. We have also got the report of Dr. Charles, who examined the plaintiff by order of the Court, made under the provisions of the Railways Act, on the file. The plaintiff called for it, and the defendant produced it, and then demanded that plaintiff should put it in evidence. This was done by order of the Court, but it is not sworn to, and I consider that, under the circumstances under which it was drawn up, I had better not rely on it in forming my conclusions in the case, especially as there is ample other medical evidence. The plaintiff was many times medically examined. Dr. Perry and Assistant Surgeons Dabp Singh and Amir Shah, and Dr. Crossley all saw him shortly after the accident and the first three attended him afterwards. Dr. Charles examined plaintiff in June 1893, Dr. Murry in June, November and December 1892, Dr. Cunningham in September 1892, and Drs. Drury and Evans in June 1893.

Of the issues drawn up in the case, it will not, for reasons which will appear later on, be necessary to go into all, a finding on issues (2), (6), (7) will be sufficient for the purposes of the case.

I will take issues (2) and (6) first —

On these I find that plaintiff entirely fails to prove that he received any injuries from the shock of the collision and that the accident partly or wholly unfitted him for his work temporarily

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or permanently. What is more, I do not believe that, apart from proof, there is any reason for believing that he did receive his injuries in the collision. As I have already stated, we have the evidence of Jashu Ram—(witness 4, plaintiff)—alone, as direct evidence to the fact that plaintiff was injured in the collision. If the evidence is dissected, we find that there is only one point which in any way corroborates this man's evidence and seven points which discredit it, so as to render its truth doubtful or impossible.

The eight points are —

- 1 That plaintiff was, immediately after the accident and subsequently, suffering from a contusion on the back of the neck in the region of the seventh cervical vertebra, and a certain amount of concussion of the spine which was followed by secondary symptoms, some of which exist up to the present time
- 2 An uncontradicted statement, made in witness's presence and hearing, shortly after the collision, to the effect that plaintiff fell, or was thrown off his berth by the shock of the collision
- 3 That the train—(No 8 Down Mail)—was only travelling at some 10 or 12 miles an hour, and that the other train was going a little faster only when the collision occurred
- 4 That the carriage—(No 437)—in which plaintiff and the witness were, was tenth carriage away from the engine, and was uninjured
- 5 That the six other passengers in the same carriage as plaintiff and two in the next one towards the engine, were unhurt and sustained no real shocks whatsoever
- 6 That the plaintiff's carriage had, in the region of the berth on which plaintiff was sleeping, no hard projecting portions whatever, against which the plaintiff's neck could have come in contact from the shock of the collision
- 7 That there was no hard article on plaintiff's berth which could have caused him injury
- 8 That plaintiff had no contusions on the top or side of his head such as he would naturally have had if he had received so severe a shock from the collision as to cause him concussion of the spine

Of these points, No 1 corroborates, and Nos 2 to 8 discredit Jaish Ram's evidence. I will discuss the evidence proving each point in turn.

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With regard to point 1—The fact of plaintiff having a contusion on the back of his neck in the region of the seventh cervical vertebra, is thoroughly proved by the evidence of Dr Perry and Assistant Surgeon Amir Shih. It is possible that this was a subsequent fabrication effected in order to deceive Dr Perry, but other symptoms discovered by this officer render this very improbable. There was paralysis of the lower limbs, and trunk and arms and other functional derangements, concussion of the spine was also indicated and established by these. The existence of the secondary symptoms is also, as I will show further on, proved by the evidence of Drs Perry, Evans, and Drury. Dr Cunningham denies the existence of these to a great extent, but has to admit that one symptom, viz, contracture of the left arm and hand exists, and thus corroborates the correctness of the evidence in favour of the secondary symptoms. Great efforts were made by the defendant's Counsel to discredit the evidence of Dr Perry both by a severe cross examination and by the production of rebutting evidence, but, on the whole, very unsuccessfully. In my mind it is clear that Dr Perry was not deceived by plaintiff feigning symptoms in the way defendant's Counsel would have me believe. His theory is that plaintiff may have got hurt when being lifted down from his berth when he was shamming paralysis, but, that, if he was not, he shammed being hurt the whole time. I do not think that either of these theories is plausible, and there is no sort of proof of them produced.

Dr Perry is an officer of experience and acumen. His evidence shows that certain of plaintiff's symptoms were actually noticed by him personally, and some gathered from the statement of plaintiff and his attendants. His veracity is undoubted and his skill indisputable, so we may be satisfied that he was not mistaken about what he personally saw. As for the others, his experience would probably have detected mistakes and fallacies if imposition had been practised, and his suspicions would have been aroused. Had such been the case, he would have been the first person to have said so in giving evidence. His evidence proves the existence of certain symptoms in the plaintiff's case, which could only, with the greatest difficulty, have been simulated so as to have deceived him, such as

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the paralysis of the lower limbs and arms, and partial paralysis of the upper limbs. Stress is laid on the fact that such symptoms as plaintiff first showed, rendered the chances of recovery very small and his condition very precarious, but there is nothing to show that recovery from them is impossible or miraculous, and, if plaintiff has been lucky enough to recover from them, this should not be to his disadvantage. He was a strong and, apparently, fully healthy man at the time, and, as such, would be more likely to recover than a less robust person. Dr Perry's evidence as to symptoms is corroborated by Assistant Surgeons Amur Shah and Dulip Singh. The last of these two gave unsatisfactory evidence, so I do not attach weight to his corroboration, but Amur Shah's evidence is not weakened in cross examination and his testimony helps to establish the correctness of what Dr Perry deposes to. Dr Crossley's evidence is of no use to us in this connection, for he made no examination of plaintiff and might have been deceived if plaintiff had been malingering. We now come to the mass of evidence to plaintiff's apparent condition of injury immediately after the accident, and on the way to Lahore at Lahore Station, and, at plaintiff's house in Lahore for days subsequent to the accident. If plaintiff had been shamming the whole time, I hardly believe that so many persons would have been deceived, and would have come forward with their evidence. They are mostly persons of respectability and credit, and I do not believe that these men would deliberately come into Court and tell lies. As to plaintiff's apparent condition, they are not, however, professional medical men, and so might have been deceived in the same way that Dr Crossley might have been, had the plaintiff been malingering. If we lump up the evidence of Dr Perry and the rest, I consider that there is such a weight of evidence direct and corroborative in favour of plaintiff being hurt at or about the time of the collision and for some time after that, that the point is proved. We now come to plaintiff's subsequent condition, viz., his condition from, say, three months after the accident till the present time. It is a point much more difficult to decide, for the proverb "When doctors disagree, who shall decide?" is thoroughly exemplified here. On the one side we have Drs Perry, Drury and Evans, and on the other Dr Cunningham,—not only this, but we have contradictory opinions on some points between Drs Perry, Drury and Evans, which still more complicates matters. The general result of this evidence leads me to believe that the plaintiff

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iff has certainly still got certain symptoms of lesion of the spine consequent on, and sequelæ to spinal concussion, though plaintiff exaggerates these to the best of his ability and makes out that he is far worse than he really is. There is an admitted contracture of the left hand and arm and other symptoms, such as ankle clonus and irritability of muscles under the electric tests which clearly demonstrates degeneration of the nervous system. Dr Cunningham expresses the strongest belief in the plaintiff's malingering, but he is contradicted by Drs Perry, Drury and Evans, and his evidence is in consequence weakened. All he proves is, that plaintiff is exaggerating his symptoms as much as he can. The medical treatises I have consulted do not help one much. None of plaintiff's symptoms, which are proved to exist, seem to be absolutely at variance with those named by the authors as occurring in cases of damage to the spinal column or secondary lesions of the spinal cord, except that plaintiff's special senses appear unaffected. The defendant's theory is that the plaintiff's fall from a horse in April 1890—which I hold proved, for reasons which will appear further on—or general degeneration of his system from fever or other illness, may have caused the symptoms which plaintiff really shows, but there is no proof of this. There is no proof that plaintiff had any really serious injury from the fall from the horse, or any other illness such as would cause his present condition, so the defendant's explanation is not established. The plaintiff was clearly in good health in 1891, and had apparently recovered from whatever illness he had in 1890. He is shown to have been actively practising his profession in Hushiarpur and other districts. It seems very unlikely that he would not have exhibited signs of the damage done to his system by that time had he really suffered permanent injury by the fall from the horse. The evidence about the illness, called "*Zof Dimagh*" or *brain weakness*, is not at all reliable.

I now come to point 2—Evidence of the uncontradicted statement is given by Dilip Singh—(witness 29, plaintiff). This man's demeanour and evidence shows a distinct bias on his part in plaintiff's favour, so his admission made to defendant's counsel when making his enquiry, and elicited in cross examination, may be accepted as quite true. It is to the effect that when he conversed with Desondh Ram shortly after the accident, when they were on their way to Lahore, the latter told him that plaintiff, after the collision, had fallen off his berth on to the floor of the

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carriage He admits that, Jaishi Ram sitting close by Desond Ram, never contradicted this statement

With regard to point 3—The evidence of Driver Field (witness 18, defendant) is conclusive on this point. He was not discredited in any way in cross examination, nor was any evidence disproving his evidence produced by the plaintiff. It is corroborated by the fact that neither he nor Mr Bailey who was also on the engine suffered any but trivial injuries though they jumped off the foot-board of the engine, just before the collision. It is further corroborated by the fact that the train sustained comparatively little damage. Only the engine, tender, front guard van and two carriages were really injured. Against this evidence we have only got plaintiff's unsupported allegation in the plaint that the trains were travelling at full speed, which carries no weight at all.

Point 4—The position of the carriage No 437 is conclusively proved by the evidence of Mr Harrison (witness 16, defendant) Ganesb Das (witness 10, defendant) and several other witnesses corroborated by the admission of Jaishi Ram and by the documents (exhibits 17, 18 and 25) on the file. There is no rebutting evidence produced on plaintiff's part. Carriage No 437 is conclusively proved to have been the one the plaintiff was travelling in, by the fact that it was the only second class carriage in the train, and by the evidence of Ganesb Das (witness 10, defendant) and by (exhibits 17, 18 and 25) on the file. Plaintiff's counsel made efforts to obtain some admission from defendant's witnesses that the carriage might have been changed and another carriage substituted for the original No 437 which plaintiff travelled in but this failed. Sylvester (witness 12, defendant) and Sindiford (witness 23, defendant) shew satisfactorily that there has been no change, and that the carriage produced is the original No 437 which plaintiff travelled. The number could not have been removed from one carriage to another without showing marks and I do not for a moment believe that the Manager or any Head subordinate of his, who could have alone arranged the substitution would have lent themselves to such a deceit.

Carriage No 437 is shewn by the evidence of Imamdin (witness 19, defendant), Doyle (witness 20, defendant) and Martin (witness 21, defendant) and by its absence from exhibits 23 and 24, to have been undamaged and run back to Lahore after the accident, as one of the vehicles composing No 1 Up train, which replaced the

original No 1 Up which collided with No 8 Down train. It is proved (*vide* evidence of Emery, witness 22, defendant) to have been in active use till the 27th January 1892, and then only to have gone into the workshops for potty repairs. No evidence to the contrary is produced by the plaintiff.

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With regard to point 5—The evidence of Mr Harrison (witness 16, defendant) and Mrs Harrison (witness 1, defendant) and the admission made by Jaisbi Ram (witness 4, plaintiff) completely proves that all the six passengers travelling with plaintiff were uninjured in any way, and that they hardly felt the shock of the collision. One of the six is shewn by Mrs Harrison's evidence not to have even been awakened by it. Jaisbi Ram, in his efforts to establish plaintiff's story, states that he himself next morning "passed blood" and afterwards "got a pain in his chest" and became "easily angry," but admits that he cannot directly attribute these symptoms to a shock, and they may be taken for what they are worth. Not only were the six passengers in this carriage uninjured, but the two gentlemen in the next carriage (a first class one) nearer the engine, are shewn to have been un hurt (*vide* Mr Harrison's evidence). No evidence rebutting this was produced by the plaintiff.

With regard to point 6—No evidence of the existence of any projecting portions or fixings in the carriage at the place where the plaintiff's upper part of body lay at the time of the accident is produced. I personally examined the carriage and there is a certified plan (exhibit 19) on the file. The only things which could be classed as projections are—

- (1) the finger stripes of the ventilator at one side of the sleeping berth,
- (2) the hinge of the berth, and
- (3) the slot into which the berth drops and rests when it is in use.

There are marks of a window strap stud having at one time been projecting from the side of carriage close to the berth, but the evidence of Sandiford (witness 23, defendant) shews this must have been removed long prior to the time of the collision. Moreover, it was in such a position that it could not have caused plaintiff's injury. The finger strip is a small projecting strip of wood, 5 inches long by $\frac{1}{2}$ an inch deep, its position is such that it also could not have caused plaintiff's injury. The hinge of the berth, and the slot for berth frame could not possibly have done

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so either The bat pags are far removed from the berth end and need not be mentioned

With regard to point 7 — The evidence of Wali Ram (witness 36, plaintiff) proves that there was no sort of hard article on plaintiff's berth at the time of the accident, the plaintiff's books and boxes were below apparently on the floor of carriage and possibly under the lower seat. The plaintiff had an ordinary native pillow, on which presumably his head was resting whilst he slept. Had there been any hard article on the plaintiff's sleeping berth near his head, we may be sure that mention of it would have been made and its existence proved. Jaishi Ram also would have noticed and mentioned any such article had one been there.

With regard to point 8 — The evidence of Dr. Perry and Dr. Crossley is pretty conclusive on this point. Amir Shah or Dahi Singh would also have noticed wounds or bruises on the top or sides of plaintiff's head had there been any. Natives usually remove their pugrees to sleep (vide evidence of Jaishi Ram), and if the plaintiff's injury had been caused by the force of a shock caused by the collision, plaintiff's head would certainly have borne marks of a blow. The weather was very cold, it was past mid night and in December, and the presumption is that plaintiff was wrapped up in a quilt or blankets, so how he could have received a blow on the back of the neck, whilst lying asleep, without injury to head as well, would be little short of marvellous. That there was no lateral motion after the collision, is satisfactorily proved by the evidence of Mr. Harrison, and by the fact proved by Driver Field, that the line is practically straight at the place where the collision took place, and that the majority of the carriages never left the rails, but ran back along the line when the drawbar of the second carriage from the engine broke.

I have now disposed of all the points for and against Jaishi Ram's evidence, and I have no hesitation in finding that his evidence is unworthy of credit. He is a pleader of the Chief Court and in a position which one would have expected him to maintain by telling the truth, but, I regret to say, this is not the case. It appears to me absolutely impossible that the plaintiff could have got injured in the way he alleges in his plaint and Jaishi Ram swears to. I will propound my theory as to how plaintiff got his injury later on. Jaishi Ram being held to be lying, there is no evidence in proof of plaintiff's allegations, and I have consequently

come to the finding recorded at the commencement of this part of my judgment I will here add a point which I forgot to mention before, and that is the demeanour of Jaishi Ram. He gave the whole of his evidence in a straightforward manner, except that relating to the occurrence immediately following the collision, he there became markedly nervous and hesitating.

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Stress is laid on the offer by the Manager of the Railway made in December 1891 or January 1892, to compensate the plaintiff. No enquiry had then apparently been made, so the admission is not of any weight. The offer of Rs 10,000 in October 1892, after Dr Cunningham had examined the plaintiff, might be considered to be a sort of admission that plaintiff's story was true, but I do not consider it to be such. The wording of the letter (exhibit 8) shows that the Manager denied the allegations of the plaintiff, as to his injuries and the cause of them, and that the offer was only made in order to avoid the expenses of a civil suit.

It may be asked how I can reconcile my finding arrived at with the fact that plaintiff, immediately after the accident, was found to be suffering from an injury such as that described. The explanation appears to me to be simple, it is this:

That the plaintiff was asleep on his berth when the collision occurred. The shock awoke him, and in order to discover what was the matter, or for some other reason, he attempted to descend from his berth to the floor of the carriage. He was probably drowsy with sleep and confused as people are when suddenly awakened, and the carriage was dark—(the lamp was shaded)—and in descending, either forgot the distance to the floor (5 feet) or missed his footing on the lower seat, and fell, with the back of his neck across the edge of the reversible back, or edge of seat or against some article, such as a box on the floor of the carriage and in this way sustained the injury he is proved to have got. The carriage has three long seats in it and two folding up sleeping berths, all run "fore and aft" of the carriage. The two sleeping berths are over the top of the two side seats, the front ends of all are against the wooden partition, separating the two compartments of the carriage (see plan exhibit 19 on file). The upper berths have each a chain at foot end of the berth. At the head end they drop into the 3 cornered slot mentioned before. They are 3 feet 6 inches above the lower seats, and the middle seat is 1 foot 9 inches from each of the former. The middle seat has a reversible back rest, the upper edge of which would be 3

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feet, about, from the surface of the upper berths, if it were turned over towards it. This back-rest has a padded face covered with leather, but in carriage No 437 has hard unpadded edges, as I found by examination. The carriage has no supporting chain from roof to berth edge in the middle, as many carriages of the same type have—so a person falling would have nothing to lay hold of if he slipped. The chain at foot of berth would be too far away to be grasped. When examining the carriage the idea occurred to me that this might be the way the plaintiff came by his injury, and I remembered that I had myself on one occasion while travelling had a somewhat similar fall, and I believe this is the correct solution of the problem. It is mere conjecture, and not based on evidence. As, however, I am not called upon to account for the way in which plaintiff was injured, except in so far as this bears on the case put forward by the plaintiff, there is no harm done by theorizing.

It is clear that plaintiff has entirely failed to prove his allegations. He was at first undoubtedly really hurt and possibly in capable then to account for his injury. When he recovered his senses, he no doubt conceived the idea of imputing his condition as the direct result of the collision. He allowed it to be first said that he had fallen off the berth from the shock of the collision. But afterwards when it was discovered that no one else had suffered a similar fall, he felt that it would not do to keep up this part of the story, and changed it to one which he thought would be more readily believed, that is, that he was injured while lying on the berth and fell afterwards when being supported off it by Jushu Ram and Dasonndhi Ram. Fortunately for the defendant—by one of those mistakes which impostors make—he omitted to provide evidence for the cause of his injury. To my mind the plaintiff's position as a Barrister and native gentleman does not preclude the possibility that he would make a false claim. He is shown (*vide* copy of the Chief Court Judgment, exhibit 4) to have set up a false defence and given false evidence in Court in a petty land case for property valued at Rs 80, is it likely that he would stick at a false allegation in order to establish a claim for (to him) a princely sum of money like Rs 2,70,000? I think not.

I now come to issue 7—I have to decide whether the plaintiff under established circumstances, is entitled to recover damages from the defendant. I find that he is not.

In the first place, he is bound to prove his case in the form it is substantially put forward in, in the plaint. He is bound to prove

on the whole fairly correctly the facts asserted by him to constitute the cause of action under which he alleges his right to compensation. It is not necessary that he should prove everything he asserts, but he is bound to prove the main facts. He is not entitled to claim his relief on a different set of facts to what he himself bases his claim on. His counsel attempts to establish that, even if the plaintiff fails to prove his allegations, he is entitled to relief on any other set of facts which may be established. This does not appear to me to be sound. It is tantamount to assuming that a person can succeed on a different cause of action to that which he puts forward, and that certainly is not the law as I understand it. The plaintiff has based his claim on no alternative theory regarding the cause of his accident. He asserts that it was due directly to the shock sustained in the railway collision, and that it is for this reason that he claims compensation. There is no assertion in the plaint that plaintiff's injury was indirectly due to the results of the collision, so I am not bound to decide whether such is a fact or not. There are many rulings of the Indian High Courts and the Punjab Chief Court and two of the Privy Council in support of the views I have above propounded—(vide Moore's Indian Appeals, 11, pages 12 to 20 and 475, Moore's Indian Appeals, 12, page 475, Indian Law Reports, 12 Allahabad, page 51, Indian Law Reports, 8 Calcutta page 975, Punjab Record Cases, No 109 of 1887, and No 159 of 1888) and cases cited at page 96, O'Kinealy's Civil Procedure Code.

Even if, for the sake of argument, we were to admit that the plaintiff could succeed if he proved that he suffered injury directly from the accident my findings shew that he received no injury indirectly from the accident. Plaintiff's fall was occasioned by his own carelessness entirely, and no one is responsible but himself for the injury he has got. The mere fact of the collision being the cause of his awakening can in no way be construed as the indirect cause of his fall any more than if the train had stopped at a station and the plaintiff in getting up to see if he had arrived at his destination, had fallen.

The first two findings being come to, there is no necessity for any finding on the rest of the issues. In order, however, to have the record as complete as possible, in case an Appellate Court should differ from me in its conclusions as to issues 2, 6 and 7, I have taken all the evidence produced on both sides, on the point of compensation. All the materials for a proper finding on

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this issue are on the file, so in case a remand under Section 562 is made hereafter when I am unable to hear the case, I will add a few remarks about this point

First, as to the evidence about plaintiff's health in the years 1887 to 1891 previous to the accident. In 1887—1888, he is admitted by defendant to have been in good health. He is shown by the evidence to have been a strong, active man, given to athletic exercises. He is proved to have been ill in 1889. What that illness really was cannot be discovered. His letters (exhibits 20 and 21), written in that year would show him to have been unwell, but there is no proof as to whether the illness was a serious and permanent one or merely temporary. I quite disbelieve the defendant's witnesses' evidence on this point. In fact the evidence about plaintiff's health produced on both sides appears to be largely tinctured with faction feeling. The plaintiff's witnesses to this point are, almost without exception, admitted friends of his or grateful clients, defendant's witnesses again are almost entirely Hindus, marshalled by L. Thakur Das, a Hindu Pleader of Husharpur. It appears that there was a dispute between the Hindus and Mohammedans about the demolition of a temple, it led to serious riots. Plaintiff was a leading man on the Mohammedan side and a good many of defendant's witnesses were on the other. This evidence must be received with the utmost caution. To give an instance of the length to which partisan feelings can go, I will refer to the evidence of Mahomed Abdulla Khan (witness 8, plaintiff), who deposes to having seen the plaintiff using dumb bells for hours and hours—a physical impossibility even for a Hercules! Sleik Nasiridin (witness 25, plaintiff), who says that plaintiff used, by way of exercise, to take the bullocks out and work his well (a two-bullock one) alone, and Abdul Aziz (witness 34, plaintiff) who says that plaintiff got up early one morning in order to drag about a dog cart by way of exercise. Any one who knows the habits of native gentlemen will be able to judge how far the above allegations are likely to be true. As for defendant's witnesses, it is clear that little reliance can be placed on them. Plaintiff's day-books and fee books for 1889, which do not appear to have been tampered with, show that his income in that year was nearly as large as in 1888, and that the number of cases he was retained in was larger. As to plaintiff's health in 1890, it is clear that he had some illness in that year. The fee-books show that his income fell ten little under Rs. 5,000 or less

than half what it was in 1888 and 1889, and his day books shew that he only appeared in 92 cases as against 305 in 1889, also that he was constantly ill in that year. It is proved (the evidence of Imamdin and Mam Khan, witnesses 52 and 53, plaintiff, and plaintiff's admission to Dr Cunningham) that he had a fall from his horse while riding and the entry of 2nd April would appear to be connected with that fall. It is stated he was ill from pain in the eyes. The word "chashm" (Persian for eyes) appears to have been tampered with and may originally have been 'sir' (head). The date of the accident corresponds with that given by Imamdin (witness No 52, plaintiff). This witness also admits that plaintiff suffered from fever in June and July. The defendant's evidence about plaintiff's illness such as "Zaf dimagh" (brain weakness), I do not much trust to. The evidence is not at all of a reliable character.

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As for plaintiff's health in 1891. He is shown to have been conducting important cases (notably the Suket ones) and others, and there is a heap of reliable testimony to the fact that he conducted his cases with energy and his usual ability. His evidence consists of the depositions of all sorts and conditions of men, and I believe on the whole true. Whether his fee books and day-books for this year are reliable is doubtful, for it was the last year he worked and he has had ample time to "cook" them. He was given ample and sufficient time to obtain corroborative evidence from the records in the Hoshwari and other district offices, but failed to produce it. This in itself is suspicious.

I now come to the question of the plaintiff's health subsequent to the accident on 5th December 1891. Dr Perry's evidence and that of Amir Shah and Dalip Singh is, I consider, when corroborated by many other native gentlemen, conclusive. For months after the accident the plaintiff was undoubtedly suffering and ill, but it appears to me clear that the plaintiff has (within the last year) made himself out to be far worse than he really is. The medical evidence, is conflicting as to his present condition and there is, to my mind, reliable evidence, such as Farnon (witness 26, defendant), to show that he is not nearly so bad as he would have people believe. Ghulam Hussain (witness 20, defendant) is clearly lying and unworthy of credit, but Farnon appears to me to be truthful. It is clear from the evidence of Dr Cunningham that the plaintiff has got a crippled left hand and arm, and from that of Drs Evans and Drury that he is not

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in a naturally good state of health Defendant's Counsel tries to establish that the plaintiff's condition may be the result of his fall from the horse in April 1890, but I consider, as I have before stated that there is not sufficient ground for holding this to be a fact or even probable, and plaintiff's fairly good state of health in 1891 militates against this theory

I now come to the question of the lessening of plaintiff's income There can be no doubt that plaintiff has regained, if he ever lost, his mental health He is shown to be able to write perfectly coherent letters and to be able to talk sensibly and properly The evidence as to his inability to apply himself to work rests on hearsay, that is, his own statements, and he has failed to prove these by himself giving evidence to them His own letter (Exhibit 22) contradicts his assertions, and I do not believe them to be true His conversations with Dr Cunningham also show that his brain is practically unimpaired Defendant's Counsel states that plaintiff's evidence and defence in the pre-emption case in Hoshiarpur will be made ground by the Chief Court for disbarring him, but we have no reasons for believing this to be the case Nothing has been done yet in the matter His ordinary average income would be about Rs 7,000 a year, and he could probably earn Rs 5,000 a year now if he were to resume practice so his income might be reduced Rs 2,000 a year by his accident No falling off in the income of his landed property could in any way be attributed to his unimpaired state of mind He has still full power of managing that property, and its income does not really depend on his personal exertions and health There is nothing to show that the plaintiff is unable to properly conduct his religious affairs I see no reason why he should not carry them on as before, or why he is entitled to compensation under this head As to plaintiff's age, we have no means of accurately fixing it He says he is 46 years old, and defendant that he is 50 years of age Some of the plaintiff's witnesses corroborate his statement, but give no grounds for their opinion So their mere assertions go for little The defendant states that plaintiff is 50 years of age, and Dr Cunningham, who as a medical officer should be able to judge fairly well, corroborates this, and so does Dr Charles in his certificate, so, I think we must accept this last estimate in preference to plaintiff's and his witnesses' assertions

With regard to the claim for Rs 5,000 for medical attendance incurred and to be incurred in the future Plaintiff's evidence

establishes the expenditure of only about Rs 1150 up to the present time, and this includes the Rs 500 paid to Dr Perry and Rs 200 to Drs Evans and Diary for their professional opinions. There is nothing to show that plaintiff would spend any large sum in the future on medical attendance, so Rs 5000 is an undoubtedly excessive estimate.

Considering all the circumstances of the case generally, my opinion is that a sum of Rs 20,000 or Rs 25,000 would be ample and equitable compensation to award to the plaintiff should he be considered entitled to anything.

I have now disposed of all the points necessary for the decision of the case, and find, for reasons given, that the plaintiff is not entitled to recover anything by way of compensation and damages from the defendant on account of the alleged injuries received on the 5th December 1891: so I dismiss the case and claim and order the plaintiff to pay the defendant's costs in this Court.

On appeal,* the Chief Court of the Punjab delivered the following judgment —

ROZ, J.—This is a claim for damages for injuries alleged to have been sustained by the plaintiff, a Pleader of the Chief Court, of between forty five and fifty years of age, in a collision which occurred on the North Western Railway between 1 and 2 A.M. on December 5th, 1891.

It is admitted that the collision occurred through the negligence of the defendant's servants, and that plaintiff was a passenger by one of the colliding trains, the Down one running from Lahore, and was at the time of the collision sleeping or lying in the upper berth of the rear compartment of a second class carriage, but it is denied that plaintiff was injured by the collision.

Owing, no doubt, to the magnitude of the damages claimed, the record in the case is a very voluminous one, and much time has been occupied in the hearing, both of the original suit and of the appeal. But the points for decision are, as noted by the Lower Court, simply these—(1) was plaintiff injured by the collision, and (2) if so, to what damages is he entitled?

The plaintiff who has not offered himself as a witness, a fact from which the Lower Court has drawn inferences unfavourable to his case, states in his plaint that he "got such a severe shock that he got at once a very painful and dangerous blow on the

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back of the neck. Below the neck the plaintiff's whole body became motionless and powerless. The plaintiff's health and strength was lost."

The evidence in support of this statement consist of (1) medical and other evidence that plaintiff was suffering severely from spinal concussion immediately after the collision. (2) the evidence of Jaishi Ram, another Chief Court pleader, the only survivor, besides the plaintiff, of the three passengers who were in plaintiff's compartment at the time of the collision.

The Lower Court has given eight reasons for rejecting the evidence of Jaishi Ram. On the medical evidence it finds that plaintiff has in fact received serious injuries, and it rejects the suggestions put forward by the defence that plaintiff has been shamming throughout, or that he shammed at first and was injured by a fall as he was being helped down from his berth by Jaishi Ram and Dasoundhi Ram (the other passenger since dead) or that the injuries were due to a fall from a horse in 1890. The Court puts forward as a conjecture of its own that plaintiff, though not injured or even pretending to have been injured by the collision, may have attempted to get down from his berth and missed his footing, it admits that there is no evidence to show this, and that no one has even suggested it. But the finding is merely that plaintiff has failed to prove that he was injured by the collision, the reason for this finding being that the nature of the collision as proved by the evidence was not such as could have occasioned plaintiff's injuries, there was nothing on or near the berth which could have occasioned the injury to plaintiff's neck, and if it had been caused by the plaintiff being dashed against the end of the compartment, he would have had a wound on the head.

It is contended for plaintiff on appeal that there is no ground for discrediting the evidence of Jaishi Ram. The Court finding as a fact that plaintiff was found injured almost immediately after the collision (he was first examined by Doctor Perry on 9th December, but he was soon by others before this), the only reasonable inference is that the injuries were due to the collision. It is denied that it has been conclusively established that there was nothing on or near plaintiff's berth which could have caused the injury to the neck, but it is urged that, even if this were so it would be perfectly possible that the mere jar of the collision caused severe spinal concussion, and that, if this were so, the

fact that further injury, including that to the neck, may have been caused by the fall as plaintiff was being helped down from his berth, would not bar or diminish his claim for damages.

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For the defence Mr Henderson has very properly and candidly admitted that he sees no reason for discrediting Jai-shi Ram, and he is willing to accept it is proved, not that plaintiff was in fact injured as he lay on the upper berth, but that he *said* he was. He also abandons the theory that plaintiff has been shamming throughout, and admits that he has in fact been suffering from serious spinal injury, he also admits that, if this injury originated in a shock received by plaintiff owing to the collision, the defendant would be responsible, even though a subsequent fall, even if due to carelessness or awkwardness on the part of the plaintiff or his friends, may have aggravated the injuries. But he denies that plaintiff has proved that he received his injuries in the manner alleged in his plaint, and he goes further and maintains that it is proved affirmatively that plaintiff could not so have received them.

It being thus admitted that plaintiff has in fact received injuries, the only question on the first of the two points for our decision is when and how did he receive them? Doctor Perry, who examined the plaintiff on 9th December, i.e., four days after the collision, is quite convinced that he had received them by that time, and it is almost inconceivable that plaintiff could have been shamming on 9th December, and yet have received real injuries at a later stage. It is also certain that plaintiff, from the time of the collision till he was seen by Doctor Perry on 9th December, acted as he would have done had he been really injured. The two medical men, Honorary Surgeon Crossley and Assistant Surgeon Dalip Singh, who saw him in the railway carriage, did not indeed make any complete examination of him, but they both believed his statement as to his injuries, and Dalip Singh says he found his temperature to be 102°. It appears to us quite impossible that the plaintiff was shamming in the carriage, and yet received real injuries before he was seen by Doctor Perry on 9th December. We think therefore it must be taken as proved that plaintiff received his injuries whilst in the carriage, and, as already stated, this is the finding of the Lower Court. How then did he receive them? The theory suggested by the Lower Court is abandoned, and it is admitted by the defence that Jai-shi Ram's evidence may be accepted that the plaintiff, whilst lying

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on his berth, declared that he was injured, and got his friends to help him down, and fell or slipped, as they were doing this. The question of how plaintiff received his injuries therefore narrows itself to this: did he receive at least some of them in the collision, or was he simply shamming as he lay on his berth, and received his injuries from the subsequent fall or slip alone?

Now it may be quite possible, though not very probable, that the plaintiff should have conceived and have put into immediate execution a plan to defraud the railway at the very moment the collision occurred, and before any one in the carriage was aware of the extent of the damage. But if this might have been the case, the coincidence of plaintiff's resolve to sham paralysis being immediately succeeded by an accident which produced real paralysis would be so extraordinary that we should not be justified in accepting this supposition unless it were proved most clearly that the plaintiff *could not* have received his injuries as he lay on his berth.

It is claimed for the defence that this has been proved, that all the assumptions of facts connected with the circumstances of the collision put forward by the learned counsel for the defence in his question in cross examination to the medical witness has been established by abundant evidence on the record, and that the answers of the medical witnesses show that the plaintiff could not have received his injuries whilst lying on his berth.

Now, many of the important facts contained in the question referred to, such as the speed of the train, the amount of, or absence of, injury to the carriages and to other passengers, the fact that the uninjured portion of the train was not derailed but merely sent backwards at a quick pace for two hundred yards, are undoubtedly proved. There is also at least nothing to show that there was any projection or hard substance on or near plaintiff's berth which could have come in contact with plaintiff's neck and have caused the bruise on it, but even taking all the assumptions contained in the question to be proved, Dr. Perry was not prepared to say that it was impossible that the plaintiff might not have received a severe spinal injury merely by lateral motion, and if the plaintiff had been lying on his side, with his back near the ventilators of the carriage, Dr. Perry considers that even the bruise on the neck might have been caused by his being thrown against the side.

Dr Drury, on the same assumption as to the facts, could not account for (1) plaintiff receiving so severe a spinal injury in the cervical regions as alleged (2) the bruise on the back of the neck

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Dr Evans, the other medical witness, does not appear to have been questioned on this point, but only as to plaintiff's symptoms when examined in July 1893. Now the point appears to us to be not whether plaintiff could have received the injuries alleged in the plaint, as he was lying on his berth, but whether he could have received any spinal injury at all? If he could and did then we should consider him entitled to damages, even though the injuries had been mainly due to, and the bruise on the neck had been caused by, the subsequent fall or slip and the plaintiff had either by a *bona fide* mistake or even by a wilful falsehood alleged that the whole of the injuries were received as he lay on his berth. As already noted, the defence does not dispute this proposition, or raise any plea of contributory negligence.

We think that on the facts and evidence just set forth we should certainly not be justified in saying that it is impossible that plaintiff could have received any serious spinal injury as he lay on his berth, and we therefore hold, for the reasons given in an earlier part of this judgment, that the proper inference is that he did receive them there, and that he is consequently entitled to damages.

As to the amount, the sum claimed is obviously preposterous. The Lower Court was of opinion that if damages were decreed at all Rs 20,000 or Rs 25,000 would be a reasonable sum. The amount offered by Government without prejudice was Rs 10,000. It is quite impossible to work out arithmetically what is due to plaintiff. It is not possible even to say what is the exact extent of plaintiff's injuries, still less can it be said what will be the effect of these injuries on plaintiff's future income, or what compensation should have been made to him for personal suffering and the expenses of his illness. But we have no hesitation in concurring with the Lower Court in its finding that plaintiff has wilfully exaggerated his injuries, and has probably invented some of his symptoms. All that we can do is to consider all the circumstances of the case and award in a lump sum what we consider fair. We do not think that plaintiff is entitled to more than Rs 20,000, and we award him this with costs in proportion. We do not direct that he should pay defendant any costs on the

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portion of the claim which has been dismissed, for he has succeeded on the main issue, viz, his claim to any damages at all and defendant's expenses in resisting the suit as had have been no greater than this would have been if Rs 20,000 only had been claimed. Plaintiff has also had to pay in both Courts the full stamp on his whole claim.

It only remains for us to notice briefly three points raised for the defence in this Court in supporting the decree on grounds decided against the defence in the Lower Court. These are (1) that the service of the notice on defendant *by post* was legally insufficient, (2) that the plaint was not properly verified, (3) that Dr Charles should have been called as a witness.

The first point has already been fully considered and decided by this Court in another case, and we entirely concur in the decision that service through the post is legally sufficient.

On the second point, it is enough to say that we concur with the Lower Court in its interlocutory order overruling the objection.

On the third point it is not correct to say that the Lower Court refused to call Dr Charles because it had admitted his report, and then in delivering the judgment, rejected the report as inadmissible in evidence. The Court did not reject the report as inadmissible, but merely declined to rely on it, in the face of the other medical evidence. Whether a medical man appointed by a Court to make an examination under Section 86 of Act IX of 1890 ought to be called as a witness by the Court or not need not now be discussed. The defence has admitted that at the time Dr Charles made his examination the plaintiff was in fact suffering from real spinal injury, and the only point on which Dr Charles could have given evidence as to the reality of plaintiff's symptoms at the time of examination. We set aside the decree of the Lower Court dismissing plaintiff's suit and give plaintiff a decree for Rs 20,000 with costs in proportion in both Courts.

Under the provision of Section 129, Civil Procedure Code, it is directed that the above decree be satisfied within three months from its date.

JUDGMENT J.—I desire to add only a very few words. That the plaintiff should have pretended to Jaiish Ram and Disha Ram that he was unable to move when he really received no injury, and immediately afterwards should have been let fall by

these two persons in taking him down from his berth, and then received the very injuries he was feigning, would be so marvellous that I am quite unable to believe it. The only alternative would be that Jaishi Ram's evidence is untrue, but I think the truth of his evidence is corroborated by all the circumstances of the case. If plaintiff was only hurt in getting down or being helped down from his berth and never alleged before leaving it that he was unable to move, it is incredible that he and Jaishi Ram would have combined to concoct a false story and conceal the real cause of plaintiff's hurt at a time when plaintiff really had received serious injury when they did not know whether the injury might not be fatal, and when they were still surrounded by all the scenes and terrors of the accident, the supposition would be most unnatural. It is equally improbable that, if plaintiff received no injury at all in the carriage, he would have feigned at once that he had, and that the very injury he was feigning would have come upon him without any cause whatever before he was examined by Dr Perry, for there is no doubt that when he was examined by Dr Perry on the 9th December he was really suffering from concussion of the spine.

A great deal of evidence was produced to show that there was nothing in the carriage in which plaintiff was travelling which could have caused the bruise on his neck, and much time was taken before us in going over this evidence to prove that the carriage was or was not the one which the District Judge found it to be.

All this is, I think, not of much importance. The spinal concussion may have been caused without any bruise on the neck, and the bruise on the neck may have been caused by the fall in lifting plaintiff down from the berth, and not by the collision. The collision must have been a most violent one, as upwards of thirty lives were lost. Dr Perry says mere lateral motion in an accident of this description would be sufficient to cause concussion of the spine, and I have no doubt that this is correct. It therefore does not matter whether there was any projection or substance near plaintiff's berth or not which could have caused the bruise on his neck. I think there must have been lateral motion, and I see nothing unlikely in plaintiff having received concussion of the spine at the moment of the shock of the collision, and before he left his berth, although the carriage remained uninjured.

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ORIGINAL CIVIL.

Before Mr. Justice B. Tyabji.

BROMLEY (PLAINTIFF),

v.

THE G I P RAILWAY COMPANY (DEFENDANTS) *

1899
March,
14 and 16

Railway Company—Negligence—Negligence of Railway Company in leaving door of railway carriage open or unfastened—Hurt caused to passenger while trying to secure door

Leaving the door of a railway carriage open or unfastened amounts to negligence on the part of a Railway Company, and the Company is liable for any injury caused thereby to a passenger

If any inconvenience or danger is caused by the negligence of the Company, a passenger may lawfully attempt to get rid of such inconvenience or danger provided that in doing so he runs no obvious risk proportionate to the inconvenience or danger, and is not himself guilty of any negligence and, if in such attempt he is injured, the Company is liable in damages

The door of a railway carriage attached to a train running from Poona to Bombay was left open or unfastened when the train left the Khandala Station. The plaintiff was then asleep in the carriage. He subsequently awoke when the train was passing through a tunnel and found that the whole of the door which opened outwards, had been torn away from its hinges, except the upper part or sunshade, which was flapping backwards and forwards against the side of the tunnel and the door post of the carriage. In attempting to secure it, the top of the plaintiff's finger was torn away and the bone of one of his fingers fractured

Held, that the injuries were caused by the negligence of the Railway Company and that the plaintiff was entitled to damages

Suit to recover damages for injuries caused to plaintiff by the alleged negligence of the defendants

On the night of the 13th October, 1898, the plaintiff travelled from Poona to Bombay in a first class carriage on the defendants' railway. The train left Poona at 9-30 o'clock P.M. At one of the intermediate stations (Khandala) one of the passengers in

the same carriage alighted and the carriage door was left open. The plaintiff was asleep in the carriage, and the train left the station with the door open. This door opened outwards and towards the rear of the train. The plaintiff stated that shortly after the train left the station he awoke and found that the train had entered a tunnel and that the door was broken off, and "the sunshade or the remaining portion of the said door continued to frequently strike the side of the tunnel with such violence as to endanger the safety of the carriage." The plaintiff further stated —

'The plaintiff endeavoured to secure the said sunshade or broken portion and to close the same but in so doing the third finger of the plaintiff's right hand got jammed in the broken portion of the said door, the whole top of his said finger being torn away and the bone of his finger fractured.

He claimed Rs. 4,000 as damages.

The defendants (*inter alia*) pleaded that there was no obligation or duty cast on the plaintiff to endeavour to secure the said sunshade, nor was there any necessity for him to do so, that his attempting to do so was a voluntary act, and that, therefore, they were not liable. They further pleaded that the plaintiff's injuries were caused by his own negligence, and that the negligence of the defendants (if any) was not the proximate cause of the injuries to the plaintiff.

Macpherson and Scott, for Plaintiff —The defendants' servants were negligent in leaving the door of the carriage open. The door was carried away when the train entered the tunnel, but the broken sunshade was left, and was an inconvenience to the plaintiff, and a danger to the carriage, and the plaintiff was justified in endeavouring to fasten it, so as to remedy the inconvenience and avoid the danger. In doing so he was injured and he is entitled to damages—*Gee v Metropolitan Railway Company*,⁽¹⁾ *Metropolitan Railway Company v Jackson*,⁽²⁾ *Richards v Great Eastern Railway Company*,⁽³⁾ *Adams v Lancashire and Yorkshire Railway Company*,⁽⁴⁾ *Robson v North Eastern Railway Company*,⁽⁵⁾ *Lee v. Nixey* ⁽⁶⁾

Lang (Advocate General) and *Louides*, for Defendants —The plaintiff must prove negligence—*Wakelin v L and S W. Railway Company*,⁽⁷⁾ *Engelhart v Farrant and Co* ⁽⁸⁾ The plaintiff

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(1) (1878) L R 8 Q B 161 at 1 179

(3) (1873) 23 L T (N S) 711

(5) (1875) 1 R 10 Q B, 271

(7) (1886) 12 Ap Ca 41

(7) (1877) 3 Ap Ca, 103 p 205 212

(8) (1869) L R, 4 C P, 739.

(6) (1890) 63 L T 295

(8) (1897) 1 Q B, 240

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does not allege there was any danger or inconvenience to himself. If there was no doubt, he might try to remedy it—*Robson v North Eastern Railway Company*, (1) *Lee v Nizey* (2). The plaintiff's act was reckless, it was his reckless act that caused the injuries.

TYABJI, J.—The suit is filed by the plaintiff to recover the sum of Rs 4,600 as damages sustained by the plaintiff by reason of the injuries caused to the third finger of the plaintiff's right hand by the alleged negligence of the company. The facts of the case may be shortly summarised as follows—

The plaintiff is a Dental Surgeon carrying on business in Poona and Bombay in co partnership with Mr Charles Efford the Poona branch being usually conducted by the plaintiff and the Bombay branch by his partner, Mr Efford. On the 13th October 1898, the plaintiff left Poona for Bombay by 9 30 P M train. He travelled in a first class carriage, and in the same compartment there was Mr Saunders, an Assistant in Treacher and Co. Mr Saunders alighted at the Khandala Station and the door of the compartment was left open. This door was not shut or fastened by any of the servants of the Railway Company and appears to have been broken or torn away from the carriage just before the accident in question happened. The circumstances leading up to the accident are described by the plaintiff in his evidence in the following words. He says—

I remember the 13th October last. I travelled from Poona to Bombay by the 9 30 P M train in a first class compartment. One gentleman Mr Saunders of Treacher and Co was with me. I went to sleep. I was asleep when the train arrived at Khandala. I was not conscious of Mr Saunders leaving the carriage. I awoke with a start and I saw the door was gone except the sunshade. The green part of the sunshade at the top. I saw it from the shaded gas light in the carriage flapping about. It seemed to be flapping against something—banging is the appropriate word. I could not say what it was banging against—banging to the door post and back. I got up and as the door came to I went up to the door and as the piece of door came towards me I took hold of it. I mean the door was coming towards me. When I seized the door it nipped my finger. I cannot say how the door nipped my finger. It was all done of a sudden. I find the time from leaving Khandala to the place where we stopped before the catch siding is about four and a half minutes. I felt the door nip me. It was not a pleasant feeling. I was in great pain not at the moment but after. The pain gradually increased until I got to Karjat. After I was nipped I let go. It was done in a second. I do not

know whether I got hold of the door. I got out at the reversing station and told the guard and asked him for water. He brought a pail of water. The guard tied up the door with his pocket handkerchief to prevent its swinging open. I then went on to Karjat. The door was fastened up with wire at Karjat.

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In cross-examination, the plaintiff said —

“When I went to sleep, one of us put the shade over the lamp in the carriage. When the accident happened to my hand I cannot remember whether the shade was on or not. The carriage I was in was a carriage with two compartments and a bath room in the middle. There was a seat at each side of the carriage and one at the end. The door was at the end of the carriage. The door that flew open was on the left hand side going to Bombay. Facing the engine it was on the left hand side. I was sleeping on a seat at the left hand side of the carriage with my feet towards where the door was. After I was startled from my sleep I walked up, and seeing that the door was gone, and the piece was flapping I got hold of it. I cannot say how long it took me to get on my legs. It was all done immediately. The train was moving when I tried to catch the door. I should not like to say I was fully awake before I was pinched. I think I must have got hold of it. I think I did and it pinched my finger. It was dark in the tunnel. I distinctly saw what I was going to catch as it came to. I tried to catch it as it was coming towards me. Immediately afterwards the train slowed down and stopped in the tunnel directly afterwards. The train has to stop before you go to the reversing station. I knew we had to stop there. I imagine my finger was hurt in the middle of the tunnel. I think it was hundred yards between the accident and where we stopped. When I woke up I did not know we were in the tunnel. I had no time to think. It was all done in a moment. I cannot remember whether it was a hot or cold night. I cannot say whether the windows were open then. The door opened outwards. The hinge of the door is furthest from the engine. * * * I do not know how many boards of the sunshade were gone. The whole of the door was gone except two pieces hanging. There was a piece of iron hanging at each end. Some of the boards were gone. I think they were the lower ones. I think some of the boards were gone from the bottom. I cannot say whether the part left actually struck the tunnel. The door had gone a long time. When I got up there was only the sunshade left. After the door had gone, the noise continued. The noise continued after my finger was injured. I cannot say if the sunshade hit the tunnel after I received my injuries. But I heard a noise of its hitting. The noise was caused through the remnants of the door hitting against the tunnel and flapping against the carriage.”

The above evidence, which is entirely uncontradicted and was given in a fair and ingenuous manner seems to me to establish the following facts —

(1) That the door was broken away in consequence of its having been left open, or not fastened, at the Khindala Station.

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(2) That a sense of great present discomfort and a vague feeling of possible or impending danger crossed Mr Bromley's mind when he was startled by the noise, and saw the door gone

(3) That it was with a view to get rid of this inconvenience and real or supposed danger that the plaintiff attempted to seize and secure the sunshade on the remnant of the door

(4) That it was in consequence of this attempt that he was injured

The question for determination, then, is—whether the company is liable to the plaintiff under the above circumstances?

Now a series of cases has laid it down, and indeed it was not disputed before me, that it is the duty of the Railway Company to see that the doors of the carriages are properly shut and fastened before the train leaves any particular station (See *Gee v Metropolitan Railway Company*,⁽¹⁾ *Metropolitan Railway Company v Jackson*,⁽²⁾ *Richards v Great Eastern Railway Company*,⁽³⁾ and *Adams v Lancashire and Yorkshire Railway Company* ⁽⁴⁾)

The above cases clearly establish that leaving the door open or unfastened amounts to negligence on the part of the Railway Company, for the consequence of which the Company is liable to the passengers. These cases and also the cases of *Robson v North Eastern Railway Company*,⁽⁵⁾ *Lee v Nissey*,⁽⁶⁾ *Wakelin v L and S W Railway Company*,⁽⁷⁾ and *Engelhart v Farrant and Co*,⁽⁸⁾ seem to me to establish the legal proposition that if any inconvenience or danger is caused by the negligence of the Company, a passenger may lawfully attempt to get rid of any such inconvenience or danger, provided that in doing so he runs no obvious risk disproportionate to the inconvenience or danger, and is not himself guilty of any negligence, and that if in such attempt he is injured, the Company is liable in damages. The *onus* of proving the Company's negligence of course lies on the plaintiff, but the *onus* of proving the passenger's negligence lies on the defendants.

The first question, then, which I have to consider is—was there any sufficient inconvenience or danger to the plaintiff caused by the breaking away of the door or the banging of the sunshade

(1) (1873) L R 8 Q B 161

(3) (1873) 23 L T, (N S), 711

(5) (1875) L R, 10 Q B 271

(7) (1880) 12 Ap Ca, 41

(2) (1877) 3 Ap Ca, 193

(4) (1869) L R 4 C P, 733

(6) (1880) 63 L T 253

(8) (1897) 1 Q B, 240

which he was entitled to get rid of? Now Mr Bromley's evidence merely states the facts. He either did not or could not analyse his own motives and feelings before he attempted to secure the sunshade. He is evidently not of an analytical turn of mind and had great difficulty in placing before the Court clearly the reasons which must have influenced his conduct. It seems to me however, a fair inference from his evidence and conduct that he must have apprehended a great inconvenience from the noise caused by the hanging of the sunshade and a possible imminent danger for its striking against the tunnel or the side of the carriage itself. This state of things was admittedly produced by the defendants' negligence in not fastening the door at Khandala. It follows that Mr Bromley was *prima facie* justified in attempting to remove this inconvenience and possible danger though the extent and magnitude of it have not been clearly explained to the Court, and were from the very nature of the case incapable of being accurately ascertained or gauged at the time. Did he, then run a risk disproportionate to the inconvenience and danger he was trying to remedy? What he attempted to do was to seize the flapping or banging sunshade in order to secure it in some way. He evidently did not consider there was any danger in doing so and I am unable to see that there was any obvious danger in what he was doing. Was he then negligent in the mode in which he was carrying out his intentions? I cannot see how he could have attempted to catch hold of the sunshade otherwise than as he did. He had no other means to lay hold of it than his own hands and he used them so far as I can see in the ordinary way without any sense of danger.

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Were there, then any surrounding circumstances which made his act an act of negligence? It is true that the lamps were shaded and it was dark in the tunnel but Mr Bromley says and I see no reason to doubt it that he could distinctly see what he was attempting to catch. As to his statement that he would not like to say he was fully awake before he was pinched I think it must not be taken too literally against him. This statement was evidently not meant seriously and the words were put into his mouth in cross examination and were assented to by him in a humorous rather than a serious spirit. The only other circumstance relied on by the defendants is that Mr Bromley knew the ground well and that if he had thought for a moment he would have seen that he was near the reversing station and that he ought to have waited

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till the train stopped, instead of trying to secure the sunshade himself. There is, no doubt, much force in this argument. Mr Bromley admits that he acted on the spur of the moment and that he had no time to think, and that the whole thing was done suddenly and without stopping to consider the bearings of all the surrounding circumstances. I am, however, of opinion that even after giving the fullest benefit to the defendants of Mr Bromley's admissions, it would not be just to attribute any negligence to Mr Bromley for what he did. It seems to me that considerable allowance must be made for a passenger who is suddenly startled from his sleep, with the door of the carriage smashed, and the remnant of the sunshade making a hideous noise (such as it made before me when produced in Court) and possibly striking against the tunnel. Whether there was any great actual or real danger in all this, I am unable to say. There is no evidence on the point, and I am left to draw my own inferences aided by nothing better than my own experience or imagination, but that Mr Bromley must have felt a sense of possible, though perhaps a vague and undefined, danger, I cannot for a moment doubt.

Under these circumstances would it be reasonable to hold that Mr Bromley ought to have remained quiet and done nothing till he got to the reversing station? As a matter of fact he did not know where he was. He could no doubt, by a process of reasoning have discovered that he was near the reversing station. But under the circumstances was it negligent of him to act immediately in the way he did? In other words, was there anything unreasonable in his immediately trying to avert a great present inconvenience from the hideous noise and an imminent and possible danger from the sunshade striking against the tunnel or even against the side of the carriage? I am fully persuaded that nine persons out of ten would, under the same circumstances, have done precisely what Mr Bromley attempted to do. On the whole, therefore, I have come to the conclusion, though after much hesitation and doubt that the injury to the plaintiff's hand was connected with and is the result of the defendants' negligence in not fastening the door at Khandala, and that the defendants are liable for the injuries according to the principles laid down in the authorities cited above.

As to the question of damages, I accept the plaintiff's evidence in the main, and I think that under the circumstances Rs 2000 for loss of income and medical charges and Rs 2,000 for personal

suffering would not be unreasonable I accordingly award Bromley
Rs 4,000 in all for damages, and the costs of the suit G I P Ry

Attorneys for the Plaintiff — *Messrs Smetham, Bland and Noble.*

Attorneys for the Defendants — *Messrs Little and Co*

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ORIGINAL CIVIL

Before Mr Justice Beaman

DULLABHJI SIKHIDAS SANGHANI (PLAINTIFF),

v

THE GREAT INDIAN PENINSULA RAILWAY
COMPANY (DEFENDANTS) *

ANNA RANU (PLAINTIFF),

v

THE GREAT INDIAN PENINSULA RAILWAY
COMPANY (DEFENDANTS) †

Negligence of Railway Company—Breach of statutory duty—Injury to passengers with arm outside carriage window—contributory negligence—Contractual obligations 1909 August 29

The fact that a door on a moving train is open is evidence, but not conclusive proof, of negligence on the part of the Railway Company.

Where there is a statutory obligation any breach of it which causes an accident is conclusive against the defendant apart from special proof of negligence. But the breach must in itself be the cause of the accident and the rule does not extend so far as to exclude the defence of contributory negligence.

In view of the contractual relations between the parties a Railway Company is not liable for injuries caused to any part of a passenger which is outside the carriage in which he is travelling provided that such injuries could not have been received had the passenger remained inside the carriage.

The application of the rule that where there is negligence on both sides the negligence of the person who had the last chance of averting

* Original Suit No 706 of 1908

† Original Suit No 751 of 1908

Bromley
G I P Ry

till the train stopped, instead of trying to scoure the sunshade himself. There is, no doubt, much force in this argument. Mr Bromley admits that he acted on the spur of the moment, and that he had no time to think, and that the whole thing was done suddenly and without stopping to consider the hearings of all the surrounding circumstances. I am, however, of opinion that even after giving the fullest benefit to the defendants of Mr Bromley's admissions, it would not be just to attribute any negligence to Mr Bromley for what he did. It seems to me that considerable allowance must be made for a passenger who is suddenly startled from his sleep, with the door of the carriage smashed, and the remnant of the sunshade making a hideous noise (such as it made before me when produced in Court) and possibly striking against the tunnel. Whether there was any great actual or real danger in all this, I am unable to say. There is no evidence on the point, and I am left to draw my own inferences aided by nothing better than my own experience or imagination, but that Mr Bromley must have felt a sense of possible, though perhaps a vague and undefined, danger, I cannot for a moment doubt.

Under these circumstances would it be reasonable to hold that Mr Bromley ought to have remained quiet and done nothing till he got to the reversing station? As a matter of fact he did not know where he was. He could, no doubt, by a process of reasoning have discovered that he was near the reversing station. But under the circumstances was it negligent of him to act immediately in the way he did? In other words, was there anything unreasonable in his immediately trying to avert a great present inconvenience from the hideous noise and an imminent and possible danger from the sunshade striking against the tunnel or even against the side of the carriage? I am fully persuaded that nine persons out of ten would, under the same circumstances, have done precisely what Mr Bromley attempted to do. On the whole, therefore, I have come to the conclusion, though after much hesitation and doubt, that the injury to the plaintiff's hand was connected with and is the result of the defendants' negligence in not fastening the door at Khandala, and that the defendants are liable for the injuries according to the principles laid down in the authorities cited above.

As to the question of damages, I accept the plaintiff's evidence in the main, and I think that under the circumstances Rs 2,000 for loss of income and medical charges and Rs 2,000 for personal

suffering would not be unreasonable I accordingly award
Rs 4,000 in all for damages, and the costs of the suit

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Attorneys for the Plaintiff — *Messrs Smetham, Bland and Noble.*

Attorneys for the Defendants — *Messrs Little and Co*

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ANNA RANU (PLAINTIFF),

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THE GREAT INDIAN PENINSULA RAILWAY
COMPANY (DEFENDANTS) †

Negligence of Railway Company—Breach of statutory duty—Injury to passengers with arm outside carriage window—Contributory negligence—Contractual obligations

1909
August 29

The fact that a door on a moving train is open is evidence, but not conclusive proof, of negligence on the part of the Railway Company.

Where there is a statutory obligation any breach of it which causes an accident is conclusive against the defendant apart from special proof of negligence. But the breach must in itself be the cause of the accident and the rule does not extend so far as to exclude the defence of contributory negligence.

In view of the contractual relations between the parties a Railway Company is not liable for injuries caused to any part of a passenger which is outside the carriage in which he is travelling provided that such injuries could not have been received had the passenger remained inside the carriage.

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As to the question of damages, I accept the plaintiff's evidence in the main, and I think that under the circumstances Rs 2,000 for loss of income and medical charges and Rs 2,000 for personal

suffering would not be unreasonable I accordingly award Rs 4,000 in all for damages, and the costs of the suit

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ORIGINAL CIVIL.

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DULLABHJI SIKHIDAS SANGHANI (PLAINTIFF),

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COMPANY (DEFENDANTS) *

ANNA RANU (PLAINTIFF),

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THE GREAT INDIAN PENINSULA RAILWAY
COMPANY (DEFENDANTS).†

Negligence of Railway Company—Breach of statutory duty—Injury to passengers with arm outside carriage window—Contributory negligence—Contractual obligations

1909
August 29.

The fact that a door on a moving train is open is evidence, but not conclusive proof, of negligence on the part of the Railway Company.

Where there is a statutory obligation any breach of it which causes an accident is conclusive against the defendant apart from special proof of negligence. But the breach must in itself be the cause of the accident, and the rule does not extend so far as to exclude the defence of contributory negligence.

In view of the contractual relations between the parties, a Railway Company is not liable for injuries caused to any part of a passenger which is outside the carriage in which he is travelling, provided that such injuries could not have been received had the passenger remained inside the carriage.

The application of the rule that where there is negligence on both sides, the negligence of the person who had the last chance of averting

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† Original Suit No 751 of 1908

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the accident is the efficient cause thereof, must be restricted to cases where the danger was apparent to both or at least one of the parties before the accident actually happened

THESE two suits arose out of the same incident. The plaintiffs were passengers in an up local train of the defendant Company proceeding from Mazagaon to Masjid. At a point just before Masjid, a down mail train passed, with the door of one of its compartments open and swinging. The door caught the arms of the plaintiffs which were projecting slightly outside the carriage windows and inflicted severe injuries. As a result these two suits were filed against the Company for damages, and, as they involved the same points of law and of fact, were consolidated and heard together.

The plaintiffs charged the defendant Company with negligence in allowing the door to swing open and further in having infringed the statutory regulations with regard to the dimensions of carriages and of the open way between the tracks.

The defendant Company denied negligence, and alleged that the accident was due solely to the negligence of the plaintiffs in putting their arms outside the windows in spite of notices to the contrary and relied alternatively on the plea of contributor negligence.

It was agreed that the question of liability should first be decided, and that, if necessary, the question of damages should be considered afterwards.

Baptista (with *Joshi*) for the Plaintiff in the first suit, and (with *Kajji*) for the Plaintiff in the second suit.

The open door is evidence of negligence. *Gee v Metropolitan Railway Company*, (1) *Bromley v. The Great Indian Peninsula Railway Company* (2)

The guard neglected his duty. See the general rules published by Government under Section 47 of the Indian Railways Act, and also the Traffic Instructions Book of the Great Indian Peninsula Railway.

The Company has in addition infringed the standard dimensions. The width of the carriages is too great, while the space between the tracks is too small.

In the case of a breach of a statutory duty, the defendant is liable without further proof of negligence *David v Britannic Merthyr Coal Company* (1)

The position of the windows is such that a person in the plaintiff's seat naturally puts his arm out

The notices forbidding leaning out of the windows were in English, a language which very few 3rd class passengers can read. The defendant Company knew the notices were disregarded. Since the accident, an additional bar had been put on the windows.

Robertson (Strangman, Advocate-General, with him) for the defendant Company

The plaintiffs took the risk themselves. It would be a serious responsibility for the Company to have to look after passengers and prevent them leaning out of windows. All the cases show that the Company does not insure its passengers, but is bound only to take reasonable care for their safety, and that only when they remain inside the carriage *Simon v London General Omnibus Company* (2) *Hase v London General Omnibus Company* (3) *Pirie v Caledonian Railway* (4). See also Beven on Negligence, p 988

The leading case on the general responsibility of Railway Companies is *Redhead v Midland Railway Company* (5). See also *The East Indian Railway Company v Kalidas Mukerji*, (6) and *Hanson v Lancashire and Yorkshire Railway Company* (7)

If the plaintiffs had remained wholly inside the carriage, the accident could not have happened. This is therefore most apparent contributory negligence.

As regards standard measurements, we had permission to increase the width of carriages.

There is no connection between the width of the space between the tracks and the width of carriages.

The placing of an additional bar on the windows after the accident is no evidence of negligence. *Hart v Lancashire and Yorkshire Railway Company* (8)

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(1) (1909) 2 K B, 147

(3) (1907) 23 T L R 616

(5) (1869) L R 4 Q B 379

(7) (1872) 20 W R 217

(2) (1907) 23 T L R 463

(4) (1907) 17 Rett 1165

(6) (1901) 28 I L R Cal 401

(8) (1862) 21 L T N S 61

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(1) (1873) L R 2 Q B, 161. (2) (1899) I L R 24 Bom., 1.

In the case of a breach of a statutory duty, the defendant is liable without further proof of negligence *David v Britannic Merthyr Coal Company* (1)

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(3) (1907) 23 T L R 616

(5) (1869) L R 4 Q B 379

(7) (1872) 20 W R 207

(2) (1907) 23 T L R 463

(4) (1907) 17 Rott o 1165

(6) (1901) 28 I L R Cal 401

(8) (1863) 21 L T N S 61

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Evidence shows that the guard did actually lock the door, so that the presumption of negligence is rebutted

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There is no case similar to this in England, but in America the case of *Todd v Old Colony, etc., Railroad Co.* (1) in the Massachusetts Court is wholly in my favour

Baptista in reply —

True the Railway Company does not insure, but it must exercise great care. It is liable for the smallest negligence, though not for unforeseen accidents. For the degree of care to be taken, see *MacNamara on Carriers*, p 577, and *Beven on Negligence*, p 33

This case is of course distinguishable from *McCauley v Furness Railway Company* (2) see also *Thatcher v Great Western Railway Company* (3)

With reference to the standard dimensions, the Company ought to have widened the centre way of the track before building wider carriages. The circulars relied on as sanctioning the increased width of carriages do not really do so, as the centre way was not widened in proportion. The Company's construction of the circulars leads to absurdity.

BEAMAN, J — These are two consolidated suits by two third class passengers on the defendant Company's train, for damages. The plaintiffs complain of injuries received and attribute them to the defendants' negligence. The defendants deny negligence in fact and further plead that if there was negligence on the part there was contributory negligence on the plaintiffs' part disentitling them to recover.

The facts which are virtually undisputed are that the plaintiffs were travelling by the 1.30 local up train from Matunga to Masjid on the 22nd March 1908. A short way before Masjid station between Mazagran and Masjid the down Nagpur mail passed at high speed. A door of one of the compartments on that train was open and swinging. It caught the projecting limbs of the plaintiffs inflicting very serious injuries. The first question I am to decide is the question of liability. As to the second plaintiff, the defendant contends that he had opened the door and was standing with his arm on the outside sill. About

(1) 89 Mass 207

(2) (1872) L.R. 8 Q.B. 57

(3) (1893) 10 T.L.R. 13

the position of the first plaintiff there is virtually no dispute. He was sitting with his back to the engine on a window seat, with his arm resting on the sill. The upper part of the arm naturally projected a little and just before the accident he was turning to the window to spit which may have caused the arm to project a little further. But whether it was five or seven inches outside the window appears to me to be of no consequence. The second plaintiff makes a like case for himself. And again the extent to which the limb was outside the window seems unimportant, though it might be important for the defendant to show that he had opened the door while the train was on the track and not in a station and so voluntarily exposed himself to an unusual risk.

The defendant Company denies first, that it was in any way guilty of negligence.

I had better therefore deal with that contention. If it be found in the defendant's favour there is an end of the case. The defendant alleges that before the Nagpur down mail left Victoria Terminus the guard in charge of the train, went down its whole length closing the doors. It is to be observed that while the train lay at the platform the doors on the platform side were the doors which became the off side doors as soon as the train was on the open track. There is a statutory obligation on the Company to close all doors. This they say they did. They go further and point to their own rules by which guards are ordered not only to close but lock all doors on the off side. Kinsley, the guard in charge of the Mail, swears that he entered the carriage to which the door which caused the injuries belongs. It was a compartment reserved for ladies. It was unoccupied. Accordingly, he swears that he put the shutters up, got out, closed and locked the door. He remembers having done this distinctly. Munro, the rear guard, Kinsley's subordinate, corroborates him. He swears that he saw Kinsley going down the train closing and locking the doors. Doctor Fouseca, a passenger by the train, has also been called to swear to this. But I cannot attach much value to his evidence. It is quite possible that he may have seen Kinsley closing some doors and yet not have seen him close this door. This evidence shows that all the off side doors were closed and locked three minutes or so before the train started. I confess it seems to me a little doubtful whether that would prove conclusively that the doors were all closed and locked.

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when the train started. Certainly it would not in England, where belated passengers seek to enter trains up to the last moment, and railway officials may open doors that have been closed to let them in, and forget to close and lock them again. In the particular case, however, there were no lady passengers and the compartment was, in fact, empty. It is still possible that after Kinsley closed and locked the door, assuming that he did, some passengers got a member of the platform staff to open it for him, and then finding it was a lady's reserved compartment, rushed off, and so the door got left open. The alternative suggestion that a passenger with a railway key came up, opened the door, and left it open seems to me too improbable. The truth appears to me to lie between two possibilities, neither of which is highly improbable. The first is that Kinsley is mistaken, and thought he had closed and locked this door, but had not. The other is that, after he had done so, some member of the railway staff opened the door and forgot to close it. In either case, there would be evidence of negligence to go to a jury. The fact that a door on a moving train is open, is evidence of negligence on the part of the Company. *Gee v Metropolitan Railway Co* (1) *Richards v Great Eastern Ry Co* (2). Evidence only, he it observed, is not necessarily, a conclusive proof. And a very great Judge doubted whether the fact alone ought to be even evidence of negligence. Taking, that however, to be settled as matter of law, I should find on this point that there was negligence on the part of the Company in respect of the open door on carriage 1846 of the Nagpur down mail. For, whether Kinsley forgot or omitted to close and lock the door, or whether another servant of the Company opened it after Kinsley had locked it and forgot to close it, I apprehend that the Company would be equally affected with negligence. It is not alleged by the plaintiffs that there was any defect in the lock or catch of the door, so that once it was closed and locked it could not possibly have opened of itself. And it is not the Company's case that any one unauthorizedly opened it after the train had left Victoria Terminus. I do not accept the suggestion that any one did so unauthorizedly by the use of a private railway key in the three minutes which intervened between Kinsley having as he swears, closed and locked the door and the train starting.

That, then, must be taken to be my first finding of fact upon the evidence. I do not wish to reflect in any way upon the honest

(1) L. R. 3 Q. B. 161.

(2) 28 Law Times (N. S.) 711

of either Kinsley or Munro. But it is plain that Kinsley was bound to swear what he did, and it is quite possible that he may have sworn the truth, just as it is quite possible that he may have been mistaken, without shaking my conclusion. As to Munro, I have no doubt that he has told the truth to the limit of his knowledge and belief.

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I will now deal with the next question of law which has given rise to a great deal of argument and minute analysis of measurements. Briefly, I take the rule of law to be that where there is a statutory obligation any breach of that which causes an accident is conclusive against the defendant apart from special proof of negligence. But the breach of the duty must in itself be the cause of the accident and the rule does not extend so far as to exclude the defence of contributory negligence. If I am right, the result will show that this part of the case is of little importance. The plaintiff's contention is that the dimensions of carriages were exceeded. The defendants reply that they were within their circulars of 1896 and 1900 and that the latter read with the special sanction obtained in 1904, completely covers them. The plaintiffs meet this by alleging that the sanction and circulars are all to be read with the orders regulating the minimum width of central track. Thus when the Company were permitted to widen their carriages to ten feet that permission was conditioned by a minimum width of 12 feet and a recommended width of 14 feet between central track points. Whereas in fact the Company widened their carriages without widening their track. The result of this was to narrow the distance between passing trains from a minimum of three feet five or six inches to a minimum of about two feet six inches at the outside. Assuming for the sake of argument, though I am not prepared to hold that it is so that the plaintiffs are right, then, while no doubt the breach of the statutory obligation coupled with the negligence of the defendant in leaving the door open contributed to the accident, it was not in itself the cause of the accident, nor could it alone have caused the accident. As a special legal argument then, standing alone this appears to me to lose all point. It is left to be a factor of the whole negligence charged upon the defendant which the plaintiff must prove and it is therefore in my opinion quite unnecessary to go into all the minutiae of the measurements and the terms of the circulars and sanction. The defendant Company admits that in the existing state of the track the carriages being of their actual dimensions, when the door swung

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open, it reached to within four and a half inches of the limit of the crossing carriages (I am not particular to the fraction of an inch because, in my opinion that makes no real difference and I therefore say, roughly, four and a half inches) Now the defendant's case is that it is only bound to carry its passengers safely inside the carriages provided for their use. No obligation whatever lies upon it to look to their safety if they get outside the carriages. Therefore, it being admitted that the plaintiffs sustained their injuries outside the limits of the carriage or carriages in which they were travelling they took their own risk and the defendant Company is in no way responsible. If that proposition is correct, it is plain that there is an end of the case. For no matter how near the open door of carriage 1816 came to the surface exterior of carriages on the up local no matter what negligence the Company was guilty of in leaving that door open, no matter how much or how little they had exceeded the dimensions prescribed by Statute no injury could possibly have been done to the plaintiffs, had they kept within the carriages provided for them. And this brings me to a consideration of the very difficult question of contributory negligence.

The defendant's case is that a passenger, who puts any part of his person outside the carriage and receives an injury to the part so extruded is guilty not only of negligence by putting himself outside the carriage but of contributory negligence which disentitles him to recover against the Company, provided that no matter what negligence the Company has been guilty of that could not have caused the passenger any injury so long as he remained inside the carriage. The plaintiffs on the other hand contend that resting their arms on the sills of the windows was an ordinary natural everyday act which was not even negligence and certainly could not have been contributory negligence disentitling them to recover for injuries done to them in such positions by an act of negligence on the part of defendant Company. It will probably be seen that these contentions approach the central question from different points. The Company appears to rest mainly upon its contractual obligations. The plaintiffs on the other hand rely upon the general principles of the common law. We contracted by the defendants, to carry passengers inside and not outside our carriages. If they put themselves outside the carriages they exceeded their rights under our contract, and were to that extent mere trespassers. We cannot be made answerable for any

injuries which they courted, and actually suffered by such unauthorized acts. The plaintiffs reply. We had a right to be carried safely, and to be protected against all ordinary and expected risks. A person is not bound to do more than look out for what ordinarily happens, he is not bound to guard against wholly unusual and unforeseen contingencies. Such a contingency was the open door of a passing train. No one can be expected to anticipate that a train will pass at speed with a door wide open, reaching to within four and a half inches of the windows of another train. In placing our arms on the sills of the windows, we did what millions of passengers in this country do every day, on the same track, with perfect safety. Our acts in themselves were not negligent. They were common every day acts every one does them, and not one in twenty million has ever incurred or been supposed to incur any risk by doing them. It is this possibility of putting the case in different ways, looking at it from different points of view involving the application of different principles that makes the decision difficult.

The general rule was thus stated by Baron Alderson in *Blyth v Birmingham Waterworks Company* (1). "Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do." It was not necessary for him to state, (goes on Pollock in his work on Torts), but we have always to remember that negligence will not be a ground of legal liability unless the party whose conduct is in question is already in a situation that brings him under the duty of taking care. This it will be observed says nothing of the party's state of mind and rightly. Jurisprudence is not psychology, and law disregards many psychological distinctions not because lawyers are ignorant of their existence but because for legal purposes it is impracticable or useless to regard them. This is the kind of ground which the plaintiffs would take. They would allege and I cannot help feeling with great show of reason, that the circumstances were not such as to impose upon them the duty of taking special care. They would say, all passengers in this country sitting by open windows on an open track are and have always been in the habit of resting their arms for comfort or convenience on the sills of the windows. The distance between the tracks if main

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been there and the presence of which could not possibly have been anticipated, makes this practice so perfectly safe, it has been so firmly established that no passenger ought to be affected with a false kind of contractual negligence merely because he followed it, and owing to an utterly unforeseen piece of negligence on the part of the Railway Company, was seriously injured. Before going, as shortly as may be, into the case law, I will mention the philosophical ground of the doctrine of contributory negligence derived by philosophical jurists from Aristotle. The four categories of causation are—1 The Essence of formal cause. That would, I suppose, in the present case, be the actual contact of the door with the arms of the plaintiff. 2 The necessitating conditions or the material cause. These would be the open door, and the arms of the passengers within its reach. 3 The proximate mover, the efficient cause. 4 The final cause, that for the sake of which the act was done. The last category has no bearing upon a question of this kind, being restricted as I understand to motive and therefore to the intentional acts of sentient beings. The doctrine of contributory negligence resolves itself into the second and third categories and the determination upon all the factors found existing within them of the question which of these factors was the efficient cause? A plaintiff's act may make one of the necessitating conditions and so be negligence. But to take it further and convert it into contributory negligence it must further be found to have been the efficient cause of the accident.

Then the text book writers and the Judges have deduced a rule of practice, which may be roughly stated thus. Where there is negligence on both sides, the test to be applied in trying to find out which was the efficient cause is, who had the last chance of averting the accident. A consideration, however, of the numerous cases giving rise to an enquiry into contributory negligence, will show that this Rule, though sometimes of great use, cannot be made universally applicable. In the present instance since the plaintiff at any rate could hardly in fairness be deemed to have known that the door which injured him was open, how was he to avert the accident? True he had in one sense, the last chance of doing so, but merely on the supposition that neither he nor the defendant knew that the danger existed. If the defendant knew that the door was open it would be as fair to say that they should have stopped their train as that the

plaintiff should have pulled in his arm. I apprehend that the application of the rule must be restricted to cases, in which both parties or one party at any rate is in fact aware of the danger before the accident actually happens.

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I will now deal with some of the authorities. I take this opportunity of thanking Mr. Baptist, for the great industry he has shown in collecting every case which has any bearing on the point, his ability in commenting upon them and the text book writers and the zeal and thoroughness which he has shown in presenting his clients' cases to the court. I may frankly add that my sympathies have been throughout and still are with the plaintiffs. I cannot help feeling that these poor men, doing what their fellows have always done with impunity, very naturally believe that they are entitled to the protection of the law, when they find that owing to an utterly unforeseen occurrence, they are maimed for life or seriously injured, and if the law should turn out to be against them I still think that the sense of most average men would be with them on the general merits of their grievance. On the other hand, I can quite understand that the Company is obliged to lay aside all sentimental considerations, when a principle, so far reaching and of such vital importance to the conduct of their business is at stake. But for that I do not doubt that common humanity would have impelled them to offer some compensation at any rate to those poor men whose injuries, whatever the strict legal rights of the parties may be, were no doubt caused by the Company's negligent act. But a Judge has nothing to do one way or the other with sentiment. My duty is to find out, if I can, what the law enjoins and keep myself strictly to that.

Now, it is a singular thing that notwithstanding the millions and millions of passengers who have travelled over Railway lines in England, and the doubtless innumerable instances of putting parts of their persons outside the carriage windows the point I have to decide is absolutely, as far as English Courts go *res integra*. There is not a single reported case of the kind. No passenger in England has ever sustained injuries in this way, or, if he has, has sued to recover damages from the Company for them. Two of the State Courts of America have considered the question. The Pennsylvania Court has held that the Company is liable, "where the road is so narrow as to end in danger projecting limbs, unless the windows of the cars are so barricaded

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with bars as to render it impossible for the passenger to put his limbs outside the windows", *New Jersey Road Company v Kennard* (1) Stripped of the rather ambiguous language in which the principle of liability is stated (which I quote from Beven) this amounts to fixing the Company with liability in every case where the road is so narrow as to endanger passengers who may put their limbs out of the carriage. For, the remainder of the qualification amounts to this only, that no accident could have happened. Of course, if the Company make it impossible for a passenger to put his arm or hand out of the window, he could not possibly receive any injury by doing that which is *ex hypothesi* impossible. Waiving that and going to the more intelligible ground of the decision, it seems to me to really go all the way, and impose upon the Company the duty of making accidents of the kind impossible, or if the Company cannot do that, then of imposing upon them liability for the consequences. If the track is so wide that putting an arm or hand out of the window could not bring about an accident there could be no liability upon the Company, because there could be no accident. But taking the sense of the decision, I think that it is clearly in favour of the plaintiffs. For what the Court fixed its mind upon was the risk to the passengers from a standing and permanent peril, the narrowness of the track. If the Company did not or could not guard against that it was liable. *A fortiori* it would be liable for a peril independent altogether of the width of the track and against which it could guard. Such for example, as allowing a train to start on a double track with one of its doors wide open. On the other hand, the Massachusetts Court decided that there was no liability in such circumstances upon the Railway Company. That Court has adopted the rule, that if a passenger's elbow extends through the window beyond the place where the glass would have been if the window had been shut, the passenger's complaint would indicate such carelessness as would disentitle him from recovering. *I add v. Old Colony, etc., Railroad Company* (2) Upon this Beven comments, "The point has not arisen in England where there is no reason to doubt that, should it, the Massachusetts Rule would be adopted." And he adds that since the above was in type, *Symon v London Genl Omnibus Company* (3) and *Hare v London Genl Omnibus Co*, (4) have been decided

(1) 21 Fa St 208

(2) 50 Mass 207

(3) 23 Times LR 462

(4) 23 Times LR 616.

in accordance with the above forecast I entertain some doubt whether this is a strictly accurate application of the rulings in those two recent cases. In the first place, there appears to me to be a clear distinction between the case of a man in a railway carriage travelling on an open track, and that of a man on an Omnibus, which, every one knows, has to thread dense traffic and frequently risk close shaving. Referred back to the general fundamental principle of negligence, it might be doubted whether the same kind of duty, or at any rate, a duty of the same degree is imposed upon persons respectively so situated. What might be ordinary and reasonable care in the one case might fall far short of it in the other. A man on an Omnibus knows that he will be constantly at varying distances from vehicles and pavement structures, that at any moment he may be brought into almost actual contact with them. A man in a railway carriage does not know this. He expects, every one expects that the track distances will, on an open line, be maintained and that nothing will come much nearer to him than the face of a passing train. Again, he knows that in all ordinary circumstances that will be some distance away from him, certainly more than a few inches. This is matter of common everyday experience, on which passengers, who are to be judged by the standard of ordinary reasonable care and prudence, may well claim to rely.

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That is one reason why I think the two Omnibus cases do not as fully make good Bowen's forecast as that eminent Winter is disposed to think. Another reason is that in both those cases the Omnibus Company was found in fact not to have been guilty of any negligence at all. In one case the passenger was actually within the limits of the Omnibus, and was injured by a projection from some structure on the pavement. It was held that the driver could not have known of this and in taking the course he did, acted with perfect propriety. The resultant injury in that case had to be put down to unveritable accident. In the other case the passenger leant over the rail of the Omnibus and again it was held that the course the driver took was perfectly proper and there was no negligence at all on the part of the defendant Company. These cases, therefore are distinguishable and the point I am to determine is, in my opinion entirely *res integra* except for the American decisions. True, there is the great weight of Bowen's own authority. The opinion of a text

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book writer is not binding on any Court. But where he is of such eminence as Beven, there can be little doubt that the expression of his opinion in this book has contributed to the absence of all claims like the present being formulated in the English Courts. Further, while I admit that Beven's opinion does not bind me, I set a high value on it, as the considered opinion of a very profound and philosophical student of this particular branch of the law and an authority amongst text book writers of the first eminence. The nearest case to this is a Scotch case *Pine v Caledonia Railway Company*, (1) There a woman seized with sudden illness put her head out of the carriage window, and was killed by a mail bag on an apparatus put up by the Company to give facilities to the Postmaster General for putting the mails on and off trains. The case was much relied on by the defendant Company. But it appears to me that, standing alone it is about as favourable to the one side as to the other. The Jury found for the Company. But it was never thought, I believe, that the decision went so far as to cover every case in which a passenger might put his head out of a train window, and so sustain injuries. The facts were very special and Lord Adam's direction to the jury shows that the verdict really turned upon the reasonableness or otherwise of the manner and extent to which the Company had complied with the Postmaster General's requisitions. Beven says "the case must not be stretched to the length of inferring that in all cases a passenger thrusting his head out of window will be disentitled to recover in the event of injury happening to him through doing so." I confess that I find some difficulty in reconciling this expression of opinion with that which shortly preceded it, that a passenger putting his arm through the window does so at his own risk and that there can be no doubt that the English Courts, should such a case come before them would follow the rule of the Mass Courts and disallow the plaintiff's claim. *Adams v Lancashire and York and North Yorkshire Railway Company*, (2) was decided on the ground that the injury was not the necessary consequence of the Company's negligence in leaving the door open. It was afterwards much reflected upon and has little bearing on the present case. In *Gee v The Met Ry Company*, (3) the facts were that the plaintiff got up and placed his hand on the door

(1) 17 Beve 1165

(2) L.R. 4 C.P. 739

(3) L.R. 5 Q.B. 161

in order to look out at the lights of an approaching station. The door flew open the plaintiff fell out and was injured.

The case was argued on a Rule before the Ex Chamber and Kelly, C B laid it down that there was not only evidence of negligence on the part of the defendant Company but evidence of liability (which is a different thing) to go to the Jury, further that there was no question of contributory negligence raised on the Rule, so that was not to be considered. Martin, B thought that there was a question of contributory negligence which was properly left to the jury. And his observations on the point are instructive. He relies a good deal upon the railway being an underground railway, where there is little to look at but walls, and also upon the windows being barred, thereby warning passengers that there was danger in putting their heads or hands out of the windows. He says 'Therefore it seems to me that you cannot possibly shut out from the consideration of the Jury whether or not a man may not do wrong and know that he is doing wrong in putting his head or hand out of the window.' As I understand the gist of that learned Judge's remarks even had the passenger put his head or hand out of the window that would have been matter proper to be left to the Jury on a plea of contributory negligence and ought not to have been withheld from the Jury as matter of law conclusively disentitling the plaintiff from recovering. The whole of Brett, J's judgment is useful. He says 'Was there evidence that it (the Company's negligence) was the sole cause? Now that becomes somewhat more complicated. If during the plaintiff's case an act of his was proved which was so clearly contributory to the accident, that it would be unreasonable for any reasonable man to find to the contrary and if that act was so clearly a negligent act that it would be unreasonable in reasonable men to find that it was not negligence so that any Court would, upon either of those points, immediately set aside a verdict of the Jury, of the finding the contrary of either I am not prepared to say that the Judge might not then rule that the plaintiff had failed to put forward evidence upon which a Jury might find in his favour that the accident was solely caused by the defendant's negligence.' Now this appears to me hard to reconcile with what had already fallen from Kelly, C B and Martin B. If merely putting a head or hand out of window is negligence of the kind indicated by Brett, J then that fact, being proved, would

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justify a Court in withholding the question from the Jury and at once nonsuiting the plaintiff. This was what the Scotch Court did in another case. In *Toal v N B Ry Co*, the pursuer complained that while standing on the platform of one of the Company's Stations, one of their trains was set in motion, with a carriage door open, that the door struck and injured him. The Court of Session nonsuited the pursuer on the ground that there was no relevant averment. This, however, was reversed in the Lords (1). I only mention this case, otherwise having no bearing on my present enquiry, as an illustration of the length to which the Scotch Courts will go in deciding upon the pleadings whether or not there are facts to be laid before a Jury at all, possibly, therefore, useful in considering whether, when the plaintiff admits that he was travelling with a part of his person outside the carriage any injury to that part would entitle him to maintain an action for damages against the Company.

Richards v Great Eastern Ry Co, (2) is a case following *Gie v Met Ry Co* and the two cases together seem to be direct authority for this proposition and this proposition only, that the fact of a door being open on a train is evidence of negligence on the part of the Company.

Graham v N E Ry Co (3) was the case of a guard on a dominant Railway who suffered injuries to his head from a post on the servient Railway, while looking out in the discharge of his duty. The ground of the decision against the defendant Company was the Jury's finding of fact that the post was put up in a position dangerous to a guard whose duty it was to look out of his van. It cannot be inferred from this that the decision or the Jury's verdict would have been the same had the guard been under no obligation to look out. Passengers are under no such obligation. But read with some of Beven's own observations on the Scotch case of *Pirie v Caledonia Railway Company*, (4) an impression may be created that a Company is bound not to construct its track in such a way as to be a trap for unwary passengers. So that where an injury occasioned to a passenger whose head or arm was out of the window by a structure on the track, which came very close to the window and could fairly be regarded as a trap, it would appear that I fear would qualify, or might qualify, the opinion he has expressed against the right of passengers, who extrude any portion of

(1) (1903) 101 *J. of L.* 35. (2) 3 *LT* 78. (3) 15 *CB* 520.

(4) 17 *Rettie* 1165.

their persons from the carriage to recover for injury For this rule must be uniform and reducible to a definite principle if it is to be a rule at all It could not be a rule and yet susceptible to modification in such cases as Beven suggests Nor would its application in such circumstances, as far as I can see be helped by adding that if the Company built a line full of such traps, its construction as a whole would be deemed to be negligent and careless For, *ex hypothesi*, if the passenger did not put any part of his person out of the window, no number of such traps, no degree of propinquity could possibly cause him an injury These appear to me to be the only cases which have anything like a direct bearing on the present question

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The Directors of the Dublin Ry Co v Judith Slatery, (1) decided that there was evidence to go to a Jury on a disputed question of fact though several of the learned Judges of appeal thought that on the facts alleged by the plaintiff himself there was not The plaintiff was crossing the line at a place where this was forbidden He was caught and killed by the incoming express The express was bound to whistle and the Engine driver swore that he had whistled twice, other servants of the Company supported him The plaintiff's evidence was that if the whistle had been sounded they must have heard it but did not Apart from that the point of interest was that where there was evidence that notwithstanding the Company had put up warnings and prohibitions these were consistently disregarded, and no effort was made to enforce them that too was evidence to go to a Jury In this case the defendant Company contends that it put notices in the compartments with the words "Do not lean out of the window" legibly written in English Evidence too has been given that the guards of the Company frequently tell passengers who are leaning out of window not to do so

In *Hanson v L & N Ry Co* (2) the plaintiff was injured while sitting in his carriage by a projecting piece of timber which was being carried on a passing goods train The timber was loaded on a truck secured by a chain only and not in the best way by stranchions The question was whether the plaintiff had successfully proved negligence The mere happening of the accident was thought not to be sufficient That early doctrine was founded on a decision of Lord Denman in *Craig v London &*

(1) 1 All P Cas 1155

(2) 6 W L 29

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Brighton, etc Railway Company (1) In some cases *res ipsa loquitur* the accident may be of such a nature that negligence may be presumed from the mere occurrence of it. But when the balance is even, the onus is on the party who relies on the negligence of the other to turn the scale. That is now I think the accepted rule. And here while the swinging door might be thought at first to be a strong instance of *res ipsa loquitur* the Company's defence has to be taken into account. It then appears that if that defence is sound, it was not the open door which was the cause of the accident at all, but the fact that the passengers were outside and not inside their carriages. If they had been inside the door might have swung as it did and done them no harm. Had the door struck the compartments and so caused injury to the passengers inside, then indeed, I think that the Company would have had to admit that *res ipsa loquitur* and would have found it hard to plead that there was no negligence on their part which being the cause of the accident rendered them liable to the persons injured.

The next case cited by Mr. Baptista is *Cooke v. Midland Great Western Railway of Ireland* (2). Here the Company kept a turn table unlocked and therefore dangerous to children near a public road. The children obtained access to the turn table through a well worn gap in a hedge which the Company were bound by statute to keep in repair. A child playing on the turn table was seriously injured and it was held that there was evidence of actionable negligence on the part of the Railway Co. It was found that there was a gap in the hedge although the Company were bound by act of parliament to maintain the hedge but it was also held that this mere breach of the statutory obligation was not the effective cause of the accident.

David v. Britannic Merthyr Coal Co (3) was a case under the Coal Mines Regulation Act and the Court held that a breach of the statutory duties imposed by that Act rendered the defendant Company liable for negligence without special proof of particular personal negligence. But there the injury was directly caused by the breach of the obligation.

In *McCauley v. The Furness Ry Co*, (4) it was held that the plaintiff a drover, who was carried free at his own risk according to his contract with the Company could not recover for an injury, although it was alleged to have been caused by the

(1) (1844) 5 Q B 717

(3) (1909) K B 146

(2) (1909) - App Cas 29

(4) L R 9 Q B, 57

"gross and wilful negligence of the Company." The principle of this decision may be extended to such a case as the defendant Company here relies on, for if it be truly a part of the implied agreement between passengers and the Company that the former are to be carried inside and not outside the carriages, then it appears to me that if they insist upon putting themselves outside the carriages they do so at their own risk like the Driver McCawley, save only that he consented to take all risks inside or outside the carriage, in which he was travelling. This decision brings into strong relief the contractual basis of the respective rights and liabilities of passengers and carriers. And it goes some way at least towards confirming the defendant's contention, that in questions of this kind no liability at all can be fixed on the Company which they did not contract themselves into.

Crocker v Banks(1) was the case of a girl employed in a Soda-water manufactory. She was injured by the explosion of a bottle. She had been warned to wear a mask and such masks were provided. Nevertheless the defendant Company was held liable, although the plaintiff had neglected to put on the protecting mask. This case is cited, I suppose, to show that the defendant Company here cannot evade liability on the ground that they had put up notices warning passengers not to lean out of the windows and had also barred the windows. It was said by the Master of the Rolls in giving judgment that the precautions which the defendant had taken showed that he was aware of the danger. And an argument from that is directed against the Company. It was held not to be contributory negligence on the part of the plaintiff that she had refused to obey the caution and avail herself of the protection of the mask. So here I suppose, it might be contended that it was not contributory negligence on the part of the plaintiffs to disregard the notice in the carriage and ignore what was implied by putting bars across the window. But I do not think that the analogy is very close, or the authority is directly in point. Much in Crocker's case appears to have turned on the tender age of the plaintiff. Further, it does not appear to have been decided on the basis of a strict and defined contractual relation.

Blyth v Birmingham Waterworks (2) was a case of injury caused to the plaintiff by the bursting of some of the defendant's pipes under pressure of extreme cold. I do not think it has

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much bearing on this question. It was cited, I believe, in support of the same general argument as that which was founded on the preceding case. The Judgment of Alderson B, however contains the general definition of negligence which has met with the approval of subsequent text book writers, and on which the plaintiffs here rely.

In *Wakelin v The London and S W Ry Co* (1) it was held that, assuming there was negligence on the part of the defendant Company, there was no evidence to go to a Jury connecting that negligence with the death of the man killed at the level crossing. There are weighty observations by Lord Watson in giving Judgment which, I think, I may quote with advantage. "It appears to me that in all such cases the liability of the defendant Company, must rest upon these facts, in the first place that there was some negligent act or omission on the part of the Company, or their servants which materially contributed to the injury or death complained of and, in the second place, that there was no contributory negligence on the part of the injured or deceased person. But it does not, in my opinion, necessarily follow that the whole burden of proof is cast upon the plaintiff. That it lies with the plaintiff to prove the first of these propositions does not admit of dispute. More allegation or proof that the Company were guilty of negligence is altogether irrelevant, they might be guilty of many negligent acts or omissions which might possibly have occasioned injury to somebody but had no connexion whatever with the injury for which redress is sought, and therefore the plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury." Now, applying those observations to the facts here, we may go so far as to hold that the plaintiff has proved an act of negligence which (apart from the strict contractual relations set up by the defendant) materially contributed to the injury. But if it only contributed "materially" or, for that matter at all because of a breach of the plaintiff's part of his contractual obligation to remain inside the carriage, if apart from that breach there would have been no material contribution to the accident by the defendant because there could have been no accident at all the bearing of these remarks, at any rate so far as they might be supposed to favour the plaintiff, appears to me to be entirely changed. Lord

Watson goes on "if the plaintiff's evidence were sufficient to show that the negligence of the defendants did materially contribute to the injury, and threw no light upon the question of the injured party's negligence, then I should be of opinion that, in the absence of any counter evidence from the defendants, it ought to be presumed that, in point of fact, there was no such contributory negligence." Those remarks were made with reference to the facts of that case. The man who was killed was run over and dead on the line and no one knew how the accident had happened. But that is not the case here. For the Court is in full possession of every fact. The Court knows exactly how the accident happened. It happened owing to two contributing causes the door of the down mail being open and the arms of the plaintiffs being out of the windows of the up local. The only question, therefore, here is whether the latter circumstance is to be taken as the efficient cause of the accident? There is no question here of the shifting of the onus of proof, which was the point most debated in *Wakelin's* case for all the facts have been virtually admitted from the commencement, (excepting, of course, the manner in which the door came to be opened, and precise consent to which the Plaintiff's limbs protruded.)

In *Cockle v London and S. E. Ry. Co* (1) the Judges appear to have taken different views of the liability of a Railway Company in such circumstances as were there disclosed. This, however, was the case of an alighting passenger and different principles apply. I do not think it needs any further notice.

Now if I turn to some older cases I find that Parke B. laid down in *Bridge v. The Great Junction Railway Company* (2) approving *Butterfield v. Lorrister* there may have been negligence in both parties, and yet the plaintiff may be entitled to recover. The rule of law is laid down with perfect correctness in the case of *Butterfield v. Lorrister*, and that rule is that, though there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover, if by ordinary care he might have avoided them, he is the author of his own wrong. That is the only way in which the rule as to the exercise of ordinary care is applicable to questions of this kind.

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In *Scott v London Dock Co* (1) it was held in the Ex Chamber by a majority of the Judges, that "in an action for personal injury caused by the alleged negligence of the defendant, the plaintiff must adduce reasonable evidence of negligence to warrant a Judge in leaving the case to the Jury. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." Arguing from that case, which was a dockyard case where an inspector was injured by six bags of stuff falling on him, the plaintiffs might, I suppose, say that here the door of the down mail was in the management of the defendants, and that what happened was what does not ordinarily happen and so forth. But although I see that arguments of that kind may be drawn from many of these cases, I miss in all of them the one point of identity with the present case which I so anxiously seek. These are not cases founded on the contractual relation of the defendant to the plaintiff and the resulting obligation to do certain things and avoid doing certain things, and not others, which are not in the scope of the risk fairly raised by the understood terms of the contract.

I might indefinitely extend this examination of the case law I have carried it this length rather to satisfy the plaintiffs and leave them no room to think that the Court has not given the fullest and most careful attention to every point in their case than for any practical use, to which I feel I shall be able to put it. For, after studying these and many other cases as well as the dicta of the text book writers, the point I have to decide appears to me to remain precisely where it was, unamplified, unilluminated. We have these facts. Passengers in this country habitually and almost universally travel with their arms thrust out of the windows of their crowded compartments, not infrequently their heads out too. When they are sitting by windows it is almost impossible for them to help resting their arms on the sills, and when they do this some part, at least, of their arms must project outside the limits of the carriage. Before the new type of carriage was introduced, they could do this, in reason with perfect safety. For other projecting parts of the carriages would

have afforded them complete protection against such an accident as has overtaken these unfortunate plaintiffs. But with the new type of corridor car the conditions have changed. There is nothing outside the car to shelter him against passing objects. So far, then, as the simple rule of observing ordinary care goes, the plaintiffs may quite fairly claim to be within it. Indeed, as I have said, any number of passengers might do what these passengers did any number of times and come to no harm.

But although they may do this at their own risk and usually with impunity, ought they to do it, and if they do it, and are injured, can they make the Company liable to compensate them? The Company have put up notices requesting or I might say for bidding passengers to 'lean out of the windows. And I think that no distinction can fairly be drawn to the Company's disadvantage between "leaning out" and putting arms or heads out.

Again, the Company have placed bars across these windows. The bars are not close enough to prevent passengers protruding their arms. But they would be a warning. Men of sense might suppose that the Company would not bar the windows were there no risk at all if travellers chose to loll out of them. Again whatever may be said of the limits of reasonable care and prudent conduct while the train is running on an open track alone, the conditions are changed as soon as another train crosses. Ordinarily the most rash and curious English traveller who, as long as there is no apparent risk of that kind menacing him will lean out of window to admire the view, instinctively draws himself well within the compartment while another train is passing. True he has every reason to believe that nothing on that train will reach his carriage window, he may rely upon the Company seeing to that. But however that may be instinct seems to side with the strict rule of contract, and remind him that he ought to be inside and not outside his carriage. For no human foresight and care are infallible. Such an accident as an unfastened door is always a possibility a remote possibility. But the English traveller would not take the chance. He would almost certainly draw back into his carriage the moment he knew that another train was about to pass him. Indians are differently constituted. They have not perhaps had the same amount of experience and the conditions of travelling by train in this country are different from those which obtain in a country like England or America.

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So that perhaps the same instinct of self preservation has not yet been developed in the average Indian passenger. But is the Company to know and reckon with this?

The point is of vital importance to the defendant Company and to all Railway Companies in this country, it is essential that they should have a clear decision upon it, a decision too upon the principle for which the defendant here contends. The true issue comes to this, is the defendant Company liable for injuries caused to any part of a passenger which is outside the carriage in which he is travelling? To decide the case upon any other ground, any ground less sharply defined than that, would defeat the object with which alone, I believe and hope, the defendant Company has contested the plaintiff's claim. In my opinion the defendant is not liable. I cannot whittle away the principle of this decision by any qualifying words. It must stand or fall upon its own principle. And that principle, if it be good law, would set all questions of this kind for ever at rest. If Court attempt to refine upon it by qualifying words and phrases such as that passengers may extrude their limbs in person, or anything of that kind there will be no end to disputes. But if it be once held that a passenger has no right of action against a Railway Company for injuries suffered to any part of his person voluntarily placed at the moment the injury was inflicted outside the carriage all future uncertainty is dispelled, and I do not doubt a vast amount of litigation will be averted. I cannot allow, if the principle is sound, that a passenger is in any better case if he puts half an inch of his person only outside the carriage, than if he put a yard of himself outside. If any distinctions of that kind are admissible at all, I should say at once that this is a case in which the plaintiffs were entitled to the full benefit of them. I do not believe that even the second plaintiff was standing outside the carriage as the defendant contends. I am quite prepared to accept his own account of the manner in which he came to be so seriously hurt. I do not attach any weight to the evidence led by the defendant Company to prove that he had opened the door and was standing with virtually his whole arm outside the carriage. I do not think the witnesses who speak to this would have been in the least likely to have observed what the second plaintiff was doing. Besides had he been so standing with the door open and facing the approaching train, I can hardly believe that he would not have noticed the swinging door and with drawn himself into safety. The case of the first plaintiff is

plain. I have no doubt that he has spoken the truth. I am quite prepared to accept his story and his brother's measurements. I will take it to be the fact that his arm was not more than five inches or so at most outside the window. According to the principle upon which I am deciding, that makes no difference at all. His arm ought not to have been outside at all, not the fraction of an inch. Now accepting the principle as the basis of this rule of law, that a passenger must travel inside and not outside his compartment, and therefore that if he does travel outside, he does so entirely at his own risk and the Company cannot be held liable for any injury which he suffers in consequence, it comes to this, that a passenger who gets injured owing to putting any part of his person outside his carriage is guilty of contributory negligence. And it would follow that where the plaintiff admitted that he had incurred the injury in this way, no matter what negligence there might be on the part of the Company, he would have no case to lay before a Jury. The Judge would be bound to enter a verdict for the defendant on the pleadings. And that I take to be the true law, notwithstanding the apparently conflicting dicta of many of our most eminent Judges to which I have already referred. Supposing I am wrong here, and that this is a case which in England ought to be left to a Jury, then the further question would arise, whether the accident was caused by the negligence of the plaintiff in putting himself in a position of risk, or to the negligence of the defendant. In this particular case were that question to be tried by me as it would be tried by an ordinary Jury, I should hesitate long before I decided that the plaintiffs were not entitled to compensation. I am pretty sure that any average English Jury would find that they were. And if I were not bound by any rule of law such as I have enunciated which restricts the Company's liability for accidents, to such as happen to passengers inside their compartments, were I merely to treat the case on general principles of ordinary prudence and average conduct I think that I should find that the accident was caused by the negligence of the Company, and not by the negligence of the plaintiffs. I do not feel at liberty to give effect to that strong leaning of my own mind. I cannot resist the conviction that the principle upon which the defence in this claim is based is the true principle. And while on the one hand it may appear to work great hardship on these unfortunate men on the other, any derogation from it, (if it really be the law, as I believe that it is)

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Messrs G C Paul and T Stohoe and Baboo Obhoy Churn Bose for Appellant. Woodhouse
C A S E R y

Mr F Ferguson for Respondents

MACPHERSON, J—The appellant in this case was the plaintiff in the Court below, and sued to recover damages from the defendants for injuries received by him while travelling as a passenger on their line of railway.

On the evening of the 2nd December 1866, the plaintiff was a passenger in a train from Mutlah to Ballygunge, which is a station intermediate between the railway terminus at Mutlah and Calcutta. The train reached Ballygunge about 6 30 P M, when it was quite dark. The plaintiff was travelling in a first class carriage in company with two gentlemen, Mr Schiller and Captain Jervis. On the train stopping at the station, Mr Schiller and Captain Jervis got out, opening the door of the carriage for themselves. The plaintiff proceeded to follow them. He was in the act of putting his foot to the ground when Jervis called to him to take care as the train was moving. At the same moment almost his foot touched the ground and he felt that the train was moving back. In the darkness, he could not see the platform distinctly, and being afraid to alight, he tried to stop himself and to recover his position on the step of the carriage. In attempting to recover himself, he slipped and fell between the platform and the train. The consequence was that his leg was broken, and he received other serious injuries.

As to these general facts there is no dispute.

The plaintiff alleges that the accident was caused by the negligence of the Railway Company—

Firstly, in not keeping the station sufficiently lighted,

Secondly, in “so negligently attending to” the place whereon passengers had to alight that the same was unsafe for passengers alighting, and

Thirdly in putting the train in motion as the plaintiff was alighting, and without notice to him, after the train had stopped for the purpose of allowing passengers to alight.

The defendants in their written statement, deny that there was any negligence on their part, and plead that the accident was attributable to want of care and ordinary prudence on the part of the plaintiff.

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would expose all Railway Companies to unfair risk, harassment, and expense. There are two sentimental sides even to this particular case, though Railway Companies are little in the habit of expecting still less of receiving sentimental indulgence.

I must therefore hold looking to the peculiar obligations under which a Railway Company lies, essentially, as I understand contractual obligations, that their liability in these two suits is discharged by the admitted facts that the injuries complained of could not have been suffered had the plaintiffs remained inside the carriage in which they were travelling. It therefore becomes unnecessary to go into the question of damages.

Looking to all the circumstances of the case bearing in mind that it is a new point, upon which the plaintiffs might very reasonably have expected in this country, at any rate, to succeed looking too to the injuries they have suffered, I think that it will be fair while dismissing their suits against the defendant Company to leave all parties to bear their own costs.

Sutherland's Weekly Reporter, Vol IX. Page 73

CIVIL RULINGS

*Before The Hon'ble W S Seton-Karr and
A G Macpherson, Judges*

MR F WOODHOUSE (PLAINTIFF), APPELLANT

v

THE CALCUTTA AND SOUTH EASTERN RAILWAY
COMPANY (DEFENDANTS), RESPONDENTS *

Railway accident—Negligence of Railway Company—Damages

The plaintiff was a passenger travelling on the defendants' railway and received severe injuries from a fall which he experienced in stepping upon the platform when the train stopped.

Held that the Railway Company was guilty of negligence in not keeping the Station properly lighted in allowing the train to overhault the Station and in not warning the plaintiff against alighting; also that the injuries sustained by the plaintiff were caused by the negligence in question and that the plaintiff did not by his own want of care contribute to the accident.

* Case No 151 of 1897. Peculiar Appeal from a decision passed by the Judges of the 24 Pargunnahs, dated the 18th April 1897.

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It seems to us that a Railway Company can scarcely be guilty of any more gross or dangerous negligence than to leave in darkness a station which is in such a condition that a wall 15 inches wide with a drop of 5 inches to the earth on the further side of it is all that passengers have to alight upon. We think, however, that the injuries which the plaintiff received are not proved to have resulted from the condition of the platform. There is no very distinct evidence on the subject but the conclusion at which we arrive, on the whole, is that the carriage from which the plaintiff attempted to descend stopped, *not* opposite the unfinished portion of the platform, *but* opposite a portion which had been completed, and was in good order. Mr Pendleton, the Agent of the Railway Company, swears that, on the morning after the accident, he examined the platform and a spot about 20 yards from the Calcutta end of the platform was pointed out to him by the Station master as that at which the accident occurred. But Mr Pendleton himself was not present when the accident happened, and what the Station master told him is no evidence—especially as the latter was not called as a witness, although (as Mr Fergusson who argued the case for the respondents told us) he was present in Court at the trial. Mr Pendleton, however, says, speaking from what he himself saw on the morning of the 3rd of December, that from the Calcutta end of the platform to the commencement of the new platform, which he supposed was about 200 feet, nearly the whole of the platform was in good order. As Mr Schiller and the engine driver agree in laying the scene of the accident close to the Calcutta end of the platform, we cannot say it is proved that what occurred was owing to the improper or unsafe state of the platform.

But it appears to us to be proved conclusively that the station at the time of the accident was most insufficiently lighted and that the negligence of the defendants in this respect was one of the main causes of the plaintiff's falling as he did.

We think the reasoning of the Judge below on this point is very fallacious. It may be true that Schiller as he entered the station, could, notwithstanding the darkness, recognize the buildings sufficiently to know that he had arrived at Ballygunge. It may also be true that, after he got out of the carriage he was able to see, to some extent what the plaintiff did. All this, however, he might have very well done if there had not been a light of any sort in the station. First class carriages, moreover,

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The Judge, who tried the case without finding as a fact that the station was properly lighted, or that the condition of the platform and station generally was such as it ought to be was of opinion that neither the condition of the station nor the want of lights caused or aided in causing the accident. He held that the accident was to be ascribed primarily to the moving of the train as the plaintiff was in the act of alighting, but he held that, at the time the plaintiff tried to get out, the train had not stopped *for the purpose of allowing passengers to alight*, that the plaintiff had no sufficient reason for supposing it had stopped for that purpose, that the defendants were justified in putting the train in motion when they did, that there was no negligence on the part of the defendants such as to make them liable for damages and that there was such want of care and prudence on the part of the plaintiff as to disentitle him from claiming damages.

The suit was accordingly dismissed with costs.

In appeal, it is contended on behalf of the plaintiff that the accident was caused solely by the improper moving of the train after it had once stopped, the want of lights, and the dangerous state of the platform, that, at the time the plaintiff began to alight, he had every reason to believe that the train had stopped for the purpose of allowing passengers to alight, that if the train had not then stopped for that purpose, notice should have been given to the passengers that the train was about to be backed and that the train ought not to have been put in motion without such notice.

As regards the question of the unfinished and dangerous state of the platform, we think it is very clearly proved that a large portion of the platform was in an unfinished and most dangerous state, and that the Railway Company was guilty of the greatest negligence in allowing a platform in such a condition to be used at all, without having taken the most ample precautions both in the way of lighting and otherwise, for the safety of persons using their railway. Mr Shinks, the Acting Agent of the defendant Company, says "In December last, the facing wall of the station (i.e., platform) was complete. At the back of the wall there was earthwork up to within 5 inches of the top of the wall. The thickness of the wall is 15 inches * * * A man stepping out of a carriage would first step on to the brick wall, and then on to the earth." Mr Schiller's evidence is to the same purport.

It seems to us that a Railway Company can scarcely be guilty of any more gross or dangerous negligence than to leave in darkness a station which is in such a condition that a wall 15 inches wide with a drop of 5 inches to the earth on the further side of it is all that passengers have to alight upon. We think, however, that the injuries which the plaintiff received are not proved to have resulted from the condition of the platform. There is no very distinct evidence on the subject, but the conclusion at which we arrive, on the whole, is that the carriage from which the plaintiff attempted to descend stopped, *not* opposite the unfinished portion of the platform, *but* opposite a portion which had been completed, and was in good order. Mr Pendleton, the Agent of the Railway Company, swears that, on the morning after the accident, he examined the platform, and a spot about 20 yards from the Calcutta end of the platform was pointed out to him by the Station-master as that at which the accident occurred. But Mr Pendleton himself was not present when the accident happened, and what the Station-master told him is no evidence—especially as the latter was not called as a witness, although (as Mr Fergusson who argued the case for the respondents told us) he was present in Court at the trial. Mr Pendleton, however, says, speaking from what he himself saw on the morning of the 3rd of December, that from the Calcutta end of the platform to the commencement of the new platform, which he supposed was about 200 feet, nearly the whole of the platform was in good order. As Mr Schiller and the engine driver agree in laying the scene of the accident close to the Calcutta end of the platform, we cannot say it is proved that what occurred was owing to the improper or unsafe state of the platform.

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We think the reasoning of the Judge below on this point is very fallacious. It may be true that Schiller as he entered the station, could, notwithstanding the darkness, recognize the buildings sufficiently to know that he had arrived at Ballygunge. It may also be true that, after he got out of the carriage he was able to see, to some extent what the plaintiff did. All this, however, he might have very well done if there had not been a light of any sort in the station. First class carriages, moreover,

Woodhouse usually carry lights, and it may be that the light from the carriage in which he had been travelling showed the plaintiff's position more distinctly than it would otherwise have been visible

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The night "was dark and smoky," as the engine-driver Mr field says by way of excuse for having overshot the station. Yet there were no lights of any description in the station, save what is called a "reading lamp" in the Ticket office, and two common hand lamps (such as railway officials of the like class generally use), held by the station master, and the peon respectively. The guard of the train, no doubt, had a lantern too, but that really does not affect the question of the sufficiency of the station light. Especially as it is in evidence that neither the guard nor his lamp had left the brake van at the time of the accident. Some attempt has been made to show that the reading lamp was so placed as to be of use in giving light to the platform. It is very doubtful whether on the evening of the 2nd December 1866 it was so placed. But, granting that it was, it still remains wholly impossible for us to say that even supposing the platform to have been in good order, the station was lighted in any degree to such an extent as the safety of passengers demand. It is not enough that the lights should be sufficient for the Railway Company and their own servants who know the premises; they must be enough to guide and direct strangers who are unacquainted with the station. See *Martin v Great Northern Railway Company* (1)

In the present instance, the station was practically left in the dark, so far, at any rate, as the plaintiff was concerned. The darkness was, it seems to us, of all things the most likely to cause the plaintiff, first to hesitate on the step of the carriage, and then to fall as he did. It may be easy enough for a man to step on to a railway platform from a moving train when he can see what he is about, but it is a very different thing for him to take a similar step in the dark, especially if he is ignorant that the train is in motion. The plaintiff says "I was looking towards the ground. I was not aware that the train had got past the platform. I could not see the platform when I looked down, I supposed there was a platform because two others had got out. I could not see the ground. I could not see anything." And again he says "I do not know whether the train had stopped when

"Schiller and Jervis got out It had stopped when I got out
 "I know that the train must have stopped, because it was backing
 "when I attempted to get out No doubt, it had stopped some
 'time before that I did not know it was backing until I put
 "my foot to the ground" The plaintiff in the belief that the
 train was standing still commenced to alight He could not see,
 owing to the darkness, that the train was moving slowly
 backwards Just as he was about to put his foot on the ground,
 Captain Jervis called out to take care, as the train was backing,
 and, almost at the same moment, his foot touched the platform,
 and he felt the motion, for which he was unprepared when he
 began to put his foot out in order to step on the ground Taken
 by surprise in this manner, it is in no degree wonderful that he
 hesitated, and wished not to complete the step which he had
 meant to take, and try to recover his footing on the carriage
 Had the platform been lighted, as it should have been, he would
 have seen from the first that the train was in motion, he
 would have seen and understood what he was about, and he
 would have had that confidence which one acting in the dark
 could not have

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Then, was there any negligence on the part of the defendants
 in backing the train when and as they did?

We agree with the Court below in finding that, as a matter of
 fact, the train, at the time when the plaintiff attempted to get out,
 had not stopped for the purpose of allowing passengers to alight
 But we do not concur in the view apparently taken by the Lower
 Court on the question of negligence as connected with the over-
 shooting of the platform by the train. We have no doubt what-
 ever that the mere fact of a train overshooting a platform, at which
 the driver has orders to stop, is in itself *prima facie* evidence of
 negligence Under ordinary circumstances, if there are proper
 signals and the engine and rails are in good working order, a
 careful driver has not the smallest difficulty in stopping a light
 train, such as that in which the plaintiff was travelling at the pro-
 per moment The Judge says that it is a common occurrence for
 trains to overshoot the mark and then move back This may be
 true, as it is also doubtless true that railway officials are
 frequently guilty of very gross irregularities and neglect of duty
 whereby they needlessly endanger the lives of hundreds of pas-
 sengers But the negligence is none the less negligence, and
 none the less culpable, because frequently repeated

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We do not mean to say that the overshooting of a station may not be perfectly excusable, and the result of circumstances which may defy the efforts of the most careful and skilful of drivers, for example, it is well known that, in certain states of the weather the rails are in such a slippery condition that the brakes and other means ordinarily used to stop the train failed to produce that effect. In the present case, however, there is really no reason given for the train not having stopped when it ought to have done so. The driver can assign no better reason than that it was dark and smoky—a reason which, with reference to the same place, probably would apply equally to almost every other night during the cold season, on which there did not happen to be moon light. But the driver mentions a fact which may possibly be the real cause of his having been too late in pulling up—the fact, namely, that there were no proper signals in use at the station. He says (and he is confirmed by Mr. Shanks) that there were no fixed signals, and no regular signal post at the station, but that the custom was to hold up a green light at the end of the station. Without saying that the want of proper signals was the reason why the train over shot the station, we find that no sufficient excuse for the overshooting is proved. We think that the defendants were guilty of negligence, therefore, in that the train overshoot the platform. That it did so overshoot the platform was unquestionably the primary cause of the disaster which befell the plaintiff. But, supposing there was no negligence, the overshooting of a station is an occurrence which necessarily is likely to produce great danger to passengers who are about to alight, and the least that a Railway Company are bound to do, if such an event does happen, is to take every possible means to divest the occurrence of its dangerous consequences. One obvious precaution is to warn passengers to sit still, and that the train is about to be backed, and, in the case now before us, we think there was great negligence on the part of the servants of the Railway in not warning the plaintiff and other passengers that the train was about to move, and that they must keep their seats. The carriage in which the plaintiff was seated was drawn up opposite to the platform where passengers usually alight. The servants of the Company saw or ought to have seen, that, during the few moments that the train stood still, two passengers got out. If it was unsafe or wrong for them to get out then, they should have been prevented from so doing, or warned not to do it. But no objection whatever was made

when Mr Schiller and Captain Jervis alighted. What, then, was the reasonable and natural course for the plaintiff to pursue under the circumstances? He knew nothing of some of the carriages having gone beyond the end of the platform, or of the intention to back the train into the station, he felt that the carriage had stopped, he saw two fellow passengers get out safely and without any objection or remonstrance on the part of the railway officials. Why should he have doubted that the right time had come for himself to alight? Was he to sit still in his carriage and say to himself, "Though the train is at a stand still opposite to the platform, and though the passengers have got out and gone away safely, I am not actually certain that the train has stopped in order to allow passengers to alight, therefore, I shall sit until some of the railway officials come and tell me it is safe for me to get out?" Such a course would have been entirely contrary to the usual practice of travellers either in this or in any other country—and certainly, upon the evidence, wholly contrary to the usual practice (apparently never objected to by the defendants) of first class passengers upon the defendants' line. The plaintiff's case is not even that of a person who himself opens the door of a railway carriage and is the first to step out for here the train was actually at a stand still, other passengers had opened the doors and had alighted safely and without any indication on the part of the railway authorities that they ought not to have done so, and the plaintiff had no notice, and no reason to suspect, that the train was going to be moved back. We say he had no reason to suspect the train was about to move, because the plaintiff swears he never heard any whistle, but, even if he had heard it, it would be impossible for us to say that it would necessarily have conveyed to his mind the information which the driver intended it to convey. We think that, as the train had stopped, and as the other passengers had got out safely, and there was nothing to lead any man in the exercise of ordinary care to suppose that they ought not to have done so, the plaintiff was justified, and acted as any reasonable and careful man would have acted in thinking that the proper time for alighting had arrived. We think there was no such want of care or prudence on the part of the plaintiff as to disentitle him to damages.

It is not because possibly, the plaintiff might have exercised more care than he did, that therefore his right of action or his remedy is barred. Nor even if there had been a certain amount

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of negligence on his part, would that necessarily be an answer to his claim? The question really is whether the plaintiff did or did not exercise ordinary care *Dalies v Mann* (1) In a recent case *Stapley v The London, Brighton, and South Coast Railway Company* (2) the Court of Exchequer refused to disturb a verdict for the plaintiff, although the person injured had been guilty of far greater negligence than could possibly be attributed to the plaintiff in the present case, even supposing there was some want of care and prudence in what he did. In that case, the negligence on the part of the Railway was that a gate at a level-crossing was left open, and the gatekeeper was absent, at a time when an express train was overdue. The person injured pressed on to the line, and was knocked down by the train which came up at the moment. A verdict was given against the Railway Company, although it was proved that the person injured might have seen the train approaching, if he had chosen to look.

We have some difficulty in dealing with a case like this where numerous questions of fact are so closely mixed up with questions of law. The rule we apply is that which has been acted on in many cases in England, and is stated by ENLÉ, C J., in expressing the opinion of the majority of the Judges in the case of *Scott v. London Dock Company* (3) where he said "There must be reasonable evidence of negligence. But, when the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

On the whole, we think that the Railway Company was guilty of negligence in not keeping the station properly lighted, in allowing the train to overshoot the station, and in not warning the plaintiff against alighting and we think that the injuries sustained by the plaintiff were caused by that negligence and that the plaintiff did not, by his own want of care, contribute to the accident.

There remains the question of damages. The evidence on this point is not so satisfactory or precise as it might have been. It is, however, undoubtedly proved that the plaintiff, at the time

(1) 10 M & W 548

(2) 1 L R 112

(3) 34 L J Ex 220

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of the accident, was a Bill Broker, with a good business, and making a considerable income; that the effects of the accident were such as to disable him wholly from work for four or five months, and that, even after that time, he would not be able to attend to business so fully or profitably as before. When we consider, in addition to this, the amount of personal suffering he has gone through, and the fact (deposed to by Dr Macnamara) that there will probably always be a stiffness of the leg which was injured, we feel assured that we are not assessing the damages too much in the plaintiff's favor when we assess them at Rupees 10,000.

We think the decree of the Court below ought to be reversed and that a decree ought to be given for the plaintiff, with Rupees 10,000 as damages, and all costs (as in a suit for Rupees 10,000), both here and in the Lower Court.

**The Indian Law Reports, Vol XXXI (Bombay)
Series, Page 381.**

PRIVY COUNCIL

(ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY)

Before Lord Robertson, Lord Collins and

Sir Arthur Wilson

KESSOWJI ISSUR (PLAINTIFF)

v

**GREAT INDIAN PENINSULA RAILWAY COMPANY
(DEFENDANTS)**

Civil Procedure Code (Act XIV of 1882) Sections 568-623—Discovery of fresh evidence—Laches—Negligence—Dismissal of application for reversal—Additional evidence on appeal—Evidence taken preliminary to hearing of appeal on the merits—Suit for damages for injuries on railway—Appeal decided not on evidence at trial but on observations of Judges at presentation of scene and events of accident on another night than that on which accident occurred

PC
1907
April 24,
May, 9

The legitimate occasion for Section 568 of the Civil Procedure Code (XIV of 1882) is when on examining the evidence as it stands some inherent lacuna or defect becomes apparent and not where a discovery

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's made outside the Court of fresh evidence and the application is made to import it that is the subject of the separate enactment in Section 623

Section 623 exacts very strict conditions, so as to prevent litigants being negligent and enjoins the Court to require the facts as to the absence of negligence to be strictly proved. Where the defendants on the day after judgment had been given against them discovered fresh evidence which with diligence they might under the circumstances have obtained before or during the trial of the suit, and even after such discovery delayed for two weeks before making an application for review of Judgment, *Held* that the application was rightly dismissed.

On an appeal on the merits of the case being filed the appellate Court without recording any reason as required by Section 568 of the Code allowed such further evidence to be taken, not after the appeal on the merits had been heard and the evidence as it stood had been examined by the Judges but on special and preliminary application. *Held* that the appellate Court had no Jurisdiction to admit the additional evidence that it was wrongly admitted and must be disregarded.

The plaintiff sued the defendants, a Railway Company, for damages for injuries sustained by him when alighting from a carriage which overshot the platform of a station at night, and the evidence on the question of what light there was either natural or artificial on the night in question being conflicting it was suggested during the hearing of the case on appeal and agreed to by the counsel for the parties that the Judges should visit the scene of the accident under conditions approximating as nearly as possible to those which prevailed when the plaintiff met with his injuries. This was done, the Judges and the legal advisers of the parties went to the station where a presentation of the scene and events of the accident was gone through by which the Judges were enabled to make a thorough investigation of the material conditions accompanying the accident. They formed their own opinion on the question of the sufficiency or otherwise of the light and gave Judgment in accordance with them, reversing the decision of the Court which tried the case.

Held that such procedure was illegal. The result of it was that the appeal was decided not on the testimony given at the trial as to what took place on the night of the accident by the Judges' observation of what they saw on another night altogether, and the decision based on it was set aside, the Judgment of the first Court being restored.

APPEAL from a Judgment and decree (December 23rd, 1904) of the High Court at Bombay which reversed on appeal a Judgment and decree (July 11th, 1904) of one of the Judges of the same Court sitting in exercise of the Original Civil Jurisdiction of the Court.

The suit out of which this appeal arose was brought by the appellant for damages for injuries sustained by him on 30th March 1903 through the negligence of the respondent Company. For the purposes of the report the facts are sufficiently stated in

their Lordships' Judgment The plaintiff stated in his plaint that he was employed by several Mill Companies in Bomhay as muccadam, and in the course of his evidence in the case he stated that he lost his harness with these Mill Companies and therefore his income in consequence of the injuries he received through the defendant's negligence At the trial of the case on the original side of the High Court (TYANI, J) the plaintiff on 14th July 1904 obtained a decree for Rs 24,000 as damages

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On 28th July 1904 the defendants applied for a review of Judgment, on the ground that since the Judgment was delivered namely on 15th July 1904, "they had discovered new and important matter and evidence which after the exercise of due diligence was not within their knowledge and could not be procured at the time when the decree was passed"

The new matter and evidence referred to related to the circumstances under which the plaintiff was dismissed from his employment as muccadam of the Century Spinning and Manufacturing Company, the Textile Manufacturing Company, and the Bombay Dyeing Company, and the affidavit and documents filed with the petition for review stated "that the plaintiff had been dismissed from his employment with the Companies abovenamed at the beginning of January 1904 for reasons not in the remotest degree connected with the alleged accident on the railway," thus contradicting the plaintiff's evidence at the trial of the case

The application for review was dismissed on 4th August 1904

On 11th August the defendants appealed on the whole case from the Judgment and decree of Mr Justice TYANI In paragraph 25 of their memorandum of appeal submitted.

That under all the circumstances of the case they should be given an opportunity of adducing evidence to show that the plaintiff was dismissed from his employment by the said Mills owing to complaints regarding his receipt of illegal gratifications or defalcations and not because of his inability to attend to his business owing to his injuries, more specially having regard to the facts that the said evidence to a large extent consists of letters written by and to the Solicitors of the plaintiff and presumably in their possession at the time of the trial and not disclosed and that the learned Judge largely based his Judgment upon the fact that he considered the plaintiff to have given his evidence frankly and spoke the truth to the best of his ability, thus raising the same questions which were sought to be raised by the review

On 27th September 1904 the defendants applied to be allowed to produce further evidence on the question raised in the above paragraph, and their application was on 30th September granted

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by the Appellate Court, but no reason as required by Section 566 of the Code of Civil Procedure was recorded for allowing such further evidence to be given

The further evidence was taken and was commented on in the Appellate Court (Sir L. JENKINS, C.J. and BATHURST, J.) its effect being stated by the Court to be "there is an end to the possibility of relying upon the plaintiff's testimony"

The Appellate Court adopted the same conclusions of fact on the merits of the case as the first Court had done, namely that the carriage did overshoot the level of the platform, that the stoppage of the train was an invitation to alight, and that the plaintiff's injuries were received by a shock or fall on alighting and not by a fall after he had alighted. But they considered that those facts

though a necessary ground work of the plaintiff's case do not by themselves suffice to establish negligence against the Company. It is essential for the plaintiff to go further and show that the situation in which he was placed by the invitation to alight at the particular spot exposed him to danger which was not visible and apparent or that he was invited to alight in an unsafe and improper place

After citing decisions to show this, the Judgment proceeded as follows —

"The result of these decisions seems to me to leave no reasonable doubt as to what is the law upon the point in question. Mere overshooting even with an invitation to alight is not necessarily or by itself negligence. To constitute negligence there must be on the part of the Railway Company some further act or omission which exposes the passenger to a danger not visible and apparent. In other words such a danger as a passenger of ordinary caution could not responsibly be expected to avoid. In the present suit this additional element is alleged by the plaintiff to exist in this circumstance that the slope was in complete darkness when his carriage drew up against it. The allegation is denied by the defendants and their witnesses who assert that there was sufficient natural light to allow the plaintiff to descend with safety. It is not now alleged that the Company's lamps on the platform threw any real light on the slope. Whether or not there was any daylight is on the record a matter of great nicety. The oral evidence is conflicting and the learned Judge of the Court below has apparently decided the point upon a consideration of the Almanac which can not be regarded as a satisfactory guide. The train is shown to have reached Lion Station at 6.21 p.m. (local time) and on that day the sun set at 6.12. If we add 40 minutes, the usual interval allowed for civil twilight it will be seen that at the calculation at 6.51 p.m. uncertain whether there was any real light or not. For upon the Almanac the arrival of the train would be coincident with the expiration of twilight. Owing to this difficulty and to the vital importance of the law

it with certainty, it was suggested that we should visit the scene of the accident under conditions approximating as closely as possible to those which prevailed when the plaintiff met with his injuries. This suggestion was welcomed by counsel on both sides, and after communication with the local observatory it was agreed that on the evening of the 8th December at forty minutes after sunset the conditions now in question would be as nearly as possible, exactly reproduced. At that time therefore, attended by the legal advisers of both parties we visited Sion Station with the result that we are clearly of opinion that the plaintiff's accident must be attributed to his own carelessness and that the Company cannot be held liable for negligence. By the courtesy of the Railway Company we were provided at Sion with the same carriage in which the plaintiff was travelling on the 30th March, and we were thus enabled to make a thorough investigation of the material conditions accompanying the accident. In the first place it was noticeable that twilight had by no means completely ceased so that the plaintiff's allegation that it was 'pitch dark' must be rejected as untrue. It appeared to us that a passenger of ordinary carefulness would have had no difficulty in alighting safely even though he had nothing but the twilight to guide him. But in fact there was a far better light, namely the light from the lamps in the carriage and the neighbouring compartments of the train, and as it is admitted, even by the plaintiff himself, that on the evening of the accident the interior of the train was lighted in the usual way, this circumstance supplies us with evidence of a very weighty character. It must be remembered that in this country, where the whole side of a Railway carriage is virtually an open window, the interior lamps project a great deal of light on the land bordering on the train, and after repeated experiments, made with all reasonable allowance due to our being forewarned, we were satisfied not only that the general lamps of the interior of the train threw sufficient light upon the landing place but that this place was specially and amply lighted from the lamp of the particular compartment. For the mere opening of the carriage door, the necessary preliminary to descending, projects the light of this lamp clearly and distinctly on the space below, and even though that space be one or one and a half feet lower than usual, we feel assured that no passenger possessing fair eye sight could fail to alight with safety. We are distinctly of opinion that there was nothing which could be called danger, either concealed or visible. This opinion receives confirmation from the undisputed fact that no mishap occurred to any of the passengers who alighted from the third class compartment ahead of the plaintiff's carriage and who in consequence must have been brought up at a greater height above the landing place than the plaintiff though they had a greater height to descend it is not denied that they descended safely."

In the result, the Appellate Court reversed the decree of TYABJI, J, and dismissed the suit with costs. On this appeal Cohen, K C and DeGrayther for the Appellant contended that on the facts of the case which had been adopted by both Courts below negligence had been shown on the part of the Railway

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Company Reference was made to *Bridges v Directors, &c., of North London Railway Company* (1) and *London North Western Railway Company v Walker* (2). The additional evidence admitted by the Appellate Court was taken in violation of Section 568 of the Civil Procedure Code: it was taken before that Court was in a position to say that it was 'required' within the meaning of that Section, and no reason was recovered for taking additional evidence. It was done therefore without jurisdiction and evidence was not admissible. The finding upon such evidence to the effect that it made reliance on the appellant's testimony impossible was quite unwarranted and erroneous. The results of the visit of the Judges trying the appeal to the locality where the accident happened was inadmissible as evidence in the case: it was not merely a view of the locality but a presentation or rehearsal, of the occurrences at the time the appellant received his injuries, at which the Judges assisted. It was setting up a new case, and introducing new matters in place of the evidence of the witnesses who saw the accident on 30th March 1903, which was the only legal evidence as to the condition of the light at the time, on which the Court of Appeal should have acted, and which could not be disregarded in favour of a consideration of a state of affairs existing at the time of the local investigation on 8th December 1904. All the procedure at the local investigation was, it was submitted, null and void.

Sir R Finlay, K C, and *Tyrrell Paine* for the Respondents contended that the Appellate Court were entitled in their discretion to allow the additional evidence to be taken: the words of Section 568 "for any substantial cause," were wide enough to include this case. The Court had jurisdiction to take the course they did notwithstanding the refusal of the application for review. Sections 623 and 629 of the Civil Procedure Code were referred to. The Appellate Court was right in holding that the facts did not necessarily establish negligence on the part of the respondents, and they were entitled to come to the conclusion that there was sufficient light at the time of the accident to enable the appellant to alight safely if he had used due care and diligence. The course taken by agreement of the parties in leaving the matter in the hands of the Court for a local inspection amounted to a submission to arbitration. There was no suggestion by either side that the circumstances at the time of the investigation by

(1) (1874) L. R. 7 H. L. 213

(2) (1903) A. C. 277

the Judges differed in any way from those at the time the accident happened. The Appellate Court wished to view the locality to enable them to decide upon the evidence as to the amount of light there was when the accident occurred. Both parties agreed and the decision was upon a question of fact. The fact that the appellant did not lose his employment by reason of the accident would reduce the damage materially. The Appellate Court was right in deciding that against him and in no case should he get the amount given him by the first Court.

Cohen, K C, replied.—The course taken in visiting the locality by agreement of parties did not amount to a reference to arbitration. Section 306 of the Civil Procedure Code was referred to. It was an unwarranted course of procedure.

The Judgment of their Lordships was delivered by

LORD ROBERTSON—The appellant was plaintiff in a suit against the respondents, for damages for personal injuries alleged to have been sustained through their negligence. He was a passenger in a train of theirs from Bombay to Sion Station, and his case was that on the evening in question, the train overshot the platform at Sion and the passengers, on the implied invitation of the respondents, alighted where the train stopped, that at this place it was dark and there were no lamps, that no warning was given to the appellant that the train had passed the platform or that special care must be taken in descending, that the appellant fell heavily, and was seriously injured, and for long disabled from business. There was no dispute as to the nature of the injuries.

The case went to trial, the respondents denying liability, evidence was let at great length and the trial lasted 10 days. The result was that the learned Judge who tried the case gave the appellant Rs 24,000 and it is sufficient at present to say that the Judgment presents a careful and complete analysis of the evidence.

Cases of overshooting the platform and resulting accidents to passengers have so frequently been tried and considered that no question of law arises for determination. The present case is only remarkable because the respondents (in the teeth of the written report of the Sion Station Master, made the day after the accident, that the train had overshot the platform), maintained at the trial and adduced witnesses including this very station master, to prove the contrary and that the passengers duly alighted at the platform. This fatal course was really to give away the case, it

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was proved to the satisfaction, even of the Appellate Court that the train did overshoot, and the respondents, by this perverse attitude, were disabled from maintaining any intelligible theory as to the conditions under which the passengers actually alighted. They could not pretend that the passengers were warned to take care, and all their evidence as to lamps applied to a place where the accident did not happen. It may be noted, in passing, that the darkness which in fact prevailed is proved by a piece of real evidence to which sufficient weight has not been given, viz., that when it became known that a man was lying hurt, lights were brought from the station.

From the description of the case now given, it is clear that the case was a commonplace and plain sailing one and required no *deus ex machina*, and that it was very deliberately investigated. Its subsequent course, however, was destined to be untoward.

Fourteen days after the Judgment of Mr. Justice TRAIL, the respondents applied to him for a review of his Judgment, on the ground that, since the trial, there had come to the respondents' knowledge new and important evidence, which was, in short, that one of the employers of the appellant said that the appellant had lost the employment of the informant's firm owing to causes unconnected with the accident, whereas in evidence, the appellant had ascribed this loss to the accident.

Now the Code of Civil Procedure permits such applications for review on the ground of such discovery, but it exacts very strict conditions so as to prevent litigants lying on their oars when they ought to be looking for evidence—it enjoins the Judge to require the facts as to the absence of negligence to be strictly proved, and it makes the Judge who tried the case final on such applications. The remedy is allowed (Section 623) to "any person considering himself aggrieved who from the discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within his knowledge, or could not be produced by him at the time when the decree was passed or for any other sufficient reason." And, by Section 626, "no such application shall be granted on the ground of discovery of new matter without strict proof of such allegation." In the present instance, the Judge refused the application and it is manifest that the circumstances rendered it inadmissible.

The appellant had in his plaint described himself as succeeded by several Mill Companies, there was no doubt of his identity.

and as to his employment, in the witness box he was explicit, even copious, as to his loss of the agencies in question, to such an extent that the respondents objected to some of his books being produced, he was cross-examined on the subject, and this took place on 17th June 1904, the first day of a trial which did not conclude till 2nd July 1904, and took place at Bombay, the scene of the transactions in question

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It is obvious that if the respondents had desired to inform themselves before or even during the trial as to this man's loss of business, all they had to do was to step round and see his employers, and it would be *passim exempli* if provisions for review were perverted to supply such omissions

After their failure to get review, the respondents appealed to the Appellate Court on the whole case, and the 25th reason of appeal was that they should be given the opportunity of adducing further evidence, which had been refused by Mr Justice TYABJI on their application for review

Having got into the Appellate Court the respondents gave notice of an application for permission to examine the man Wadia, whose information had founded their application to Mr Justice TYABJI, and this application was supported by affidavit, just as in the Court below. The Appellate Court heard the application, and on 30th September 1904, granted it, or rather, with greater latitude, ordered that "further evidence" be taken, and taken it was, before one of the Appellate Judges, not merely of Wadia, about whom the application was made, but several other witnesses being examined for the respondents, and the appellant being examined for himself

Now, at this stage the question is under what jurisdiction was this fresh evidence taken by the Appellate Court? They had, as has been noticed, no jurisdiction to reverse the refusal of Mr Justice TYABJI, appeal from his decision being excluded by statute. The 568th Section of the Code of Civil Procedure can alone be looked to for sanction of this proceeding, but when its terms are examined, they will be found inapplicable. The part of the section which alone is colourably relevant is "If the Appellate Court requires," which plainly means needs, or finds needful, "any document to be produced or any witness to be examined to enable it to pronounce Judgment, or for any other substantial reason, the Appellate Court may allow such evidence to be produced, or document to be received, or witness to be

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examined " The section goes on " Whenever additional evidence is admitted by an Appellate Court, the Court shall record on its proceedings the reason for such admission "

Now this evidence was admitted by the order of 30th September 1904, and that order states no reason for such admission *Prima facie*, therefore, this was not done under the 568th Section. But further, the ultimate Judgment of the Appellate Court puts it beyond doubt that in fact the learned Judges were simply reviewing and reversing Mr. Justice TRIBUN's refusal of review, for they frankly narrate that refusal, and go on to say " On the case coming up in appeal it appeared to us desirable that the further inquiry invited should be undertaken " On this phraseology " in appeal," it must be observed that the further evidence was ordered not after the appeal on the merits had been heard, and the evidence as it stood had been examined by the Judges, but on special and preliminary application. This is important, because the legitimate occasion for Section 568 is when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. That is the subject of the separate enactment in Section 623.

On these grounds, it appears to their Lordships that the Appellate Court had no jurisdiction to admit this evidence, that it was wrongly admitted, and does not form part of the evidence in this appeal. It must, therefore, be disregarded. The evidence, however, was necessarily read and commented on, and in fairness to the appellant, their Lordships think it right to add that they do not agree in the following analysis of it which is taken from the Judgment of the Appellate Court. " The result may be stated in a single sentence. There is an end to the possibility of relying upon the plaintiff's testimony "

The appeal having been heard on its merits, there ensued what it may be hoped, is an unprecedented chapter in appellate procedure. The Court seems to have adopted the view that the train had overshot the platform, and to have considered that the *crux* of the case was the question of light, and this question, of course, was a complex one, what light came from the sky and what from artificial sources, the station lamps having been the artificial light relied on by the respondents. The course taken by the Appellate Court had better be described in their own language.

" Owing to this difficulty and to the vital importance of settling it with certainty it was suggested that we should visit the scene of the accident

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under conditions approximating as closely as possible to those which prevailed when the plaintiff met with his injuries. This suggestion was welcomed by Counsel on both sides and after communication with the local observatory it was agreed that on the evening of the 8th December at 40 minutes after sunset the conditions now in question would be as nearly as possible exactly reproduced. At that time therefore attended by the legal advisers of both parties we visited Sion Station with the result that we are clearly of opinion that the plaintiff's accident must be attributed to his own carelessness and that the Company cannot be held liable for negligence. By the courtesy of the Railway Company we were provided at Sion with the same carriage in which the plaintiff was travelling on the 30th March and we were thus enabled to make a thorough investigation of the material conditions accompanying the accident.

The result was that it became manifest to the two learned Judges that "a passenger of ordinary carefulness would have had no difficulty in alighting safely, even though he had nothing but the twilight to guide him. But, in fact, there was a far better light, namely the light from the lamps in the carriage," and "this place was specially and amply lighted from the lamp of the particular compartment."

The practical result was that the appeal was allowed and the suit dismissed, the case being decided not on the testimony given at the trial as to what took place on the night of the accident, but by the Judges' observation of what they saw on another night altogether. Their Lordships find it impossible to admit the legitimacy of such procedure or the soundness of such conclusions. Even if the question of light could be isolated from the rest of the case there was no ground whatever for despairing of sound results being yielded by a careful analysis of the evidence, and, in fact this was demonstrated by the excellent Judgment of the trial Judge. On the other hand, the method actually adopted is subject to the most palpable objections and fallacies.

It was suggested by one of the learned counsel for the respondents (in irreconcilable inconsistency with the leading argument), that this proceeding was so remote from regular judicial methods as to constitute an arbitration, and that the result was not appealable. Their Lordships do not think that the appellant is shown to have done anything to exclude his appeal. In the Judgment it is stated that counsel on both sides welcomed the "suggestion, which is thus traced, in its inception, to the bench. But the "suggestion" was "that we should visit the scene of the accident under conditions approximating as closely as possible to those which prevailed when the plaintiff met with his injuries."

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Their Lordships do not approve of such a suggestion, but even if it had been tentatively carried out, it did not necessarily follow that the Court would cast to the winds the legal evidence in the case, and decide on impressions arising on the concerted representation. It would be too strict to hold that it is the duty of counsel, at their peril, to restrain Judges within the *curia curie*, and to insist on their abstaining from experiments which to some may prove too alluring to admit of adherence to legal *media concludendi*.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed, the Judgment of the Appellate Court reversed with costs, and the Judgment of Mr Justice TRAIL restored. The respondents will pay the costs of the appeal.

The Indian Law Reports, Vol. XXVIII. (Calcutta)
Series, Page 401.

PRIVY COUNCIL.

*Before The Lord Chancellor, Lord Macnaughten, Lord
Dairy, Lord Robertson and Lord Lindley.*

THE EAST INDIAN RAILWAY COMPANY, DEFENDANT
v.

KALIDAS MUKERJI, PLAINTIFF.

(ON APPEAL FROM THE HIGH COURT AT PORT WILLIAM IN BENGAL)

P C
1901
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*Railway Company—Passengers—Responsibility of a Railway Company
in the care of passengers—Injury to the latter by the illegal act of a
fellow passenger—Indian Railways Act (IX of 1890) Sec 2—
Negligence*

The legal obligation upon a Railway Company to exercise due care and skill in carrying passengers does not extend so far that the Company can be held responsible under all circumstances for not carrying them safely. Negligence alleged against them must be proved affirmatively, where denied. It was not the duty of the Railway servants to search every parcel that passed the ticket barrier carried by a passenger.

Words in the Judgment of the Chief Justice Q.B. in *Collett v The London and North Western Railway Company* (1) as to the duty to "carry safely," explained.

As no act or omission, of neglect had been proved against the Company or their servants the decrees below were recommended for reversal, and the suit for dismissal

APPEAL from a decree (17th February 1899) of the Appellate High Court(1) affirming a decree (8th June 1898) of a Judge of the High Court in the Ordinary Original Civil Jurisdiction

This suit was brought by the respondent for damages upon the alleged negligence of the defendants, appellants, as having resulted in the death of his son, Atindranath Mukerji, who died from injuries received on the 27th April 1896 from an explosion and a fire, which took place in the Company's train on the Railway between Secunderabad and Dadri. The fire was caused by the explosion of fireworks illegally brought into the compartment, in which the deceased was travelling, at the Aligarh station.

The plaint charged that the Railway Company undertook to carry Atindranath safely, but conducted themselves so negligently in that behalf, that the explosion occurred, in consequence of their servants having allowed fireworks to be brought into the carriage. The defendants denied that the disaster was caused, or contributed to, by any negligent, unskilful or improper conduct on their part or that of their servants.

The question at issue resolved itself into whether due care had been taken by the defendants for the purpose of preventing fire works from being taken, as they had been, by two persons, Ahid Hossein and Gholam Hossein, both of whom were killed by the explosion into the compartment.

On this appeal the main question decided was, whether upon the evidence brought forward for the plaintiff to establish the averment of negligence on the part of the defendants, enough had been shown to establish a *prima facie* case against them, and to justify the decrees of the Courts below in the plaintiff's favor.

By Section 59 of the Indian Railways Act, 1890, it is provided that no person shall take dangerous or offensive goods with him upon a Railway, without giving notice of their nature: that the servants of a Railway Company may refuse to receive such goods for carriage, and that any Railway servant, having reason to believe that any such goods are contained in a package, may cause the package to be opened for the purpose of ascertaining its contents.

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The Judge of the High Court in the Original Jurisdiction, O'KINEALA, J, at the conclusion of his judgment, found that the defendants had not exercised that degree of care in providing for the safety of their passengers, which the law imposed upon them, and decided that therefore they were liable to pay damages to the plaintiff in this sum

This Judgment appears in the report of the appeal to the Appellate High Court, where the Judgments of the Chief Justice, and of PRINSEP, J, and AMIR ALI, J, are given with full statements of the facts (1). The Chief Justice, in whose Judgment PRINSEP, J, concurred, expressed his opinion, that it was for a Railway Company to show such a degree of care as might reasonably be required from them, considering all the circumstances of this case, which on this appeal appeared to him to range itself under that class of claims, where a *prima facie* case has been so presented as to require an answer from the defendants to satisfy the Courts that they have taken all reasonable care and precaution in the matter. It had been contended that the defendants that the case differed from others of the class, inasmuch as the fire-works were not under the control of the Company, but under that of third parties. However no evidence had been given to show that any care or precaution was taken at the station, where the fire-works were brought in, to stop passengers, who might be carrying, or be suspected of carrying dangerous goods. He referred to the Railways Act, 1890. It had not been shown that the fire works were not openly carried in. It was well known that they were then in much demand being used for marriage festivities at that season most frequent. The Company, then, might not unreasonably be expected to take precautions in regard to fire works. None of their servants had been called to show what took place at the barrier on the station. Thus, in the absence of evidence as to matters lying peculiarly within the knowledge of the defendants, the presumption raised, in the opinion of the Judge trying the case, that there had been absence of reasonable precaution, was well grounded. The appeal was therefore dismissed.

Mr R B Haldane, K C, Mr R F Bray, K C, and Mr S A T Rawlatt, for the Appellant. The Judgments appealed against are in error. Up on the admitted facts of the case the

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disaster occurred in consequence of the unlawful act of third persons, for whom the appellants were not responsible. And there was no evidence that such unlawful act was accompanied by any negligence, or breach of duty, on the part of the appellants, who had no knowledge, or means of knowledge, of the coming danger, still less had they allowed, in the sense of permitted, the bringing in of the fire works. The expression, "*res igitur a laqueatur*" had been referred to as applicable here, but the circumstances when regarded showed that it did not apply. The accident was not due to, or the disaster increased by, any defect in the appliances or rolling stock or anything under the control of the appellants. And as to negligence on their part or on that of their servants, there was no evidence of it, either direct or inferential, or presumptive. In fact, the accident and all the causes that led to it were in matters beyond the control of the Company and their servants, as shown in the evidence adduced, which consisted largely of what the Company had supplied. In such a suit as the present it was for the plaintiff to establish that there had been a breach of the obligation on the defendants, as carriers of passengers, to take due care and due skill. The obligation was limited to that. *Readhead v The Midland Railway Company* (1). It also was for the plaintiff to show that there was something in the way of the defendants' duty that they might have done, and that they had omitted to do, *Smith v. Great Eastern Railway Company* (2). To bring home the charge of negligence much depended on the degree of control exerciseable by the defendants and their servants, and the mere knowledge of the possibility of danger, in the quarter whence it arose, would not be enough to cause responsibility to attach. A plaintiff in such a case must prove some negligent act or omission on the part of the defendant, as shown in *Wallin v London and South Western Railway Company* (3). Again, where there was an even balance of evidence, the claim, upon the imputation of negligence, could not be maintained, and as to this *Cotton v Word* (4) was cited. Also in *Welfare v London and Brighton Railway Company* (5). No proof was given that the Company knew that they were exposing the person coming on to their premises to danger, and the result in the action was a

(1) (1871) 1 R. & C. B. 413 and on appeal (1879) L. R. 4 Q. B. 379.

(2) (1866) L. R. 2 C. 1. 4.

(4) (1860) 8 C. B. (N. S.) 468.

(3) (1866) L. R. 1 N. 41 Cas. 41.

(5) (1869) 1 R. 4 Q. B., 693.

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non suit, which was held to be right. In *Briggs v Oliver*(1) there was a difference of opinion as to whether a non suit was right, but it was agreed that there was no case to go to a jury, where the evidence was consistent with the absence of negligence. And *Toomey v London and Brighton Railway Company*(2) shows that, in order to render the defendant liable, the plaintiff must show an act or omission more consistent with there having been negligence than with its absence.

It was not in itself negligent, to regard the improbability of a third person's default, *Daniel v Metropolitan Railway Company* (3). The proposition on which the defendants could rely was stated by ERLE, C.J., in *Scott v London and St Katharine Docks Company*,(4) to the effect as follows: "Were the thing to be shown under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if those, who have the management, use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." Here, it was submitted, the bringing in the fire-works was not under the management of the defendants, in the sense meant.

Mr H H Asquith, K C, and Mr J H A Branson for the Respondents. Sufficient evidence has been given upon which the Courts below rightly inferred negligence. In the case last cited it was said that when the facts were more within the knowledge of the defendants than of the plaintiff some weight might be attributable to the absence of explanation by the former, and such absence was referred to in the Judgment already quoted. The general principle on which the division of the High Court proceeded was, that it had been the duty of the Company to exercise the degree of care, which might reasonably be required under all the circumstances. That was right, and it was incumbent on the defendants, after the evidence of the circumstances had been given, for the plaintiff to attempt to show how the pack, box, or parcel, had passed the barrier. It was for them to show that its dangerous nature was not recognised. As the case was left, it was left unknown, whether there was anything that should have aroused attention and suspicion of dangerous articles being carried. This case did not fall within

(1) (1867) 1 H & C 403

(2) (1873) 3 Q. B. (1873) 11

(3) (1871) L.R. 5 H.L. (1871), and (1871) 46 C. 45 (4) (1875) 3 H. & C. 11

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that class, where in consequence of there having been neither power nor means to avert the danger, there was no evidence that could be submitted to a jury. This case was also outside the class, where the evidence on the question of negligence, or no negligence, was equally balanced. The case really fell within the proposition declared in *Scott v The London and St Katharine Docks Company*,⁽¹⁾ which expressly mentioned the absence of explanation by the defendants, as giving rise to a presumption. The Courts below had acted rightly upon this. In short, the plaintiff averring negligence had presented evidence, which required explanation on the part of the defendants. Special circumstances might render special care obligatory on the Company. The provision in the Indian Railways Act, 1890, Section 89, gave them the control, to exercise which they should have shown themselves ready when called upon. There was the well-known fact that at that time of year the local traffic in fireworks was active, and there was the evidence of the passengers having been stopped after the event by only a few days, from carrying fireworks. No evidence whatever was adduced by the defendants after the plaintiff's case was closed. Nothing had been brought forward to show that precautions would have been useless, that fireworks were undistinguishable in ordinary bundles, or other particulars relevant to this important part of the defence.

Mr R B Haldane, K C, in reply, referred again to *Scott v. The London and St Katharine Docks Company*⁽¹⁾, and to the general rule stated in the Judgment in *Cotton v Wood*,⁽²⁾ that where the evidence is equally consistent with the existence or non existence of negligence the party alleging negligence has not made a case for a jury to decide.

Their Lordships' Judgment was delivered by Lord Halsbury —

THE LORD CHANCELLOR — In this case the plaintiff, who is entitled to bring the action, sues the defendant Company for the death of his son, who was killed by an explosion in a railway carriage. The explosion was caused by the bringing into the carriage of a quantity of fireworks. The carriage was one in which smoking was permitted, and a small charcoal stand was there for the accommodation of the smokers. The two persons responsible for bringing in the combustibles, themselves became

(1) (1865) 3 H and C 596

(2) (1860) 8 C B (N S) 563

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the victims of the explosion; but the action is brought against the Railway Company upon the allegation that they were guilty of negligence in permitting the explosives to be brought into the carriage.

No precise evidence was given as to the course of business at the station at which the two persons in question got in. The fact that the fireworks were brought in was clear. But it is contended that it was the duty of the Company to see that dangerous articles, such as fireworks, should not be permitted to be brought into a passenger train. That it would be negligence knowingly to permit such articles to be carried in a passenger carriage is obvious enough, but it is not suggested, so far as the Railway Company or their servants are concerned, that they were knowingly permitted to be brought in.

The sole question is whether, upon such facts as are here proved, their Lordships can find reasonable evidence of a neglect of duty on the part of the Company, in not detecting the nature of the parcel or parcels which it is presumed that one, or both, of the persons who brought the fireworks to the train had with them when they passed the ticket barrier at the station at which they got into the train.

No evidence is given by any one of the appearance, or even the bulk of the parcel or parcels. No evidence is given by the Railway Company of any inspection of any passenger's luggage at the station in question. The parcel, whatever it was, was placed under the seat of the carriage, and some expert evidence was given that the extensive explosion which occurred, and in which the two people responsible for carrying the fireworks were themselves killed, might be caused by a half-a-dozen bombs such as are usually used on such an occasion, as these fireworks were intended for, namely, a Hindu marriage, and these bombs are described as being about the size of ordinary cricket balls.

There is no evidence, direct or indirect, of the dimensions of the parcel or parcels, and it seems to have been assumed on both sides that the practice of passengers carrying some of their own parcels into the carriages in which they travel prevails in India as in England.

The question then is reduced to this: whether there is any proof that the parcels carried by the two passengers exhibited such signs of their real nature as ought to have called the attention of the Railway servants to them, and thus prevented such

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dangerous goods being carried. Their Lordships can find none. If one puts into plain words the duty, the neglect of which is relied on, it at once discloses the absence of evidence on the part of the plaintiff. The duty is to prevent dangerous goods from being carried. What evidence is there that any servant of the Company knew, or had any opportunity of knowing, or enquiring, what these parcels contained? It has been already pointed out that there is no evidence of what they looked like, or whether any part of them was so uncovered as to suggest danger to any one.

Their Lordships cannot think that the Railway Company were under the obligation to disprove what was not proved, *i.e.*, to disprove that these were dangerous looking parcels, when not a shred of evidence has been given that they were dangerous looking. It was not indeed contended, as it could not be, that it was the duty of the Company to search every parcel which every passenger carried with him.

One source of error which their Lordships think has been committed in the Judgments below is an apparent misunderstanding of what has been decided in the Courts of this country as to the true obligation which exists on the part of a Railway Company towards its passengers. The learned Judge AMEER ALI, in terms says — 'Now it may be regarded as settled law that, in the case of carriers of passengers under statutory powers, there exists an express duty, independently of any implied contract, to carry them safely.' Their Lordships observe that in the course of Mr Asquith's argument yesterday, he used the same phrase that the extent of the obligation of a Railway Company is to carry safely — in short that they are common carriers of passengers. That is not the law. It appears to have given rise to the impression that, that being the state of the law, it was for the Railway Company to prove beyond doubt that they were not responsible for the accident that occurred. As a matter of fact, the argument would be illogical, because if they were carriers of passengers in the sense of being common carriers they would be responsible, quite independently of any question whether there was negligence, or not. It would be enough to show that the passenger had not been carried safely which would at once establish liability. The learned Judge appears to have been misled by an observation of Lord Campbell in the case that he quotes of *Collett v*

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The London and North-Western Railway Company (1) That turned upon the duty of the Railway Company, which was set out in the declaration to carry a Post Office clerk under certain provisions of Railway Legislation. It was demurred to, upon the ground that there was no contractual relation between the Post Office clerk and the Railway Company. The Judgment upon demurrer is sufficiently explained if one looks at the allegations in the declaration, and the Judgment upon it. But unfortunately Lord Campbell used a phrase which the learned Judge AMPER AM quotes, that the Railway Company were under an obligation to carry safely, which their Lordships think has been the origin of the error. Lord Campbell says — "I am of opinion that there is no difficulty in the question which has been raised. The allegation that it was the duty of the Company to use due and proper care and skill in conveying is admitted," admitted, that is to say, by the demurrer. "That duty does not arise in respect of any contract between the Company and the persons conveyed by them, but is one which the law imposes. If they are bound to carry, they are bound to carry safely." That probably is the origin of the error which then Lordships think the learned Judges below have fallen into. What Lord Campbell is saying there is that they are not relieved from the ordinary obligations which would exist by contract because by statute they were compelled to carry the Post Office clerk, and he goes on to say that the obligation is not satisfied by carrying a man's corpse, and not himself. His mind is not applied at all to the extent of the obligation created, but his mind is upon the argument that there was no obligation at all, and he practically says "You must take as much care of him as if he was a passenger who contracted with you." Whatever may be the difficulty that arises about such a phrase in Lord Campbell's mouth, there is no difficulty whatever if one looks at the Declaration and the Assignment of the breach of duty, where the duty is set up, and, indeed, Lord Campbell, in the earlier parts of his Judgment, points out, to carry with reasonable care and diligence, and the allegation in the Declaration, corresponding to the duty which exists, is that they did not do so, and then the assignment of breach is not that the man must not carry it safely, which according to the argument would be sufficient, but the allegation is that they did not use proper care and skill in it.

carrying If one looks at that, as indeed at the two other cases which the learned Judge AMEEZ ALI, quotes as justifying the *onus* that he throws upon the Railway Company it is intelligible enough In the one case it was a child under three years of age, between whom and the Railway Company, of course, there was no contract and the other is a case of the same character It is important perhaps to observe what runs through the Judgments, and to observe that Mr Asquith, naturally enough, used the same phrase yesterday in his argument as enforcing the necessity of the Railway Company discharging themselves by any conceivable evidence by saying that their contract was to carry safely Their Lordships think it is desirable that the error should be plainly stated, because it may mislead others hereafter It is enough to say that, in their Lordships' Judgment, there is no such obligation on the part of the Railway Company

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Their Lordships will therefore humbly advise His Majesty that the Judgments appealed from must be reversed, and Judgment entered for the defendants in both Courts below, but, having regard to what fell from counsel at their Lordships' Bar, without disturbing any directions given in India as to costs

Solicitors *Messrs Freshfields* for the Appellants

Solicitors *Messrs T L Wilson & Co*, for the Respondent

Appeal allowed

The Bombay High Court Reports, Vol. VII Page 113.

ORIGINAL CIVIL

Before Westropp, C J.

VINAYAK RAGHUNATH, PLAINTIFF,

THE GREAT INDIAN PENINSULA RAILWAY
COMPANY, DEFENDANTS *

Adoption—Son adopted after Death by Widow of Deceased—Legal Representation—Child—Damages—Measure of Damages—Act XIII of 1880

A son adopted by the widow of a deceased Hindu (in respect of whose estate no probate letters of administration or certificate of heirship has

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been granted) is the legal representative of the deceased and as such is entitled to maintain a suit under Act VIII of 1855 for the benefit of the persons if any entitled to compensation for the injury occasioned to them by the death of the deceased against those whose negligence caused that death.

Such an adopted son is not however entitled to have any portion of the damages awarded in the suit allotted to him as a child of the deceased.

Quære—Whether a son if adopted by the deceased in his life time would be entitled to damages under that Act?

Measure of damages in actions brought under Act VIII of 18

The facts of this case appear from the Judgment of the Court.

The suit was tried in a Division Court by WESTROFF, J

The Hon'ble A R Scoble (Acting Advocate-General) and *McCulloch* for the Plaintiff

Marriott and Ferguson for the Defendants *Cur ad coll*

WESTROFF, CJ.—Raghunath Narayan, Chief Divan or Minister of His Highness the Raja of Dhar, was travelling in a second class carriage, part of a train, upon the defendants' railway, early on the morning of the 26th of June 1867. The train then met with an accident at that part of the line where there is a bridge over the Suki nalla, between Bhosawal and Nimbera. The Divan was, by that accident, so much injured that he died upon the 28th of the same month. The evidence contained in the reports of the accident, made by the defendants' own officers, was so strong, that the learned counsel for the defendants, at an early stage of the trial, admitted that they could not deny negligence on the part of their client. They also admitted that the Divan was a passenger in the train, and that his death was occasioned by the accident. These admissions confined the case to the fourth and fifth issues. The fourth issue is whether the plaintiff is entitled to recover any damages for his own benefit in respect of the grievances alleged in the plaint, and, if so, how much. The fifth issue is whether the plaintiff is entitled to recover any damages on behalf of the widow and daughter of Raghunath Narayan in respect of the grievances in the plaint mentioned, and, if so, how much.

The deceased Divan, Raghunath Narayan, had a son who predeceased him by only eight days. The deceased left surviving him a widow, named Jankabin, aged about thirty-six years at the time of her husband's death, and four daughters, three of whom were married before his death, the fourth, named Mathra or

Mathura, is about five or six years of age, and still unmarried. Jankibai has, since her husband's death, adopted the plaintiff as son of the deceased. There is not any evidence of express authority having been given to her by her husband to adopt a son, but, on the other hand there is not any evidence of his having refused to adopt or of his having enjoined her not to adopt, and, accordingly under the Hindu law prevailing in the Dikhan to which he belonged, his sanction of the adoption will be implied. *Radhialai v Radhabai* (1). The adoption being valid, and no probate, or letters of administration, or certificate of heirship having been granted in respect of the estate of the deceased, the plaintiff as his adopted son, is his legal representative, and as such is, under Section 1 of Act XIII of 1855, entitled to maintain this action on behalf of the parties upon whom that Act confers the right to damages from the defendants, as having, by their neglect and default, in not having properly constructed their bridge, caused the death of the Divan. His widow and unmarried daughter are clearly within the Act as persons entitled to damages proportioned to the loss resulting from his death to them respectively.

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It is unnecessary for me to decide, and I therefore, wholly abstain from giving any opinion, whether a son, adopted in the life time of the deceased person in respect of whose death the action is brought under the Act would be entitled to damages, but I think that the word 'child' (which under the glossarial clause [Sec 4], is defined as including the "son and daughter, and grandson and granddaughter, and stepson and stepdaughter," of the deceased) must be limited to mean one who is the child of the deceased at the time of his death, and herein might perhaps be included a child of which the widow was then *en ventre*, but not a son adopted, after the death of the deceased, by her. The word 'child' is in the English Stat 9 and 10 Vict c 93 defined in the same way as in Act XIII of 1855, and has been held to mean a legitimate child. Accordingly, where the mother of a woman who was killed brought, as administratrix, an action on behalf of herself and her deceased daughter's illegitimate child, damages were given to the plaintiff on her own account only, and none for the illegitimate child. *Dickinson v The North Eastern Railway Company* (2). As the plaintiff in this suit has been lawfully adopted by the widow, and, therefore, cannot be regarded

(1) 5 Bom H C Rep A C J, 181

(2) 33 L J Ex 91

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by Hindu law as illegitimate, that case applies to the present one no further than in showing that the Court of Exchequer, in construing the word "child," was not disposed to give any further extension to the legal meaning of that word than the statute itself, in its glossarial clause had already given to it beyond its ordinary signification in law. The action had no existence at Common Law—it is the creature of legislation, and the Act ought not to be interpreted so as to impose upon parties who may be sued under it any wider or greater liability than is distinctly within the particular reason for which it was passed. Act XIII of 1855 is intitled "an Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong." Before the passing of the Act "actionable wrong" meant any such wrongful act, neglect, or default as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof. *Actio personalis moritur cum persona* was then the rule. But this Act continued the right of action to his "executor, administrator, or representative, for the benefit of the wife, husband, parent and child if any of the person whose death shall have been so caused," and the damages to be given shall be such as the Court "may think proportioned to the loss resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought." The plaintiff was the Divan's first cousin once removed, and lived, it has been said, in his hon^r at Dhar but at the time of the occurrence of the accident or of the Divan's death had not been adopted, and could not then, either by the law of nature, or the Hindu law, be considered to have been his child. Furthermore, the plaintiff was then seventeen years of age—i.e. one year more than the Hindu law deems full age. Even assuming that the adoption relates back to the death of the deceased, the injury supposed to have been suffered by him in virtue of the retrospective operation of the adoption, was one to which he was voluntarily subjected by himself and his parents by giving him in adoption. They then knew of the death of the Divan, and, notwithstanding, assented to the adoption by the widow, which was to make the plaintiff the son of one whose death had been caused by the negligence of the defendant. In that view the case would seem to be one for the application of the maxim *volenti non fit injuria*. So far, however, from any loss resulting to the plaintiff by the death of the Divan the plaintiff has been considerably benefited by it, inasmuch as that

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event was the reason for the plaintiff's adoption by which he has acquired a right to succeed to the property of the deceased, who, it has been deposed had an *ma* village in the Dhar territory, and other property. It is velamently probable that the plaintiff would never have been adopted if the deceased had lived, as he was only forty year of age when he met with the accident, and may fairly have expected to have sons born to him. Under such circumstances were any damages recoverable by the plaintiff, they could only be nominal damages. But I see no reason for supposing that the Indian Legislature intended to confer upon the widow of a deceased Hindu the power of imposing upon persons sued under the Act a greater liability than existed at the death of her husband. That Legislature has not shown itself unmindful of the necessity of making in the Act a provision especially suitable to India not to be found in the English Stat 9 and 10 Vict, c 93 by introducing the word "representative" after the words "executor and administrator." So many cases might occur in India in which there would be neither executors nor administrators as to render such an addition indispensable. A later English Statute (28 and 29 Vict, c 95) has made a somewhat similar provision for England. The Indian Legislature being thus alive to the special circumstances of Indian Society and having carefully enumerated in the glossary to the Act persons as coming within the scope of the word 'child' as used in the Act, who cannot be regarded as within the ordinary legal meaning of that word, I should have expected to find the case of a posthumously adopted son specially mentioned in the Act, if it were intended that he should be included. The fourth issue must, for those reasons, be found in the negative, and in favour of the defendants.

The next question is as to the amount of damages which should be awarded to the plaintiff, not on his own behalf but on that of the widow and daughter of the Divan. The Divan's father, Naro Jagganath Gunt, stated that the Divan was thirty eight years of age at the time of his death, but this old man was not a very accurate witness, and it is safer to assume that the Divan was of the age of forty years, which is that named in the plaint. He had formerly been in the British service as a Kulkarni at Patnagiri, in the Collector's department, at Rs 75 to Rs 100 per mensem, and had been educated at the High School of Poona. Three or four years ago, having left the British service, he became Divan

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to H H the Raja of Dhur at Rs 250 per mensem as salary, with a further allowance of Rs 6 per month, is a Brahman writer, Vishvanath Narayan a person attached to his suite, deposed. The Divan's father spoke also of Rs 131 per month being allowed to the deceased as wages for twenty-six attendants. These were not mentioned by the Brahman, and I understand them to have been persons allotted to him as assistants. I therefore do not reckon their wages as forming any personal allowance to the deceased, or as increasing his dignity. Rs 26 per mensem equal Rs 3,072 per annum. Mr Slater, an Insurance Company's agent, has been examined to prove that the price of an annuity of Rs 3,100 on the life of a Hindu aged 38 would be Rs 40,259 11-10, i.e., allowing him about twenty-two years to live. But that evidence is inapplicable to such a case as the present. The deceased was liable at any moment to dismissal from his office of Divan, which he held neither for life nor *quandiu bene ges sit*, but *quandiu princeps bene placeat*. It is, therefore, impossible to regard his annual income of Rs 3,072 as Divan in the light of an annuity for life, or for any given number of years. However, looking at his education, his appointment at the time of his death, the probability, if he had lived and lost that appointment, of his getting another, the position in society enjoyed by his widow and daughter while he held his office of Divan, and lost to them by his death, and looking also at his age which I take to have been forty, and the ages of his wife and unmarried daughter, which were then thirty-six and six years respectively. I think that Rs 10,000 will be a fair sum at which to assess the damages payable to them,—whereof Rs. 7,000 must be allotted to the widow, and Rs 3,000 to the daughter.

It having appeared, in the course of the above case, that the plaintiff (who was a boy of seventeen years of age) had executed a *mukhtarnama* in favour of one Krishnaji Shudeshwar, and that the latter had appointed one Naray in Balkrishna to bring the suit (who for so doing was to receive one half of whatever should be received, subject to a private understanding that he was in reality to retain one third only, and to hand over the difference between one third and one half to Krishnaji Shudeshwar), and that a *mukhtarnama* had not been signed by the widow or the daughter (who was a minor), the Court held that, though the plaintiff had a right to sue, and to appoint an agent for that purpose, he had no right to make such a bargain as the above on behalf of the

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interested. The Court therefore, directed the solicitors for the defendants, in conjunction with the solicitors for the plaintiff, to transmit her share of the damage to Jankibai, the widow of the deceased, at Dhur and the Court further directed that the Rs 3,000 allotted to Mathuri the infant daughter of the deceased should be paid over to the Official Trustee to be invested in Government paper and held in trust for her the annual income and dividend to be paid to Jankibai for the maintenance, education and clothing of the infant and Rs 1,000 part of the principal to be paid to Jankibai on the marriage of the infant for her marriage expenses and the balance Rs 2,000 to be paid to the infant Mathuri on her attaining her full age according to law. Costs of this suit to be paid to the plaintiff by the defendants as between solicitor and client.

Decree accordingly

Attorneys for the Plaintiff *Dalla and Limel*

Attorneys for the Defendants *Hearn, Cleland, and Paulo*

Note—Two other cases brought against the same defendants under similar circumstances were decided by the Chief Justice the day before Judgment was given in the above suit.

In the first, *Sorabji Ratanj v The G I P Railway Company*, the damages were laid at Rs 14,400.

The suit was brought by the plaintiff as administrator of his deceased father, on behalf of himself and Ratanbai, the wife, and Chandabai, the mother of the deceased.

Ratanji Nanabhai, the deceased, was about sixty or sixty-two years of age at the time of his death. He was a carpenter, in good health, and an excellent workman. He earned about Rs 8 per mensem, including *dasturi* allowed him by his employer. The plaintiff was in delicate health, unable to earn his livelihood.

WESTLOFF, C J, in giving Judgment, said—Looking at the probable age of the deceased, his state of health, the probable length of time during which he would have sufficient strength to exercise his calling, and the state of dependance of his family upon him, and without pretending to make or to be able to make, any minute arithmetical calculation of these elements, I think that the sum of Rs 8,500 will be fair damages, and of this sum I direct that Rs 4,000 shall be allotted to the plaintiff, Rs 3,000 to Ratanbai, the widow of deceased, and Rs 1,500 to Chandabai, his mother. The defendants must pay the costs of the suit as

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between solicitor and client. (His Lordship added that he made such order as to costs, that the plaintiff and the other persons interested might have the amount allotted to them without deduction, and not as any special mark of disapprobation of the conduct of the defendants)

In the second case, *Ratanbai v. The G. I. P. Railway Co.*, the damages were lud at Rs 77,500

The suit was brought by the plaintiff (a woman of forty-nine or fifty years of age) as widow and administratrix of Palanji Jivanji, on behalf of herself, three sons of the deceased—namely Dorabji, said to be aged seventeen or eighteen, but who was married and had a son, and was learning the trade of a carpenter, Bezabji, said to be aged sixteen years, but who had been living with his wife for two years, and was learning the trade of a *mistri*, and Ratanji, said to be aged twelve years and also on behalf of Khimsetji an infant grand-son, aged about three years, a son of a deceased son Hormasji, of the deceased. "That grand-son," his Lordship said, "comes within the meaning given to the word 'child' in the glossary to the Act (XIII of 1865); but the widow of Hormasji, in whose behalf also the plaintiff sues, does not come within the range of the Act, and is not entitled to any share in the damages."

Palanji Jivanji, the deceased, was aged fifty-three years at the time of his death (26th January 1869). He was a contractor for building houses and making repairs to ships in the harbour. He had become insolvent, and filed his schedule on the 12th of March 1866. According to the schedule (as finally amended), the total earnings of the deceased for the seven years preceding his insolvency amounted to Rs 19,000, or Rs 2,714 per annum = Rs. 226 per mensem, and his losses in contracts during the same period were stated to aggregate Rs. 19,446-11-0. His expenses far exceeded his means, and at the time of filing his schedule he was overwhelmed in debts, his debts amounting to Rs. 1,22,359-11-0. He appeared to have lived very extravagantly. After stating the above facts his Lordship said. What I have already said shows that the amount of damages claimed is quite preposterous. My difficulty is, satisfactorily to myself, to fix any amount. In the case of such a person as the deceased, who, as the evidence shows, even in the last year he was in trade, suffered serious loss, and who was habitually a reckless borrower of money, and certain thus to

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incur a heavy outlay for premium and interest, it is extremely difficult to say what portion of his gross earnings would in his future career have been properly available for his own use and that of his family. His prudence in making, and skill in executing contracts as a ship and a house carpenter, judging from his losses heretofore, would seem to have been but small. Assuming, however, as I think a jury might do, that his past experience and passage through the Insolvent Court would not have been wholly lost upon him, but still in the losing sight of his previous career and character, and of the probability that, if he had lived, his subsequent career would have borne if not a complete, at least a strong, resemblance to it, it is perhaps not unreasonable to suppose that out of his gross earnings taken at Rs 226 per mensem, which should appear to have been the average during the last seven years, he might legitimately expend on himself and family Rs 50 per mensem, i.e., Rs 600 or £60 per annum or Rs 60 per mensem, i.e., Rs 720 or £72 per annum. That is I believe, allowing a far more liberal monthly sum than during the seven years previous to his insolvency he could have had regard to his losses and general position, have legitimately expended. He did, in fact, expend a great deal more, but not legitimately when his circumstances as respects to assets and debts are taken into account.

I am, in such a case as this, necessarily compelled to resort to conjecture, and have to come to the best conclusion that, as jury, I may—I should have been very glad indeed to have the power of calling in the aid of twelve jurors in such a case.

Mr Slater has deposed that an annuity of £60 on the life of a Parsi aged fifty three should be valued at about Rs 6,185.

Allowing for what the deceased would have expended on himself alone, and for the probability of his power to work or carry on business diminishing as he advanced in age, I think that Rs 6,500 will be fair damages.

Of this sum Rs 2,500 should be allotted to the plaintiff (the widow of the deceased), Rs 700 each to his sons Dorabji and Bezaaji, who are, I think, old enough to earn a livelihood for themselves, Rs 1,100 for Rustamji, the youngest son of the deceased, who is still only a school boy, and Rs 1,000 to his grandson, Kharsetji who being only three or four years of age, will not for a long time be able to gain a living. The shares of Dorabji, Bezaaji, Rustamji, and Kharsetji, who are minors, are to be paid to, and invested in Government papers.

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by the Official Trustee, Mr London, in trust for them, and to be paid over to them respectively on their attaining their full age of eighteen years. The interest and dividends on their said respective shares are to be paid, during their respective minorities, to plaintiff for their support and maintenance.

The defendants must pay the plaintiff her costs as between solicitor and client, and simple interest at six per cent per annum on the amount of this Judgment from this 27th day of August until payment, such interest to be divided amongst the plaintiff and her said three sons and grandson in the proportions in which the damages have been allotted to them. Should it be made to appear to the Official Trustee that it is for the benefit of any one or more of the said minors that his said share, or their said shares respectively or any part thereof, should be applied in the advancement, or for the benefit, of such minor or minors during his or their minority, the Official Trustee is to be at liberty, personally or by counsel or attorney, to apply to a Judge in chambers for an order or orders to that effect.

**The Bombay High Court Reports, Vol VIII,
Page 130.**

ORIGINAL CIVIL

Before Sargent and Melvill, J J,

RATANBAI (WIDOW), (PLAINTIFF), APPELLANT,

v

**THE GREAT INDIAN PENINSULA RAILWAY
COMPANY (DEFENDANTS), RESPONDENTS ***

1871
July 18

Death caused by negligence—Compensation to family of Deceased—Measure of Damages—Act VIII of 18

Measure of damages to be given (under Act VIII of 18) to the family of a person whose death has been wrongfully caused considered

English cases bearing upon the subject discussed and applied

This was an appeal from the decision of WESTROP CJ, in Original Suit No 326 of 1869. Judgment was delivered in the

Division Court on the 2nd of August 1870 A brief summary of the facts of the case will be found at page 120 of the 7th volume of the Bombay High Court Reports, Original Civil Jurisdiction (1)

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In addition to the facts there set forth, it was stated by Bamanji, the eldest son of the deceased, that besides the property mentioned in the schedule of the deceased as possessed by him during the time over which his schedule extended, he had also been possessed of a sum of Rs 60,000, which had been lost by the misconduct of one of his sons, Hormasji. This fact did not appear on the face of the schedule. It was also stated by Bamanji, that the profits of the deceased for the year preceding his death had risen to the sum of Rs 500 or 600 per mensem, but the deceased's books for that year were not produced at the hearing, and the learned Chief Justice said that he did not consider Bamanji's evidence trustworthy.

The appeal came on for hearing on the 15th of June 1871, before SARGENT and MELVILL, JJ

Anstey and Mayhew, for the Appellant.—The learned Chief Justice was wrong in taking the schedule, and the sum of Rs 19,000 entered therein as the profits of the deceased, as the basis of his calculations. During the latter period of his life time the deceased had carried on two classes of business—1st, that of speculator, 2nd, that of skilled workman. For some years preceding his insolvency he had almost abandoned the latter for the former, and his insolvency was caused thereby. During the year immediately preceding his death he had returned to his legitimate business, and the profits of that year should be taken as the basis upon which the damages should be awarded. The statements of Bamanji as to the amount of these profits are entitled to credit. There was, at any rate, a reasonable expectation of an increased profit to the relations of the deceased from the continuance of his life, by reason of his having discontinued his speculations. This ought to have been taken into consideration in awarding the damages. *Dalton v South Eastern Railway Company*, (2) *Franklin v South-Eastern Railway Company*, (3) *Pym v Great Northern Railway Company* (4). The damages should not have been calculated according to annuity tables. *Armsworth*

(1) See ante p. 590 (2) 27 L J, C P 227; S C 4 C B N S, -96

(3) 3 H C N 211

(4) 32 L J, Q B, 377, 4 B N S, 396

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South-Eastern Railway Company,⁽¹⁾ per Parke, B The measure of damages under Lord Campbell's Act is not the same as that in actions brought by the sufferer himself In the latter class of cases pecuniary loss must be distinctly proved and such proof only can be acted upon In the former class the mere relation of parent and child, and the loss of the former, is sufficient to warrant the Court in awarding damages *Tilly v Hudson River Railway Company* (2) See this case and other American authorities collected in a note at page 652 of Mr Sedgewick's work on Damages (4th ed)

The Honorable A R Scoble (Acting Advocate General) and *Fergusson*, for the Respondents —The Chief Justice had to consider in awarding damages, *firstly*, what was the position of the deceased at the time of his death, and *secondly*, what reasonable expectation he then had of retrieving his former position The schedule was the only safe guide for estimating his prospective by a consideration of his past profits The deceased was an insolvent who had only obtained a personal discharge under the Act There was no reasonable expectation that he would have materially improved his position All contingencies must be considered see the Judgment of Cockburn, C J, in *Pym v Great Northern Railway Company* (3) Damages must be confined to pecuniary injury no *solatium* can be given for wounded feelings *Blake v Midland Railway Company* (4)

Anstey in reply —We do not claim anything as mere *solatium* We ask for damages for the loss of a parent's care and nurture

Cur Adv Vult

18th July 1871 SARGENT, J —This suit was brought under Act XIII of 1855 by the widow and administratrix of one Palani Jivanji, who was killed on the 26th of January 1869 at the Reversing Station on the Bore Ghat The only question in the case is whether the learned Chief Justice has rightly assessed the quantum of damages for the loss resulting from the death of the deceased to the parties for whose benefit the suit was instituted The wording of this Act is almost identical with that of the corresponding English Act commonly called Lord Campbell's Act—the only difference (if it be one) being that in English Act the jury are to give damages proportioned to the "injury," and

(1) 11 Jur 758

(2) 2 B & S, 59

(3) 20 New York Rep 252.

(4) 18 Q B 93

in the Indian Act the Court is to give damages proportioned to the "loss" resulting from the death. The latter expression is (if anything) not so large as the former, and, therefore, so far, is less favourable to the parties claiming compensation.

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Now, although some difference of opinion would appear to have existed amongst Judges sitting at *First Principles* in the early cases tried under the English Act as shown by the summing up of Mr. Baron Parke in *Armsworth v South Eastern Railway Company*(1) and of Chief Baron Pollock in *Gilliard v Lancashire and Yorkshire Railway Company*, (2) it was afterwards clearly laid down by the Queen's Bench in *Blake v Midland Railway Company*(3) that the principle upon which damages are to be assessed is that of a loss of which a pecuniary estimate can be made and that, therefore, compensation in the form of a solatium could not be given. Further, it was laid down, both by the Court of Common Pleas in *Dalton v South Eastern Railway Company*(4) and by the Exchequer Chamber in *Franklin v South Eastern Railway Company*, (5) that the pecuniary advantage was not to be confined to one for which the deceased would have been legally liable, but might be one of which the claimant had a reasonable expectation. Both those principles were adopted and applied by the Exchequer Chamber in *Pym v Great Northern Railway Company* (6) Chief Justice Erle, who delivered the Judgment of the Court says — "The jury were bound to give damages for the money which they supposed lost by the reasonable probability of pecuniary benefit being taken away by the death." We see no reason for applying a different principle to cases under the Indian Act. Now, the deceased in the present case was a man of fifty three years of age. He had filed his schedule in the Insolvent Court on the 17th of November 1868, and, after several postponements arising from the unsatisfactory state of his balance sheet, was expecting his discharge in the following March. His legitimate trade had been that of a contractor for building houses, and repairing ships in the harbour, but it appeared from his balance sheet that in or about 1864 he became engaged in extensive land and building speculations with borrowed capital, which proved unsuccessful. That from 1861 to the time of filing his schedule, the amount of gross profits realised by his business had been only Rs. 19,000, whilst the losses on two contracts alone had amounted to

(1) 11 Jur. 759

(3) 18 Q. B. 93

(5) 3 H. & N. 211

(2) 12 L. & Times R., 356

(4) 4 C. P. D. 8., 296

(6) 32 D. J. R. B. 377

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Rs 19,446, and that at the time of his becoming insolvent he owed Rs 1,22,359 to general creditors, one of whom had a mortgage on the only piece of property (except some trifling jewellery) left to the insolvent, namely, a house in the Fort, valued by himself at Rs 66,000. Much stress, indeed, was laid on a sum of Rs 60,000 which, it was said, had been made away with by the deceased's son Hormasji before the insolvency. We think that the evidence before the Court in support of this story—whatever other evidence it might have been in the plaintiff's power to give—was quite unreliable, but in any case the money is gone, and we do not understand how the story, if taken as proved, can materially affect the question before the Court as to the probable future property of the deceased, had he lived. The probable future of such a man must necessarily, for the most part, be a matter of mere conjecture. It does not admit of being determined by any strict process of reasoning, but looking at the deceased's past career, as disclosed by the schedule, we can discover no ground of reasonable expectation that there would have been any source to which the wife and family could look for pecuniary benefits other than the profits of his regular business. It was, however, objected that the Chief Justice should not have taken as the basis of his calculation the entry in the schedule of profits realised between 1861 and 1868. It was said that the profits of the deceased's regular business might reasonably be expected to be larger than before his insolvency, as he had abandoned speculation and devoted himself exclusively to his legitimate calling. And the evidence of his son Bamanji was relied on to show that his monthly profits during the year preceding his death had risen to between Rs 500 and Rs 600. But we cannot accept the mere statement of Bamanji as sufficient proof of what those profits may have been, more especially when we find him admitting that his father sustained a loss of Rs 12,000 in doing repairs to a ship called the "Ritual" during the last year of his life and that he could not say whether his losses exceeded his gains, as he did not keep his accounts. If it were intended to rely on the increase of his business during the year preceding his death, the books of the deceased should have been produced, as the best and proper evidence as to the state of his business. Lastly, it was urged by Mr Anstey that the Court should give compensation for the loss of the deceased's "protection and care" and the authority of an American case cited in Sedgewick on damages was pressed on us as establishing that proposition. Now so far as by the expression

"protection and care" may be meant the money which a father can reasonably be expected to spend on his family, compensation has been given for it but so far as it is intended to mean more than that, without saying that under very special circumstances it might not be brought within the principle we have laid down, we are of opinion that no such circumstances exist in the present case. On the whole, we are unable to say that the family had a reasonable and well-grounded expectation of pecuniary benefit exceeding the sum assessed by the learned Chief Justice, and the appeal must, therefore, be dismissed and with costs, unless the Company consent to waive them, which, as this is the first case in which the application of the Act has been fully discussed, we think they might do with great propriety.

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—

Appeal dismissed

**The Indian Law Reports, Vol. XXVIII. (Madras) Series,
Page 479.**

APPELLATE CIVIL

*Before Sir S Subrahmania Ayyar, Officiating
Chief Justice, and Mr. Justice Benson.*

JOHNSON AND ANOTHER (PLAINTIFFS), APPELLANTS,

IN ORIGINAL SIDE APPEAL No 48 OF 1904,

PORTO NOVO CANDASWAMY AND OTHERS (PLAINTIFFS)

APPELLANTS, IN ORIGINAL SIDE APPEAL No 51 OF 1904

v.

THE MADRAS RAILWAY COMPANY (DEFENDANTS),
RESPONDENTS IN BOTH.*

Fatal Accidents Act (Indian)—XIII of 1875—'Representative of the deceased' : who are—The right under the Act is distinct in each and is a several, not joint, right—Limitation Act XI of 1877, Ss 7, 8, art 21, Sched II—Representatives under Act XIII of 1875 not persons entitled to sue within the meaning of S 7 nor 'joint creditors' or joint claimants within the meaning of S 8 of the Limitation Act—Construction of statute.

1905
April 7, 17,
19

* Original Side Appeal Nos 48 and 51 of 1904, presented against the Judgment of Mr. Justice Moore in Original Suit Nos 76 and 159 of 1904 respectively.

Johnson and
Candaswamy
v
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Railway

The word 'representative' in Act XIII of 1855 does not mean only executors or administrators but includes all or any one of the persons for whose benefit a suit may be brought under the Act and it makes no difference whether the deceased was a European or Eurasian

Under article 21, Schedule II of the Limitation Act, the suit must be brought within one year from death unless the bar is saved by Section 7 or 8 of that Act

The right of the beneficiaries under Act XIII of 1855 is not a joint right but a distinct and several right in respect of the same cause of action enforceable at the suit of all or one of them suing for himself and the rest. *Pym v The Great Northern Railway Company* (1)

The beneficiaries are in the position of joint decree holders and the right of suit conferred by Act XIII of 1855 is analogous to the right to apply for execution conferred on one or more of several joint decree-holders by Section 231 of the Code of Civil Procedure. The beneficiaries therefore are not persons 'entitled to sue' within the meaning of Section 7 of the Limitation Act, and limitation will run against all when any one is competent to bring the suit

The principle in *Perasami v Krishna Ayyan*(2) followed

They are also not joint creditors nor joint claimants under Section 8 of the Limitation Act. Joint claimants are persons whose substantive rights are identical and not those who are permitted to enforce distinct and different rights under one judicial process

Almasa Bibi v Abdul Khader Sahab(3) distinguished

Sections 7 and 8 of the Limitation Act must be held to apply to suits under Article 21 if they are capable of being grammatically applicable to them. The previous state of the law and the absence of evidence to show that the Legislature meant to effect a change will not justify Courts in holding in the absence of express words, that they do not so apply

THESE SUITS were brought under Act XIII of 1855 for compensation for death caused by the negligence of the defendant, the Madras Railway Company, resulting in what is known as the Mangapatnam accident. The accident in question took place on the night of the 11th September, 1902. Civil Suit No 76 of 1904 was instituted on the 28th April 1904 and Civil Suit No 159 of 1904 was instituted on the 7th October 1904

The plaintiffs in Civil Suit No 76 of 1904 are the minor son and daughter of one Mr Johnson, an Eurasian, who was killed in the accident, represented by their mother and guardian as next friend. No letters of administration or probate had been obtained to the estate of the deceased. The plaintiffs in Civil

(1) 4 B & S, 396.

(2) I L R, 25 Mai 431

(3) I L R, 25 Mad, 26

Suit No 159 of 1904 are the minor sons of Naryanaswami Mudali, a Hindu who was killed in the same accident. They were represented by their mother and guardian as next friend. There were no executors or administrators in this case also. The defendant pleaded *inter alia* in both the suits that the plaintiffs' claim was barred by limitation. In Civil Suit No 76 of 1904 the defendant further pleaded that the plaintiffs were governed by the provisions of the Indian Succession Act and that they were not representatives' as that could only apply to executors or administrators. In Civil Suit No 159 of 1904 the objection was again taken that the plaintiffs were not the representatives of the deceased. The contention that the plaintiffs were not 'representatives' was overruled in both cases by Mr Justice Moore. The material portion of his Lordship's Judgment is as follows —

'The case has been posted for trial of two preliminary issues, namely, as to whether the plaintiffs are entitled to sue as representatives of their deceased father and as to limitation. Mr Chamier for the plaintiffs contends that the plaintiffs are representatives of the deceased under Section 1 of the Act, but that the widow should not be held to be a representative, while Mr Napier for the defendant maintains that neither the minor children of the deceased nor his widow can be deemed to be his representative. Mr Napier argues that, according to legal phraseology in England, the representative of a deceased person means his executor or administrator and no one else, that Mr Johnson was a Eurasian governed by Act X of 1865 and that in considering what the word representative means in the Act of 1855 when applied to such a person, it must be held that it refers to his executor or administrator and cannot refer to any other person. Mr Napier referred to several decisions which certainly support the contention that the words legal representative, personal representative and representative as used in statutes and judgments of Courts in England refer to executors and administrators only and can be applied to no one else. It does not however, in my opinion follow that the word representative as used in the Act of 1855 when applied to a person governed by Act X of 1865 means an executor or administrator and no one else. The wording of the section to my mind shows clearly that this is not a correct view to take. It cannot have been the intention of the Legislature to declare by Section 1 of the Act that a suit brought for the benefit of the wife or child of a deceased European shall be brought by his executor or administrator or

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representative, i.e., executor or administrator Mr Napier attempts to remove this difficulty by the contention that in this section the words executor and administrator alone are applicable to persons governed by Act X of 1865 while those words and also the word representative are to be applied in the case of Hindus and Muhammadans I cannot accept this interpretation It must, I conceive, have been the intention of the framers of the Act that all the three words should be applicable to all persons with respect to whose estate a suit might be brought under the Act, whether Europeans, Eurasians Hindus or Muhammadans In other words, if a European or a Hindu has an executor or administrator such executor or administrator must bring the suit but if there is no executor or administrator the suit can be brought by any person whom the Court holds to be a representative of the deceased The next question to be considered is as to whether the Court should hold that in the absence of an executor or administrator, the son of the deceased can, for the purposes of this suit, be deemed to be his representative I am of opinion that it should be decided that only the sons of the deceased but also his widow are entitled to bring a suit under the Act as his representatives The Statute (9 and 10 Vict, chap 93, 1846) on which the Indian Act of 1855 is based, provides that the suit should be brought by the executor or administrator of the deceased There is no mention of representatives As it was found that, owing to the difficulty and expense of taking out letters of administration persons entitled to compensation were prevented from recovering the same, it was enacted in 1864 (27 & 28, Vict chap 95) that in case the executor or administrator did not sue within six months all or any of the persons for whose benefit the right of action was given by the Statute of 1846 might sue in their own names It was not however, found to be necessary to amend the Indian Act of 1855, because it was, as I believe, considered that the word representatives in that Act included all the persons for whose benefit the right of action was given It must be remembered that the right of action conferred by the Act is not for the benefit of the personal estate of the deceased, but for the benefit of his wife, parent and child, and farther that, as held by the Court of Queen's Bench in *Blake v Midland Railway Company* (1) the Act does not transfer to representatives the right of action which the person killed would have had but gives to the representative

a totally new right of action in different principles' There are not many reported decisions of the Courts regarding the provisions of the Act of 1855 but the view that I take, namely that where there is no executor or administrator, any one or more of the persons for whose benefit the right of action is given can sue to enforce that right seems to be that which has been acted on by the Courts although there is no direct decision to that effect *Lyell v Ganga Dai*,⁽¹⁾ for example, was a case that was very fully argued and eventually came before a Full Bench of five Judges That was a suit brought by a widow (Ganga Dai) to recover damages on account of the death of her husband, and, as far as can be seen from the report it was never even suggested that she was not entitled to sue as her husband's representative Reference may also be made to *Rajah Raghunath v The G I P Railway Company*⁽²⁾ where it was held by WESTROFF C J, that an adopted son was entitled to bring a suit under this Act as legal representative I therefore hold on the first issue that the plaintiffs are entitled to sue as 'representatives of the deceased' On the question of limitation the learned Judge held that both the suits were barred under Article 21 of Schedule II of the Limitation Act and that Section 7 of the same Act did not save the bar as there were, in both cases the widows who could have brought the suits as representatives of their deceased husbands

The plaintiffs in both cases appealed

Mr D Channer for Appellants in Original Side Appeals Nos 48 and 51 of 1904

The Advocate General (Hon Mr J P Hallis) and Mr Nayyer for Respondent in both

JUDGMENT—In one of these cases the plaintiffs are the minor children of one Johnson, a Railway passenger, who was killed in the Mangapatnam Railway accident The plaintiffs sue with their mother, the widow of the deceased, as their next friend In the other suit the plaintiffs are the minor children of a Hindu named Narayanasami Mudali, another Railway passenger, who lost his life in the same accident They also sue with their mother, the widow of the deceased as their next friend In neither case is there any executor or administrator of the deceased The suits are brought against the Madras Railway Company for compensation under Act VIII of 1855, and were instituted after the expiry of one year from the death of the persons referred to

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The question is whether the suits are time barred. The answer to this question must be in the affirmative with reference to Article 21 of Schedule II of the Indian Limitation Act unless the bars saved by the provisions of Section 7 or 8 of the Act

Before proceeding to consider the applicability of these provisions to the cases, it is necessary to see what is the precise nature of the right conferred by Act XIII of 1855 under which the claims are made. As stated in the preamble of the Act itself the relations of a person whose death was caused by the wrongful act of another were not, prior to its enactment, entitled to claim compensation on account of the death. The right to claim compensation in respect of such a death was created by the Act. It is provided that every suit shall be for the benefit of certain specified near relations of the deceased "and shall be brought by and in the name of the executor, administrator or representative of the person deceased."

The learned Advocate-General for the defendants contends that in the case of Europeans and Eurasians the only "representatives" of a deceased man is his executor or administrator and that in this Act the word "representatives" has no application to Europeans and Eurasians, but is used only with reference to Hindus and Mohammedans. Mr. Chamber for the plaintiff contends that the word "representative" in the Act is equivalent to and includes, all the "heirs" of the deceased. We do not think that either of these views is correct. That the word is not equivalent to "heirs" seems clear from the fact that in Act XII of 1855 which was passed on the same day as Act XIII, and which deals with a cognate subject, the right is given to bring a suit against "heirs or representatives" of the deceased wrong doer. Nor do we think that there is any reason for limiting the meaning of "representative" in the narrow way suggested by the Advocate-General. We think that the word means and includes all or any one of the persons for whose benefit a suit under the Act can be maintained. These persons are the representatives of the deceased, in the sense, that they are the persons taking the place of the deceased in obtaining reparation for the wrong done.

In cases where the deceased is represented by an executor or an administrator such an executor or administrator is given the power to sue for the compensation for the benefit of the specified

relations. Where there is no executor or administrator, or where there is one, and he fails, or is unwilling to sue, then in our opinion the suit may be instituted by, and in the name of, the representative of the person deceased. But one suit only is allowed to enforce the claims of all the persons beneficially entitled,—it being provided that the rights of each and every one of them shall be adjudged and adjusted by the Court in such suit. The right of *each* beneficiary is only to receive compensation in proportion to the loss occasioned to *him* by the death of his deceased relative. From this it follows and it was in effect so decided in *Pym v The Great Northern Railway Company*(1) with reference to the provisions of Lord Campbell's Act that the right of the beneficiaries to compensation is a right distinct in each. In short, the beneficiaries entitled to compensation under Act XIII of 1855 are not persons entitled to claim compensation *jointly* but are parties entitled to relief *severally*, in respect of the same cause of action which is enforceable at the suit of all or any one of them suing for himself and the rest. If this is the correct view of the statutory right given to persons in the position of the plaintiffs in these cases it is clear that Section 7 of the Limitation Act has no application to suits such as the present, since in each case there is a widow of the deceased who was under no disability and who could have sued, and therefore all the persons entitled to the compensation and capable of instituting the suit were not minors or otherwise incapable of suing within the period of one year prescribed by Article 21. With reference to the view that in cases like the present the suit might have been brought by any one of the beneficiaries for the benefit of all, the case is analogous to that of a joint decree holder who can with the permission of the Court under Section 231, Civil Procedure Code, take out execution of the decree for the benefit of himself and the other decree holders, but who was held not to be a person entitled to apply in his own right within the meaning of Section 7 of the Limitation Act. See the Full Bench decision in *Periasami v Krishna Ayyan*,(2) where it was held that the time with reference to an application for the execution of a decree passed in favour of several persons jointly, ran against all the decree holders notwithstanding the minority of some of the decree holders, and notwithstanding that any one of them might, with the permission of the Court, have executed the whole decree on behalf of all.

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(1) 4 B S 396

(2) 1 L. P., 25 Mal. 431.

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Passing now to Section 8 of the Limitation Act, that also must be held to be inapplicable. Of course, persons having claims such as those sought to be enforced here are not joint creditors and unless they can be held to be *joint claimants* of the kind mentioned in the section the benefit thereof cannot be claimed by them. From the language of the whole section it is obvious that the term "*joint claimants*" is used with reference to persons whose *substantive* right is joint, or put it otherwise, with reference to more than one individual possessing the same identical substantive right. The latter part of the section relating to the discharge by one of the joint creditors or claimants, without the concurrence of the others, conclusively points to the correctness of this view. The expression therefore does not comprehend persons whose rights are distinct and *different*, but who are permitted to enforce such separate rights by one judicial process to which all are parties or by a process instituted by one on help of all. *Abasaheb v Abdul Kader Sahab* (1) is distinguishable on the ground that the right to sue for an account and share of profits of the partnership sought to be enforced by the heirs of the deceased partner was joint and indivisible notwithstanding the several character of their interests *inter se* in the profits, if any.

Now, with reference to suits brought for compensation under the Act as it stood before it was amended by Act IX of 1871, the question of the disability of any or all of the persons entitled to compensation was immaterial, and the suit had to be brought within a year from the date of death. Whether when the words "and that every such act as shall be brought within twelve calendar months after the death of such deceased person" in Section 2 of Act XIII of 1855 were repealed and Article 21 of the Second Schedule to Indian Limitation Act was introduced there was an intention to make a real change in the law, it is not easy to say. Having regard to the object and purpose of Act XIII of 1855 and the inexpediency of postponing the trial of questions of fact involved in a claim to be made under the provisions of the Act, it is not probable that the running of time was meant to be suspended on account of any disability on the part of some of the persons beneficially entitled. It is not improbable that the repeal of the provision as to limitation contained in Act XIII of 1855 as it stood before the amendment and the enactment of Article 21 in

lien of it were merely for the sake of symmetry as urged by the learned Advocate-General. Still the mere absence of evidence that the Legislature intended to effect a real change in the law would not justify the Court in holding that the present suits are barred by limitation if the language of Section 7 or 8 was grammatically capable of application to them. That, however, as already pointed out, is not the case.

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The conclusion of the learned judge is therefore right and the appeals fail and are dismissed with costs.

Messrs Short & Beuen—Attorneys for Appellants

Messrs Orr, David and Brightwell—Attorneys for Respondents

The Madras Law Times, Vol. IV., Page 251.

MADRAS HIGH COURT.

Before Mr. Justice Davies and Mr. Justice Benson.

THE MADRAS RAILWAY COMPANY (DEFENDANTS),

APPELLANTS,

v

RATILAL KALIDAS (PLAINTIFF), RESPONDENT

A S APPEAL No 23 OF 1905 *

Railway Company—Negligence—Onus—Indian Evidence Act (1872), Section 101.

1903
July, 27.

Held that in a suit brought by the legal representative of a deceased person, who was killed at an accident, while travelling in the train, the onus of proving that there was no negligence on the part of the Railway Company, lies upon them, on the principle of law enunciated in Section 101 of the Indian Evidence Act, 1872.

Great Western Railway Company of Canada v Brad (1 Moore's P. C. Cases New Series p 111) referred to.

JUDGMENT DAVIES, J.—The undisputed facts in this case are that the mail train from Madras to Bombay passed by Mangapattinam Station at the 20th mile from Madras at 3 29 A.M. on the morning of the 12th September 1902, and that, within a

* O. S. No 87 of 1903 in the High Court of Judicature at Madras. See Appendix A., Case No 34.

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minute or two afterwards, it was completely wrecked seven telegraph posts beyond the 205th mile, that is, about one third of a mile away by the falling of the bridge over a water-course at that spot, and that the plaintiff's father was one of the many passengers who as then killed either by shock or by drowning in the flood which had carried the bridge away

The main question before us is whether the defendant Company is guilty of negligence in not seeing to the stability of the bridge or in not preventing the ill fated train from proceeding over it

It is unknown whether the bridge had fallen before the train came to it, or whether it was the weight of the train passing over it that caused it to collapse. The case for the defendant Company is that the bridge had gone very shortly before the accident and so the train was precipitated into a chasm. That is, however, merely conjecture. There is no positive evidence as to when the bridge went down. The only thing we know for certain is that it was at some time between 12 55 A M when a slow train going in the direction of Madras passed over it safely and 3 30 A M when the accident happened.

The onus of proving that there was no negligence on the part of the Railway Company in either of the respects stated above, in my opinion, lies upon them, not only under the ruling in the case of *The Great Western Railway Company of Canada v Braid*(1), namely, that the fact of a breach on a line of Railway is *prima facie* evidence of improper construction or maintenance which it is for the Railway Company to rebut, but under the general rule of the law of evidence that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him, (Section 106 of the Indian Evidence Act). Here it is only the Railway Company that can inform us whether that bridge was properly constructed and maintained, and that every precaution was taken by them on the night in question to prevent an accident to it or to the line, or, if such an accident did happen, to stop a train from running into the danger. Everything was under their sole control and no one else can know what steps were taken for the safety of a train full of passengers travelling through a storm in the dead of night.

On the first point I think that the defendants have fully discharged the onus that lay upon them. The bridge had stood

the test of time for thirty-four years, with never a flaw or defect. And the defendants prove that its failure was due to an unprecedented deluge of rain which not only brought down a flood of water far higher than the highest flood level previously known, but, with the flood masses of debris in the shape of trees and straw-stalks which, so to speak, choked up the water way, which was otherwise amply sufficient to carry off the water of even this unprecedented flood. The rush of water was probably increased by the bursting of the band of an old disused tank which had ceased to store water until that night and it was all so sudden that it was impossible to take measures to safeguard the bridge from its approach. Mr Justice MOORE, the learned Judge who tried the case in the Original Side accepts the view of Mr Thompson, the Railway Chief Engineer, as to what was the actual cause of the bridge giving way, namely, the lateral pressure of the water on the Pier No 2 and on the girders fastened to that Pier, which caused it to slide along its foundation. I see no reason why that opinion, the reasons for which are set forth by Mr Thompson in great detail, should not be relied on. And it shows beyond all doubt that no human foresight could have provided against such exceptional circumstances. The plaintiff has entirely failed to prove the case he set up that the foundations of Pier No 2 which fell had been allowed to become unsafe. There is nothing in the defendant's evidence to support that theory, and the plaintiff has called no witnesses on his own behalf to establish it. I am satisfied, therefore, that the collapse of the bridge was due to what is termed an act of God, and that the defendants are therefore not responsible for it.

On the other point I am equally satisfied that the defendants have failed to discharge the onus of proving that they kept a proper watch upon the line so that if from causes beyond their control the line was breached, a train which was under their control could not have been stopped from moving into the danger. It appears that during the months of June July and August, night watchmen were employed to patrol this portion of the line, as that is the time of year when the Railway authorities expect the worst weather. So that the employment of night watchmen had been discontinued on the 31st August and admittedly there were no night watchmen on duty on the night in question. Mr Justice MOORE has pointed out that if rainy weather is the test for the employment of night watchmen the months in which their employment is most necessary are September and October,

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because the heaviest rain falls in that part of the country in those months and he has come to the conclusion that, if night watchmen had been employed on this occasion, intimation of the dangerous condition of the line could not have failed to be given to the Station Master at either Mangapatnam or Kondapuram in time to stop the Mail train from Madras.

The condition of things on that night on the line between Mangapatnam and Kondapuram, the next station towards Bombay, was that not only had the bridge, where the accident happened fallen, but there were two other breaches on the line—one about half a mile away from the bridge just before the 206th mile where the embankment had been washed away for 160 yards and another beyond the 207th mile where the ballast next to a bridge had been washed away to a length of 30 to 40 feet and 14 feet in depth. Thus, in about two miles, the line was seriously breached in three places. I quite agree with Mr Justice Moore that, if night watchmen had been on duty, it would have been impossible that the fact of all or some of these three breaches could not have been communicated to the Station Master at Mangapatnam in time to save the train from proceeding.

The statement for the defence is that every provision was made for watching the line after the night watchmen were discontinued. That arrangement, it is stated, was that in stormy weather the Permanent Way Inspector and the gang maistries and men should patrol the line. That there was a storm of unusual severity on that night is proved not only by the fact of the three breaches on the line between Mangapatnam and Kondapuram, but from the evidence in the case which shows that this storm commenced at 11-30 P.M. at the latest and continued almost throughout the night. That is the evidence of the Railway servants themselves. But if we take the only independent evidence in the case that of the Village Magistrate of Mangapatnam it rained in torrents there from 10-30 P.M. till 5 A.M. the next morning. That being the state of the weather, the gangmen and the Permanent Way Inspector should have gone out on their patrol much earlier than they did. According to their own evidence the Permanent Way Inspector at Kondapuram Station did not go out till 2 A.M. and the gang maistry and two coolies on the Mangapatnam side till 1 o'clock. I therefore agree with Mr Justice Moore in considering that this also was a piece of negligence on the part of the Railway servants.

Judging however from the very unsatisfactory and conflicting character of the evidence given by these men, as pointed out by the learned Judge his own strong impression is that not one of these men went out on patrol that night. It was upon the Railway Company to show that these men were doing their duty on that night, but they have allowed the evidence chiefly elicited by the plaintiff as to the conduct of their servants which shows that they did not do their duty, to pass unchallenged. Assuming their evidence to be true it conclusively proves that even going out late as they did had they obeyed the rule laid down for their guidance they could have prevented the Mail train from leaving Mangapatnam at 3.29 A.M. and thereby averted the disaster.

Tulukkanam, the second witness for the plaintiff who was the gang maistry on the Mangapatnam side and the two coolies with him state that starting from Mangapatnam they reached the third breach, that is, the one beyond the 207th mile at 2 A.M. It was their duty under Rule 199 of the General Rules, which runs as follows—"Every Railway servant observing any failure of any part of the works must, if he considers that the same is likely to interfere with the safe running of trains, report the circumstance as soon as possible to the nearest Inspector of Permanent Way and to the Station Masters of the stations on each side of the point at which such failure has occurred"—to report the fact of this breach to the Station Master at Kondapuram as well as to the Station Master at Mangapatnam. It was three miles from that breach to the Kondapuram Station which could therefore easily have been reached by one of the three men by 3 A.M. The line clear from Kondapuram to Mangapatnam was not signalled till 3.10 A.M. Had the Station Master at Kondapuram received the information by 3 A.M., he could not have sent the line clear message and the mail train would consequently have been detained at Mangapatnam on account of that breach alone, and, whether the bridge fell with the train or before it came, the train could not have gone upon it.

Tulukkanam has given no reason for not going himself or sending one of his two men to Kondapuram. His story is that he left one man at the breach with detonators and that he and the other man returned towards Mangapatnam to inform the Station Master at Mangapatnam which place they were unable to reach before the accident happened, because of breach No. 2.

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at the 206th mile. There was no reason for him to take the third man with him when he started for Mangapatnam to make report because he should have sent that man on to Kondapuram to make similar report at that end.

But apart from and in addition to this, there was a gang maistry and several men on the Kondapuram side of the breach at the 207th mile who, according to the evidence, must have also become aware of that breach at about 2 A.M. In fact, three gang coolies were met coming back to Kondapuram by the Permanent Way Inspector—according to him two miles away from Kondapuram but according to his assistant only one mile away. In either case the time not being later than 2.30 A.M., the Permanent Way Inspector having started from Kondapuram at 2 A.M. in the direction of Mangapatnam any one of these coolies had ample time to give the information to the Kondapuram Station Master before the line clear message was sent. The Permanent Way Inspector should have expressly told them to do so not only under the rule but because he and his assistant were responsible for the safety of the whole line between Kondapuram and Mangapatnam and not only for the particular breach near the 207th mile. But he neither told the men to make the report nor did he himself go, or send his assistant to do so, could negligence be worse?

It is therefore clear that if any one of these men had done their duty under the rules prescribed for the prevention of accidents in cases where a line is breached the mail train would have been saved from destruction.

The learned Advocate General argues that under the general law of negligence the accident to the train at the bridge was too remote a consequence to be attributed to the neglect of rule on the part of the employees of the Railway Company and he has cited a number of English cases in support of his contentions which, I must say seem to me all beside the mark. Here there was a duty cast upon each one of the Railway servants present under the rule I have quoted, which none of them obeyed. In the case of disregard of any rule of this kind which is made for the protection of a train not only on one spot in a section of a line between two stations but for the whole section between two stations, any accident that could have been prevented had the rule been obeyed must be treated as a direct consequence of the omission, whether it was wilful or negligent. It was not a case

where the men were allowed to use a discretion of their own. They were to follow the rule implicitly. But assuming that this was a case for discretion it was undoubtedly exercised wrongly. The breach beyond the 207th mile indicated breaches elsewhere in the neighbourhood from the same cause, that is, floods, and, as a fact, there were, we know, two other breaches within two miles of the one that was first seen. The men were consequently put on their guard to give the earliest information they could of the line being unsafe. They profess to have known what their duties were, and yet did not perform them. The weather was extraordinary and extraordinary precautions should have been taken. But we find that even the ordinary precautions were neglected. Of course, if there was no patrol at all that night, then the negligence of the defendant Company is manifest and is of itself sufficient to establish their liability.

I am, therefore, of opinion that the wreckage of the train at the bridge at Mangapatnam was a direct consequence of the neglect of duty to report the fact of one of the three breaches on the line to the Kondapuram Station Master. It is perfectly certain that the Station Master could not have given the line clear message to Mangapatnam until the line was really clear and the line at the 207th milestone could not have been clear for some time, that is, until the breach was repaired. During that time, the two other breaches, i.e., at the 206th mile and at the bridge, must have become known, and if communication with Mangapatnam was still cut off, the fact of such breaches could have been communicated to Kondapuram and thence by wire to Mangapatnam. So that, in whatever light one views the whole matter, whether the negligence on the part of the Railway Company was in not employing night watchmen at this season of the year or in that the men substituted for the night watchmen did not turn out on patrol till long after danger to the line was imminent, the fact remains that, if their story be true and they had done their duty in obeying the rules, this terrible disaster could not have happened.

Mr Norton for the plaintiff urges that the damages given by the learned Judge are not sufficient. In the first place, he says that the account of the net income of the plaintiff's family has wrongly been calculated. But he does not put us to a position to judge of the question. The accounts are kept in the Guzerati language and are not translated for our inspection. He then

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objects that the principle upon which the Judge has determined the question of damages is wrong, and that credit should have been given to the probable savings of the deceased—the father of the plaintiff. Here also we have no data to show that he would have saved anything. The assessment of damages in cases like this must always be more or less arbitrary. I see no reason for supposing that there could have been any fairer method than the one adopted by the learned Judge.

The appeal and the memorandum of objections are therefore both dismissed, the former with costs on the higher scale. Certify for two counsel on each side.

BENSON, J.—In this appeal the Madras Railway Company appeals against the decree of Mr Justice MOORE on the Original Sided in what is known as the Mangapatnam case. The plaintiff in that case was the minor son of one Kalidas Ramchand, who was killed in an accident which occurred on the Madras Railway on the 12th September 1902. He alleged that the death of his father was due to the negligence of the defendants—the Railway Company—and he sued for damages, as his father's representative under the provisions of Act XIII of 1855 which provides that when the death of a person is caused by the wrongful act, neglect or default of another, the representative of the deceased may recover damages from the other if the act, neglect or default was such as would have enabled the deceased, if he had survived to maintain an action for damages.

The learned Judge who tried the case found that there was negligence on the part of the Railway Company in not properly watching the line of Railway and gave the plaintiff a decree for Rs 33,000 as damages.

Against this decree the defendants appeal on the ground that the accident was due to a sudden and wholly unprecedented deluge of rain which could not have been foreseen and guarded against by them, that the watching of the line was properly and efficiently carried out, and that the accident was in no way the result of any negligence on the part of their servants in regard thereto.

The evidence shows that on the morning of the 12th September 1902 the mail train, No. 81, from Madras to Bombay passed through Mangapatnam Station at 3-29 o'clock without stopping, and that about half a mile further on, on reaching the Katar or Mangapatnam bridge, (No. 665) at mile 205/7 the whole train,

with the exception of the rear carriage was precipitated into the river, owing to Pier No 2 and the girders of the 2nd and 3rd spans of the bridge having been carried away by a sudden flood which came down the stream, and it is not denied that Kalidas Ramchand with 70 or 80 other persons, was killed in the accident. It was argued for the plaintiff that if the bridge had been properly constructed and maintained it would not have been carried away, and it is further urged that the destruction of the train might have been averted if there had not been neglect on the part of the defendants' servants with respect to the watching of the line. With regard to the first of these matters, I entirely concur in the finding of the learned Judge that there was not any default in the original design materials or construction of the bridge. It was an iron girder bridge of three spans each being $31\frac{1}{2}$ feet in width. Each pair of girders weighed 22 tons and rested on pieces of stone and lime masonry. The masonry is shown to have been excellent, and both it and the girders were in sound condition at the time of the accident. Mr Norton for the Respondent urged that there was a stratum of Kunkur across the bed of the stream when the bridge was built but that this had disappeared after the accident and he urged that this must have been gradually eroded by the action of the stream, prior to the accident and that the piers thereby lost a portion of their original support and that the defendants were guilty of negligence in taking no steps to supply any substitute for this support. In regard to this argument it is sufficient to say that there is nothing to show that this stratum of Kunkur which lay under several feet of sand was materially eroded before the night of the accident. For aught that appears it may have been carried away on the night of the accident when the flood came down with a velocity of 10 feet per second. The evidence of Mr Thompson, Chief Engineer of the Madras Railway who is an officer of great experience shows that there was no material scouring under Pier No 2 and that its fall was not due to the foundations being scoured out. This pier, like Pier No 1 rested on a bed of shale, which Mr Thompson considers is a good base for such a bridge. Then it was argued that the waterway under the bridge was insufficient but I do not think that this was so. It, in fact, was greatly in excess of what would ordinarily seem to be sufficient. There has been a good deal of confusion in the argument before us as regards the discharging capacity of the bridge from not bearing in mind that the figures given in

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Exhibit T and in parts of the evidence of the expert witnesses, Mr Thompson and Mr Gnanaprasadam refer to what the bridge could discharge when the water rose to the highest point, reached by the flood that night, viz, to the top of the girders which is several feet above the bottom of the girders to which alone the Engineers in building a bridge contemplate that the water may rise. The correct facts may be stated as follows—The bridge was built in 1868 and the highest recorded flood prior to the accident showed only a height of 4 feet 11 inches above the bed of the river. The lowest part of the girders was two and a half feet above this, so that the free waterway provided was more than 50 per cent in excess of what previous experience indicated as sufficient. But, in point of fact, the discharging capacity of the bridge and the margin allowed to meet extraordinary floods, was much greater than these figures would, at first sight, indicate. The catchment area of the divide in which the bridge is situated is 9 square miles, and the rain water that falls in this area is carried off by three culverts or small bridges in addition to the Mangapatnam bridge. The calculations (Exhibit T) and the evidence of the experts who were examined show that the Mangapatnam bridge by itself provides for the flow of some 10,000 cubic feet of water per second. This is the flow that could take place in the space between the sandy level of the river-bed, and the lowest part of the girders of the bridge. But whenever there is a rapid flow of water over a sandy bed that is a scour of the sandy bed, and this increases with the velocity of the flow. The evidence of the experts shows that with the water of the river just coming up to the bottom of the girders the scour would be so great as to have allowed about 14,000 cusecs of water to flow under the bridge.

The evidence also shows that if the intensity of the rainfall was equal to the heaviest cyclonic rain recorded at the Madras Observatory during 42 years (viz, 2.35 inches in an hour) the maximum quantity of rain water that would have come to the bridge would, from the catchment area of 9 square miles, have been only some 5,000 cubic feet per second.

Thus the water way provided was nearly three times what the heaviest recorded rainfall would have indicated as necessary. There was no evidence as to the actual rainfall at Mangapatnam on the night in question, but at Kondapuram, six miles away the rainfall gauged was 6.25 inches between 6 P.M. on the 11th and

On the 12th September 1902 and from this and other evidence at the trial it was assumed that the rainfall was about 9 inches, a figure which gives 2 37 inches as the maximum in any one hour, and practically the same figure of 5,000 cusecs as the maximum flow from the catchment area

These circumstances I think, are sufficient to show that the waterway provided by the Engineers in constructing the bridge was sufficient

The question then naturally arises, how was it that the bridge was swept away ?

The evidence of the Chief Engineer, Mr Thompson, showed that the bridge was capable of bearing a lateral pressure of some 45 tons while the lateral pressure of the full water discharge under the bridge would not be more than half that amount and he was of opinion that the disaster to the bridge was caused by the water rising to the top of the girders so as to press against them and thus add this pressure to that exerted by the water directly on the piers. The learned Judge accepted this theory as to the immediate cause of the bridge giving way and I see no reason for holding otherwise. The evidence of the Engineer, Gnanaprasadam, who made the calculations in Exhibit T, and who made a detailed examination of the levels, etc., after the accident, shows that at a point about 1,100 yards above the bridge the volume of water passing down the stream when at its highest was 14,000 cusecs and to this would have to be added 800 cusecs for the drainage joining the stream between that point and the bridge. We have however, seen that this is just the quantity of water which the bridge (allowing 4,000 cusecs for scour) and the culverts in the same divide could discharge without the water rising so as to press against the girders. Why, then, did the water rise above the bottom of the girders and press against them? There is evidence that sticks of cholam stalks, babul trees and other debris were carried down in the flood, and this debris getting caught in the girders of the bridge was probably sufficient to raise the water above the level of the bottom of the girders, so as to press against them laterally in the manner described by Mr Thompson. Moreover, if the stratum of Kunkur referred to by Mr Thompson existed until the night of the flood (a matter which however is doubtful) it would not have been scoured out for some short time and until scoured out its existence would diminish the 4000 cusecs allowed as due to

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scour and thus raise the water above the bottom of the girders. The evidence of Mr Guanaprakasam also offers a probable explanation as to how it came about that a body of water so much in excess of what would be due to the probable rainfall found its way into the stream on the night in question. Some two miles above the bridge there is the large Mangapatnam Tank. Its bed is cultivated and it has not been used as a tank for 100 years. The water that flows into it from the adjacent hills ordinarily flows in a stream inside its bund to the escape at one end of the bund where it flows out and joins the stream flowing down to the bridge. On the night of the flood this escape was insufficient to allow the water to flow out of the tank as rapidly as it flowed in, and in consequence the water became ponded up in the tank. Mr Guanaprakasam, taking the flood levels shown on the borders of the tank calculated that no less than 11,000,000 cubic feet of water were thus at one time ponded up. The bund of the tank then breached in four places and the vast volume of water then poured down into the stream and on to the bridge.

There is a second smaller tank not far from the larger tank, and it also breached on the night in question added its quota to the flood in the stream.

The learned Judge was inclined to attach less importance than this witness did to the breaching of the tank, but the witness's figures are based on his observation of the actual flood level and on mathematical calculations, neither of which have been shown to be wrong. However that may be, it is certain that the water which came down to the bridge was about three times as much as calculations based on the drainage area and the experience of the heaviest cyclonic rain measured during 42 years at the Madras Observatory, indicated as the maximum that should be provided for. If we add to this that the highest flood level previously recorded at the bridge itself was only 4 feet 11 inches, while the bridge allowed a waterway of 7½ feet, and if we remember that the bridge was constructed as long ago as 1868 and that from that time up to the night of the disaster it had never suffered any damage or injury from flood, though there were disastrous floods in the neighbourhood in 1974, I think that there is ample justification for the finding of the learned Judge that the defendants were not guilty of negligence in regard to the construction and maintenance of the bridge.

am of opinion that its destruction was due to an altogether unprecedented rush of water down the stream in consequence of a sudden and violent storm of rain and probably in part also to the breaching of the two tanks which caused the water in the stream to rise above the level of the girders and thus subjected the bridge to a pressure which could not have been presumed and which it was never designed to resist.

It is now necessary to consider whether the loss of the mail train could, and ought to have been averted, notwithstanding the destruction of the bridge if the defendants' servants had not been guilty of culpable negligence in regard to the watching of the line. Exhibit 25 is a book of general rules prescribed under Section 47 of the Indian Railways Act, 1890, by the Government of India for all State Railways in India. These rules were made applicable also to the Madras Railway by Exhibit 29. They however do not provide for night watchmen. That is done by special rules made by each Railway. The learned Judge who tried the case has traced in detail the history of the rules prescribed by the Madras Railway in this behalf. I think it enough to state that night watchmen were originally considered necessary throughout the year on all parts of the line, but these were abolished mainly for financial reasons, in 1880 (except at certain bridges which were thought to be in especial need of careful watching) and in lieu of them the gang industries were required to put the most trustworthy of their gangs on as temporary night watchmen whenever the weather was threatening and floods might be expected. In 1898 the rules (Exhibit B) in force at the time of the accident were promulgated and they provided for night watchmen being regularly employed during certain specified months on certain specified parts of the line. On the section in which the Mangapatnam bridge is situated night watchmen were to be regularly employed in June, July and August only, but Permanent Way Inspectors were "expected to see that night patrolling is carried on over their lengths at any time when wet or stormy weather is prevalent." The learned Judge has held that the defendants were guilty of negligence in not having any permanent night watchmen in September and October. He points out that according to the returns of rainfall published in the *Gazette* by the Meteorological Department, these are, on an average of years, the two months in which the rainfall is heaviest in that part of the country where the disaster occurred,

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and that it is considerably heavier in those months than in June, July and August in which months the Railway authorities considered that the permanent employment of night watchmen was shown by experience to be a reasonable and desirable precaution. No reason has been suggested for omitting in September and October the precautions deemed necessary in June, July and August. This being so, and as the line north and south of Mangapatnam runs close to a series of hills sufficient to cause, as the expert, Mr Chatterton, thinks they actually did on the present occasion cause, a sudden precipitation of rain from the clouds drifting against them, I am not prepared to differ from the finding of the learned Judge that the defendants must be held to be guilty of negligence in not having had any permanent night watchmen on this part of the line at the time of the accident. Exhibit B contains detailed rules for the guidance of night watchmen when such are employed. During the months when these are not employed the practice is for two coolies in each gang to sleep in turn at the toolshed of his gang, and to turn out when called by the maistry on the advent of wet and stormy weather. The length of a gang's section is usually three miles. If the weather is very bad for a long time, the maistry is expected to call out his whole gang, usually consisting of six coolies. There appear to be no separate set of rules for their guidance on these occasions, but they are expected to act in accordance with the directions in Exhibit B, and of course in accordance with the statutory rules framed by the Government of India in Exhibit 28, so far as they are applicable.

It may be explained that the Mangapatnam Station is at mile 204/16 from Madras, i.e., 16 telegraph posts beyond the 204th mile—there being usually 20 telegraph posts to a mile. The Mangapatnam bridge is at mile 206/7 and the next station beyond the bridge and to the west of it is Kondapuram at mile 210½. Thus the length between the stations is a little under six miles and is in charge of two gangs, No. 4 from Mangapatnam to mile 207½ and No. 5 from that point on to Kondapuram.

The evidence shows that on the night of the 11th September 1902 Enkargadu and Munigadu of Gang No. 4 slept at the toolshed at Mangapatnam and were called by their maistry Tulukanam, shortly before 1 A.M. when there was a violent storm of wind and rain in progress. They went out to patrol the line and saw the mixed train No. 32 from Kondapuram, but as to whether

this was at the station or just beyond the bridge there is a conflict of evidence

They and the train passed safely over the bridge and they then went along the line to mile 207/6. Here they found that there had been a washout by the side of a culvert and that the line was in consequence dangerous. They accordingly took appropriate precautions by putting down fog signals on the line half a mile to the east (i.e., on the Mangapatnam side) of the breach, and posting Munigadu there with his lamp. Fakirgadu and Tulkanam then went back towards Mangapatnam to warn the Station Master there and stop the Mail train which was shortly expected. When however, they reached 205/16 they found that there was a great breach in the line for some 500 feet, and they say that the water was flowing to a depth of some four feet and so strongly that they could not cross it. They waited there till the water subsided towards dawn and then, crossing the breach, walked on to the Mangapatnam bridge, where they found it partially swept away and the train lying in the stream.

Turning now to No 5 Gang, it consisted of John Maistry and 6 coolies. Only one of these, Saothiah, has been examined. He says that on the night of the 11th he slept at the toolshed near bridge No 672 and was called out by John Maistry when it began to rain, and on going to bridge No 672 they found the line washed out and in a dangerous condition. One of the coolies, Kamal, he says, was posted on the Mangapatnam side of the breach, and another, Philip, on the Kondapuram side, while he himself went on towards Mangapatnam and found Munigadu already posted on the line with his lantern. He says that he took Munigadu's place and told Munigadu to go and give information to the Mangapatnam Station Master and that Munigadu at once started off to do so. Why Munigadu should have thought this necessary is not clear if Fakirgadu and Tulkanam had already gone to Mangapatnam as they say they had for that purpose. This, however, is only one of many difficulties and discrepancies in the evidence of these coolie witnesses, which, as the learned Judge has shown, makes it by no means easy to determine with accuracy what was done by each of them. John Maistry appears to have remained at the breach while the other three coolies of the gang, Peerkhan, Ankola and Naganna, went towards Kondapuram. The witness says "Peerkhan was told to go to the west and look about and watch. That is all that John Maistry told him to do."

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So much for Gang No 5 It is next necessary to see what the Permanent Way Inspector, Mr Carrapiett, was doing He lives at Kondapuram and was first roused by the rain at about 11 P M but he says that it was not then heavy, so he went to sleep again The rain roused him a second time at 1 40 A M, and he then woke up his Section Maistry Subriyalu, and two gang coolies, and they went out on the line at 2 A M They went towards Mangapatnam as the storm was coming from that direction According to Mr Carrapiett's evidence they met Peerkhan, Ankola and Naganu, the three men of John's Gang already referred to, at mile 208½ Subriyalu, however, in his evidence says that they met them a mile from Kondapuram which would be at mile 209½ They told him of the dangerous state of the line at 207/6, but he gave them no instructions to inform the Station Master at Kondapuram, or to send a telegram through him to Mangapatnam He apparently gave them no instructions at all, but went on to the gap at 207/6 There he found that the breach was 30 or 40 feet in length and 14 feet in depth, and he also found that precautions had been already taken by John Maistry by posting men on each side of the breach He then returned to Kondapuram in order to arrange for the repair of the breach

Now, the fact that stands out most prominently in connection with the action of the two gangs and of Carrapiett is that they made no attempt to inform the Station Master of Kondapuram and through him the Station Master of Mangapatnam of the dangerous state of the line though both ordinary prudence and the express rules of the Government of India, required them to take this precaution Rule 199 (Exhibit 28) expressly requires that "every railway servant observing any failure of any part of the works must, if he considers that the same is likely to interfere with the safe running of trains, report the circumstances as soon as possible to the nearest Inspector of Permanent Way and to the Station Masters of the stations on each side of the point at which such failure has occurred" Now not one of all the men who, as we have seen, knew of this breach obeyed the direction of this rule or made any attempt to give any information at all to the Station Master at Kondapuram at least until 4 A M, long after the train had been wrecked Yet it is certain that had they done so with reasonable promptitude the terrible disaster to the Mail train would have been averted It is said that Gang No 4 who were the first to know of this breach

could not properly have spared a man to go to Kondapuram as Munigadu was rightly posted with fog signals on the Mangapatnam side of the gap, and Fakirgadu and Iulukanam were right in going together along the line towards Mangapatnam whence the next train was expected in order to warn it and inform the Station Master at Mangapatnam. They at that time did not know of the disaster to the bridge or of the long breach at mile 205/14/16, and as Kondapuram was no nearer than Mangapatnam they properly resolved to go to Mangapatnam rather than Kondapuram.

A suggestion was made that one of them might have gone to Mangapatnam and the other to Kondapuram but Mr Thompson, the Chief Engineer, gave it as his opinion that they were right to go together towards Mangapatnam because if there had been another breach on the way to Mangapatnam one man if alone would have been helpless, that is, he would have been required to stay by the breach and there would have been no one to go on to Mangapatnam. I think that this view is correct, and that it cannot be said that the men of Gang No. 4 were wrong in not informing the Kondapuram Station Master. But I do not think that the same can be said of the men of Gang No. 5 or of Carrapiett and his men. In regard to them the defence is two-fold. It is argued that in fact they did not know of the gap in time to enable them to warn Mangapatnam through Kondapuram in time to stop the Mail train, and that even if they did, the Railway Company is not in law liable since the train was not wrecked at the breach at 207/6, but at the Mangapatnam bridge which Carrapiett and the gang coolies had then no reason to suppose to be in danger. In dealing with this matter the learned Judge, while holding Carrapiett responsible for disobedience to rule 199, thought that the negligence was of little importance as he thought it "doubtful if Carrapiett starting from Kondapuram at 2 A.M., could after arrival at bridge No. 672 have sent or taken a message back to Kondapuram in time to enable the Station Master to stop the Mail train." It may be that if Carrapiett waited until after he had himself seen the gap at Mile 207/6 it would have been late, but he knew of the gap long before that, and so did John Maistry and all his gang.

We have seen that Carrapiett met three men of John's gang at mile 208½ according to his own evidence, or at mile 209½ according to Subrayalu's evidence, and learned the dangerous

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state of the line from them. I have no doubt that there was then ample time for Carrapiett or any of those with him to have gone or sent a message to Kondapuram in time to stop the Mail train. Carrapiett's house is three telegraph posts to the west of Kondapuram Station. He set out at 2 A.M., walked to the gap at 207/6, inspected it, and got back to Kondapuram by 4 A.M. The distance he travelled was therefore well over six miles and he did this in two hours, including the time necessary to inspect the breach. He was, therefore, travelling at rather more than three miles an hour. The place where he met John's coolies was at most only two miles from Kondapuram and the time must have been not later than 2-40 A.M. A message could, therefore, have easily been sent back to Kondapuram so as to reach the Station Master in time. The 'line clear' signal was given by the Kondapuram Station Master to Mangapatnam at 3-10 A.M., and the Mail train actually passed through Mangapatnam at 3-29 A.M. If, therefore, the messenger had travelled at the moderate pace of only 4 miles an hour, he would have reached Kondapuram just as the 'line-clear' signal was being given, and 19 minutes before the train left Mangapatnam and therefore in ample time to have saved the train. Coolies with an urgent message could easily travel faster even on a stormy night like this, but even allowing a rate of only 4 miles an hour there was ample time for John Mastry after he had seen the gap, or for Carrapiett after he had heard of it from John's coolies, to have informed the Station Master at Kondapuram as required by rule 199 and thus to have averted the disaster. Most unfortunately neither of them made the slightest attempt to comply with the rule. The learned Advocate-General has however strenuously argued for the defendants that the damage was in law too remote and that even assuming that John and Carrapiett could have informed the Kondapuram Station Master in time, still the defendants are not liable since the disaster was not caused by the breach at 207/6, which alone was known to John and Carrapiett and in regard to which they had taken other precautions, but by the failure of the Mangapatnam bridge of which they then knew nothing and which they could not reasonably have expected to occur. In support of his argument he referred to the law as laid down in *Sharp v. Porell* (1) *Cobb v. Great Western Railway Company*, (2) *Smith v. The London and South Western Railway Company* (3) and other authorities. I do

(1) L.R. 7, C.P. 253.

(2) (1893) 1, Q.B. 159.

(3) L.R. 6, C.P. 14.

not, however, think that those authorities negative the liability of the defendants in the present case. I would be disposed to attach very great importance to the argument of the learned Advocate General if it were certain that the destruction of the bridge was due to the breaching of the tank and would not have occurred if the tank had not breached. For if that were so it might be argued with much justice that the defendants were not liable for the destruction of the train any more than they would have been if the bridge had been destroyed by an earthquake or blown up by an anarchist.

But in the present case it is impossible to say with certainty that the destruction of the bridge was due to the breaching of the tank, and not to the sudden rush of rainfall apart from its effect in causing the tank to breach. We do not know whether the tank breached before or after the destruction of the bridge. The calculations referred to in the early part of this Judgment which indicated that the breaching of the tank probably contributed to the flood which swept away the bridge are necessarily based on an assumption as to the maximum rainfall that took place in any one hour. The assumption was, that the rainfall was not more than 2.37 inches, but as to what it, in fact, was we have no evidence and Mr Chatterton in his evidence as an expert stated that he thought that the rain must have been very much greater than 2.37 inches in an hour. If so, the whole basis of the argument that the tank must have caused, or contributed to the destruction of the bridge fails. If the destruction of the bridge was not due to the breaching of the tank, but was due to the rush of water from the sudden storm then I have no doubt as to the liability of the Company. It is true that John and Carrapiett had no particular reason for expecting a disaster at the Mangapatnam bridge, but considering the violence of the storm then raging, the fact that it had already breached the line at 207/6 and the indications that its severity was no less in the Mangapatnam direction, I think that they might reasonably and ought to have anticipated the probability of other dangers to the line beside that which they knew actually existed at 207/6 and in regard to which they had taken some of the precautions indicated in the rules laid down for their guidance. Carrapiett says the rain was the heaviest he had ever known in those parts and that it was heaviest between 2 A.M. and 3.30 A.M. We know that 6.2 inches fell at Kondapuram. The Village Munsif of Mangapatnam says there was a torrent of rain from 10.30 P.M.

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to 8 A.M. and that he had never seen such rain. The guard of the wrecked train speaks of the thunder and lightning and pouring rain. Carrapiett himself says "it was a night on which breaches might occur." It will also be remembered that the Chief Engineer defended the action of Thulkanam in taking Fakirgadu back with him from the breach at mile 207/6 by saying that it was advisable for him to do so in order that if they met with another breach on the way to Mangapatnam they might be in a position to safeguard the approaching Mail train from that danger. I think, therefore, that in addition to the plain statutory duty under the rule there was abundant reason why John and Carrapiett might have reasonably anticipated danger to the line between mile 207/6 and Mangapatnam owing to the terrible storm then raging and they ought to have attempted by all means in their power to inform the Station Masters in order that the approaching Mail train might be prevented from entering on the dangerous section until that section had been examined and was known to be safe. In these circumstances I do not think that the defendants can be absolved from liability by showing that they could not have anticipated the precise place or manner in which the accident happened. The accident that actually happened was one of the kind that the defendants' servants might have reasonably anticipated from the conditions which they knew existed, and which they ought therefore to have taken all proper precautions to guard against. I must, then, hold that the defendants are liable on this ground as well as owing to their failure to maintain a system of permanent night watchmen.

The learned Judge held that negligence was also established against the defendants on the ground that neither Thulkanam nor Carrapiett turned out to patrol the line as early as they ought to have done. In this view I think that the learned Judge is right. Considering the violent character of the storm as spoken to by all the other witnesses, it is difficult to believe that it began as a mere drizzle as Carrapiett says, at 11.30 P.M. or that it did not become of such a character as to render it necessary for him to go out on patrol duty until 1.40 A.M. It will be remembered that the large watchout at mile 207/6 was found by Thulkanam and his gang about 2 A.M. It must have been raining heavily for a considerable time previously to have caused this damage to the line. The Village Munsif, who is almost the only independent witness examined on the point of

that there was a torrent of rain from 10-30 P.M. If this was so, and considering that there were no permanent night watchmen employed at the time, I must agree with the finding of the learned Judge that it was the duty of the gang coolies and Permanent Way Inspector to have been out and on the alert earlier than they were.

The evidence of the Chief Engineer shows that the Mangapatnam bridge was probably not washed away until the water had risen to the top flange of the girder which was 3 feet and 9 inches above the bottom of the girder. The water must have taken some time to thus rise above what may be called the free water-way to the top flange of the girder, and during this time the flood was of such a character that it ought to have attracted the attention of the watchmen or patrols if they were on duty. The same witness expressed the opinion that the breach at 20.5/14/16 occurred before the bridge was swept away. In this state of facts I agree with the learned Judge in thinking that if the system of night patrols as laid down in Exhibit B had been in force on the night of the accident and if the gang coolies and Permanent Way Inspector had been on the alert as early as they ought to have been, the probability is that the dangerous state of the bridge would have been observed in time to have stopped the train before it passed Mangapatnam Station and this terrible disaster would have been averted. I do not think that the plaintiff has shown that the defendants were guilty of negligence in not using rockets or port fires as it has not been shown that such precautions could have been used effectively.

The learned Judge has awarded Rs 33,000 as damages to the plaintiff. The latter has filed a memo of objections alleging that the learned Judge has erred both in his method of calculation and in his figures, and claiming a larger sum. The suggestion of the learned Counsel for the appellant that the damages should be based on an assumed annual saving by the plaintiff's father throughout his life is one I cannot adopt.

I am not aware of any more satisfactory basis than that adopted by the learned Judge and it has not been shown that the figures of his calculation are incorrect. The award of Rs 33,000 as damages seems to me in all the circumstances of the case to be reasonable. I would therefore, dismiss the appeal with costs and also dismiss the memo of objections. Two Counsels on each side. Costs on higher scale.

In the High Court of Judicature at Bombay.

ORDINARY ORIGINAL CIVIL
JURISDICTION.

Before Davar, J.

PERIN A PATELL, PLAINTIFF,

v.

G I P RAILWAY COMPANY, DEFENDANTS

and

A D PATELL, PLAINTIFF,

v.

G I P RAILWAY COMPANY, DEFENDANTS

Suits Nos 426 and 427 of 1907.

1908
September,
21

Suit for compensation for injury and loss of life—Act XIII of 1855—Suffocation by gas in train—Negligence of Railway

The plaintiff in the first suit was the daughter of the plaintiff in the second suit, and the two suits were heard together

On 12th December 1906, A D Patell the plaintiff in the second suit, left Muzzafarpore for Bombay by rail with his wife and four children to attend the wedding of his younger brother at Broach. At Cawnpore Station their friends, Mr and Mrs Hormusji Lala, joined them, and they all travelled together to Bombay in a second class compartment. On arrival of the train at Jhansi, they were obliged to shift into an old second class compartment with cane seats which the Station Master provided for their use in the Punjab Mail Train, and it left Jhansi at 5-30. According to the statement of the second plaintiff, the party were happy and cheerful until they arrived at Bina at 8-30, but during their journey between Bina and Bhusawal, they repeatedly complained at stations on the line to the servants of the Company that the lamps were burning dim and that they were suffocated from the effects of gas in the carriage. At Bhusawal the train arrived at 10 and the lamps were put out. They continued their journey and arrived at Victoria Terminus on the morning of the 14th. The whole party complained of nausea headache, giddiness and irritation in their throats.

Mrs Patell and her children were placed under the treatment of several Doctors. Mrs. Hormusji felt also ill and became sick. She was also under medical treatment. Mr. Patell was getting worse and died 8 days after her arrival at Bombay. The cause of her death was admittedly d.

to the attack of Broncho pneumonia. Perin also suffered like her mother, but she fortunately recovered. She was, however, said to have been permanently injured, while the others got over their illness after some time.

P. A. Patell
v
G. I. P. Ry.
and
A. D. Patell
G. I. P. Ry.

Mr. Patell, on behalf of himself and his children, sued the Railway Company for compensation for the loss occasioned by the death of his wife, which he estimated was Rs. 50,000. He alleged that the death was due to Broncho pneumonia which was the direct result of the inhalation of gas in the second class carriage in which she travelled and which caused irritation and inflammation of the lungs. He further alleged that the carriage provided for his wife was in such a bad order and so constructed as to allow of the escape of gas in large quantities into the said carriage. He also alleged that the attention of the servants and agents of the defendant Company were repeatedly called to the fact and they were requested to provide another carriage and to take steps to stop the nuisance caused by the escape of gas, but they failed and neglected to do so.

The charge of Perin, the first plaintiff, was materially the same as that of the second plaintiff, except that her lungs were seriously affected and permanently injured.

The defendant Company denied all the material allegations of the plaintiffs and stated that no gas could have leaked into the carriage in which the plaintiffs travelled, that, even if the gas did escape into the compartment, it could not have caused the illness and death as alleged in the plaint, and that the illness and death were due to other causes.

Several witnesses, including medical men and experts, were examined on behalf of the plaintiffs and defendants, and the Judge arrived at the following decision:—

(1) that the gas apparatus and fittings attached to the carriage in which the plaintiffs travelled were in perfect order.

(2) that there was no leakage or escape of gas in the carriage from Jhansi to Bombay.

(3) that the symptoms exhibited by members of the plaintiffs party were not due to the inhalation of gas in the carriage.

(4) that Broncho pneumonia from which Mrs. Patell and Perin suffered, was not the result of the inhalation of the gas used in the carriage.

Under the circumstances the suit was dismissed.

JUDGMENT.

By a Consent Order, bearing date the 19th of October 1907, these two suits were consolidated and were ordered to be heard together. The plaintiff in the first of these suits is the daughter of the plaintiff in the second suit. The second suit is really the more important of the two suits and the pleadings in that suit are fuller.

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Ardeshir Dhunjibhoy Patell, the plaintiff in the second suit, is a member of the Parsi community of Bombay. He was called to the Bar in England in January 1893 and soon thereafter returned to India and was admitted as an Advocate of this Court. He waited in Bombay for about 10 months and then went to Muzzafarpore. He secured good practice there and has been since 1894 settled at that place. When he went to Muzzafarpore he had been married and his eldest child Perin had then been born to him. He made a home for himself at Muzzafarpore and about 8 months after he had been there his wife joined him. The child was left at Bombay and did not join the parents till two years after her mother had left for Muzzafarpore. Another daughter and a son were born to him at Muzzafarpore. They are named Dina and Dira. Perin is now 14 years of age, Dina is twelve and Dira is seven. The plaintiff Ardeshir evidently did very well at Muzzafarpore, for in 1902 he built for himself a bungalow in what he calls "the very best situation" at Muzzafarpore next to the Travellers' Bungalow of that place. The fact that he built the bungalow for himself evidences his intention of settling permanently at Muzzafarpore, or, at all events, till he continues to practise at the Bar. The plaintiff's family, or some members of them, were in the habit of coming to Bombay formerly every year to see their relations and friends and latterly every alternate year. The last journey Mrs Patell made to Bombay was in December 1906 and is fraught with much sadness, for the whole family started in the hopes of having a happy holiday participating in the festivities attendant on the wedding of Mr Patell's younger brother, Rustom, and a speedy return to their home at Muzzafarpore. These hopes were most cruelly frustrated, and Mrs Patell never lived to realise her hopes but died eight days after her arrival in Bombay under circumstances which must evoke the sympathy of all those who have heard the tale as it was unfolded during the hearing of these two suits.

The case for the plaintiffs, as gathered from their plaints, their own evidence and the evidence of the witnesses called on their behalf, is shortly this. Mr Patell's younger brother, Rustom, was to be married at Bruch on the 20th of December 1906. Mr Patell's father, his brothers and their wives and children all resided in Bombay at their family house at Marine Lines. The family were desirous of having Mr Ardeshir Patell, his wife and children with them at the wedding and as they did not find it convenient to come to Bombay earlier, the wedding was purposely fixed to take

place on the 20th of December to enable Mr Ardeshir to take advantage of the Christmas holidays. The bride's home was at Broach and the family had decided to leave Bombay for Broach on Sunday, the 16th of December. Ardeshir decided on the 10th of December to start from Muzzafarpore on the morning of the 12th. He decided to proceed via Cawnpore, because Mr and Mrs Hormusji Lala, who were particular friends of the family and who resided at Cawnpore, were also invited to the wedding and Ardeshir had arranged that they should journey down to Bombay together. Ardeshir had been in previous correspondence with Hormusji about their intended journey to Bombay. When he made his final arrangements he telegraphed to Hormusji that he and his family were starting on the 12th and asking him to reserve a compartment in the train. The line from Muzzafarpore to Cawnpore is narrow gauge. At Cawnpore they have to get into a train that starts from Lucknow and stops at Jhansi. At Jhansi some of the carriages of this train are attached to the Punjab Mail, which starts from Rawalpindi and runs on to Bombay taking Jhansi on the way.

The plaintiff Ardeshir, his wife Awahai, his three children Perin, Dara and Dina, and another child Naja, a niece of his who had been staying with them, left Muzzafarpore early in the morning of Wednesday, the 12th of December. They say they were all well and happy when they started on their journey and were in a very cheerful state of mind in anticipation of the festive holidays they were going to enjoy. They arrived at Cawnpore about 8 A.M. on the following morning, the 13th of December. They were met there by their friends. As they had plenty of time at their disposal before the train from Lucknow would come in, they were invited to proceed to the house of Hormusji Lala's brother Jamsetji where they were given a breakfast. As they were proceeding on a journey to join marriage festivities the breakfast consisted of dishes prepared on auspicious occasions. One of such dishes specially mentioned is *Sai*—something akin to sweetened vermicelli. They left Cawnpore with Mr and Mrs Hormusji Lala at about 11 A.M. They travelled in a reserved Second Class Carriage which was cushioned. They had a cheerful comfortable journey up to Jhansi. At Cawnpore they say they were assured by a Railway servant that the carriage in a compartment in which they travelled was a through carriage to Bombay and would be attached to the Punjab Mail at Jhansi. They arrived at Jhansi at about 3.30 P.M. still happy, well and

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cheerful At Jhansi their troubles began On arrival they were told that the carriage they were in was not a through carriage and would not be attached to the Punjab Mail They protested and complained to the Station Master, but all to no purpose They had to get out and wait at the station for the Punjab Mail which on that day was late by about 2 hours Mrs Patell was much annoyed at having to change carriages Dhunbaiji Pestonji a lady friend who had gone to the Jhansi station to meet the party and who was examined on Commission at Calcutta, says when told finally that she would have to get out and change 'she got very wild over it' Ardesbir says the Station Master Mr Knight promised to give him a reserved compartment in the Punjab Mail The Punjab Mail arrived at Jhansi a little before 5-30 It remained at the station for about 20 minutes Mr Knight took the plaintiff Ardesbir and pointing to a Second Class Compartment said "This is for you" Ardesbir says the first thing that struck him was 'the old appearance of the carriage' He noticed that the seats were without cushion He went up to Knight and said, 'Is this the way you keep your promise' Knight replied 'This is the best I can do for you The train is late Hurry up' The first person of the party who got in was Mrs Patell Immediately on getting in she said, "This carriage is very dirty and there is a smell of gas" and came out Thereupon Hormusji's Talisildar Chohey Samaldas, who was present at the station and who has been examined on Commission at Calcutta called the Bhusti and the Mehter, who are always ready at the station platform, and the carriage was cleaned and the lavatory washed with phenyle water The train left, according to Ardesbir, a little before 6 P M Exhibit No 14 is a statement prepared by the defendants from their records, showing the exact time when this train arrived and left all the stations where it halted between Jhansi and Bombay Except as to Jhansi the statement is admitted to be accurate This statement gives the departure time from Jhansi to be 5-39 With reference to Jhansi all that was insisted on by the plaintiffs was that the train only stopped there 20 minutes This is not disputed by the defendant Company, so nothing turns on the exact time when the Mail left Jhansi I will take the time of arrival and departure at the halting stations from Ex. No 14 The train arrived at Bina at 8-00 It stopped there only 10 minutes during which a dining car was annexed It seems that the refreshment room proprietors had wired to the Bina refreshment room people about the plaintiffs

party and as soon as the train arrived their dinner was brought into their carriage. The party had up to now nothing to complain of. They were still happy and cheerful in spite of being in an old cane seated carriage. According to Perin they laughed, talked, had recitations for about an hour after leaving Bina and then prepared their beds and went to sleep. The position of each one of the 8 persons as they went to sleep is accurately shown in Ex 1, which is a plan annexed to Ardeshir's plaint. This plan also shows the position of the lamps in the compartment. There were two lamps in the compartment itself and one in the lavatory. The plaintiffs did not notice at Jhansi how the lamps were lit. When they got into the compartment the lamps were lit. Before going to sleep the party noticed that lamp marked A in Ex 1, the one furthest from the lavatory, in the words of Ardeshir, "was not burning as well as the other ones. It was flickering."

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Between the time the party went to sleep and the arrival of the train at Itarsi, at 1-20 A.M. in the early morning of the 14th of December, nothing happened. Before going on to what happened when the train arrived at Itarsi I think it is necessary to set out here what the plaintiff Ardeshir states about the state of his health during the eventful journey. I gather this from evidence given in Court and his statement made by him in writing on the 29th of December 1906 for the information of his solicitors. His statement is Ex No 2 in the case. It appears that since September 1904 Ardeshir has been suffering from chronic nasal catarrh. At Muzzafrapore before December 1906 he had two attacks of asthma, the last attack being in May 1906. When he left Muzzafrapore at 6.00 A.M. on the morning of the 12th he was quite well. Thirty miles after Muzzafrapore the train arrived at Sonapore. His friend Binaji who came to see the party off, accompanied them as far as Sonapore. In Ex No 2 Ardeshir says: "When we arrived at Sonapore I began to suffer from my usual complaint of nasal catarrh. I could not sleep well that night * * * * We arrived at Cawnpore about 8 A.M. the next morning and were received at the station by Messrs. Horinusji and Ardeshir, who invited us to their place to have *chota khana* as we had sufficient time to go and come back. I was not feeling well but Mrs. Patell wished me to go with her and the children which I did * * * * We arrived at Jhansi at 2.30 P.M. * * * * As I was not feeling well,

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P A Patell Mrs Patell and Mrs Hormusji took me to the refreshment
 G I P Ry room where I had a cup of tea "

A D Patell This was the state of the plaintiff Ardeshir's health previous to
 G I P Ry the arrival of the train at Itarsi. What happened to him when
 — the train stopped at Itarsi is best described in his own words
 "I awoke at about half past one. I was the first to wake up
 I felt as if I could not breathe. I shouted to my wife and told
 her that I could not breathe well. I told her I feared I was
 getting an attack of asthma. Both my wife and Hormusji who in
 the meanwhile also woke up, disabused my mind. They said
 they felt the odour of gas. My wife said she could not sleep
 well because of the smell * * * I woke up after the train
 stopped at Itarsi "

Speaking of the incident in Ex No 2 he says ' Mrs Patell
 wished me to rub the application on my chest, but the bottle
 being kept in a box which was underneath the bedding, I told
 her not to trouble herself about me "

The plaintiff Ardeshir goes on to say that his wife opened a
 window, and she and Hormusji called out for Guard and Station
 Master. A native servant of the defendant Company came up
 to the carriage. They complained to him about being suffocated
 with gas and pointed out to him lamp A. The man went up to
 the roof of the carriage and did something to the lamp which
 had the effect of making it burn brighter. The train left Itarsi
 and a short while afterwards the lamp "went dim again "

The next station at which the train stopped was Harda where
 it arrived at 2 4 A M. It stopped there 10 minutes. Here again
 the adult occupants of the compartment or some of them shouted
 for Station Master and Guard. The Guard came up to the
 carriage a little before the train started. Ardeshir says — He
 was a European Guard. We told him we were getting the smell
 of gas and we pointed out the lamp A to him. He said and
 it was time for the train to start. He promised to look into the
 matter at the next station "

After leaving Harda Mrs Patell and her daughter Dina were
 sick. The train arrived at the next halting station Khandwa at
 4 26. Here again it stopped 10 minutes. On arrival Ardeshir
 and Hormusji shouted for the Guard and the Station Master. They
 got out and stood on the platform. The Guard and the Station
 Master came up. The account of what happened according to
 the case of the plaintiffs had best be given in Ardeshir's own

words —“ We were at the door when the Guard and the Station Master came up to our carriage. We informed them of what had happened. The Guard went inside. He *opened the lamp from inside* and it seemed to me that he was satisfied that the lamp was not burning properly. I asked the Station Master to put me in some other carriage. I said I was ready to pay the difference between 2nd and 1st Class fares if he put me in a first class. I said this because Hormusji had gone and seen the other carriages and told me that there was no room in any other Second Class carriage. Hormusji said there was no room in any of the 1st Classes either. When I asked the Guard and Station Master to put me in another carriage one of them said that the train load was already heavy, they could not add a carriage to the train and there was no room in the train itself ”

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Ardeshtir says they shouted again at Burhanpore, but no one came. In Ex No 14 Burhanpore is not mentioned as a halting station between Khandwa and Bhusawal. The train arrived at Bhusawal at 6-32 on the morning of Friday, the 14th. Between Khandwa and Bhusawal Dara and Perin became sick and vomited. Mrs Patell had been sick altogether two or three times before arriving at Bhusawal. The lights were here put out. What happened at Bhusawal, and whether the plaintiff Ardeshtir spoke about their troubles to the Parsi at the refreshment room there, is of no importance whatever. The train left Bhusawal after a halt of 10 minutes. About the smell of gas in the carriage Ardeshtir in the course of his cross-examination says —

“ I did not find that the smell of gas was less when we stopped and more when the train was in motion. The smell was much the same while the train was stationary and while it was in motion. The smell of gas was just the same up to Bhusawal. It was neither more nor less at any stage between Itarsi and Bhusawal. After Bhusawal we got no smell of gas. They put out the light at Bhusawal.

At a later stage of his cross examination Ardeshtir says —

“ I cannot say that there was no escape of gas between Bhusawal and Bombay on the day we arrived. I did not get the smell. As far as I am concerned I did not get the smell, but then my powers of smell are defective. No one of our party said that they smelt gas between Bhusawal and Bombay. My wife said she smelt gas even after she got home. She complained like that for 2 or 3 days after her arrival in Bombay. I don't think that from the fact that

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nobody complained of the smell of gas between Bhusawal and Bombay that there was no escape of gas' * * * *
 * " Some of my witnesses say there was smell of gas after we left Bhusawal Hormusji and my daughter Perin say so * * * * In the train after leaving Bhusawal Hormusji said there was no smell of gas, but after we came home he told me that he had felt the gas all along but he said there was none to divert my and my wife's attention and cheer us up I accepted Hormusji's statement in the train and I believe my wife did so too as she made no complaints I don't think in the carriage Perin complained of the smell of gas after Bhusawal Perin told me she smelt gas after Bhusawal, afterwards It may have been before or it may have been after her mother's death "

Perin in her evidence confirms her father's statements on this point I will discuss this evidence after I have set out the contentions of both the parties

Between Bhusawal and Munnar, Naji got sick and Dama became sick for the second time They all complained of nausea headache, giddiness and irritation in their throats At Munnar the passengers in the adjoining compartment got out There was inter communication between the two compartments, and finding the other compartment of their carriage empty, Mr Patell, Perin and Dama got in there They tried to go to sleep but could not At Deolali three Parsees, one of whom (Mr Pardi) has been examined as a witness in the case, tried to get into the compartment in which the plaintiff's party had travelled from Jhansi It was pointed out to them that the compartment was reserved and they thereupon got into the adjoining compartment and Mrs Patell and Perin returned to their own compartment Dama remained where she was for some time Ardehir and Hormusji say the Parsees who came in noticed the unpleasant condition of Mrs Patell and the children and made inquiries and that thereupon they were told by them the whole story of their journey—how they had suffered from escape of gas in the carriage, how they had repeatedly complained to the Company's servants and how their complaints were left unheeded and Mr Pardi was called to corroborate their statement But the Igatpuri and Asara thotram has to pass through several tunnels and all Up trains are always lighted up at Igatpuri Ardehir came to light the lamps of the plaintiffs' compartment, and

Ardeshir refused to allow him to do so. After Igatpuri Ardeshir in his plaint says Perin and Dinu were both sick.

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The Punjab Mail with the plaintiff's party arrived at 2-17 P.M. on the Victoria Terminus. Some relations and Dr J. N. Bahadurji, a friend of the plaintiffs' family, met them at the Terminus. Dr Bahadurji noticed the unhappy condition of the party, more especially of Mrs. Patell who was feeling so ill that she had to sit down on a trunk. He was told the whole story of the journey and he gave certain directions as to keeping all doors and windows open and giving them all plenty of fresh air.

Although Mrs. Patell was anxious not to upset the members of the family and tried to belittle her illness she was found on the evening of her arrival to be so ill and uncomfortable that Dr. Kupadia, who has his dispensary in the neighbourhood of the plaintiffs' family house, was called in about 5 P.M. This was on Friday, the 14th of December. He was told the whole history of the journey as the plaintiff and his witnesses Hormusji and Perin have told before the Court. He prescribed some medicine and an application for the throat. A cousin of the plaintiff, who is a qualified medical man but who does not practise as a Doctor but has made Dentistry his speciality and who lives in the same house, saw Mrs. Patell and Perin later in the same evening. Dr. Kapadia saw Mrs. Patell and the children again the following morning at 8.30. That day, the 15th, the plaintiff Ardeshir, accompanied by his cousin Dr. Patell went to Colonel Kbareghat,—a retired Officer in the Indian Medical Service, who has a consulting practice in Bombay—and consulted him about his nasal catarrh and incidentally told him the history of their journey and the condition of his wife and children. On the same day Dr. Bahadurji called and saw Mrs. Patell. On the following day, Sunday the 16th, Mrs. Patell and the children appeared to be better—no Doctor was called in. Ardeshir's father, brothers and some relations left for Broach that day. Mrs. Patell came out of the room into the landing to bid them good bye. She told them she would follow them to Broach on Tuesday or Wednesday. The same day Dr. Tata, the husband of Mrs. Patell's sister, came with his wife to see them. Mrs. Hormusji, who with her husband was staying in the family house as guests, felt ill and became sick. Dr. Tata prescribed for Mrs. Hormusji, Mrs. Patell and Perin.

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On Monday, the 17th, Mrs Patell was worse Dr Kapadia was not called in any more, but Dr Jehangir Lalauwalla was called in. He was told the history of the journey. He treated her. He saw her again in the evening and on the morning of the following day, Tuesday the 18th. On that day later on Dr Bahadurji was called in and he examined Mrs Patell as well as Peria who was showing the same symptoms as her mother. On the 19th Wednesday, Dr Bahadurji and Dr Lalauwalla met and held a consultation. The idea of going to Broach was finally abandoned on that day. Naji and Mr Hormusji were the only two of the party that came from Mazzafapore and Cawnpore who went to Broach to participate in the wedding festivities. On the 20th Thursday, Mrs Patell continued to be under the treatment of Drs Bahadurji and Lalauwalla—Dr Patell assisting them in administering oxygen etc. Mrs Patell continued steadily to get worse. On the 21st Friday, Dr Surveyor was called in for consultation and met Drs Bahadurji and Lalauwalla. Dr Surveyor and Dr Bahadurji saw Mrs Patell on the morning of Saturday the 22nd. In the evening Colonels Childe and Meyer were called in. They met Drs Bahadurji and Surveyor. According to Colonel Meyer Mrs Patell was then dying—a little after midnight she died. It is not disputed by the defendants that Mrs Patell suffered from Broncho pneumonia and that that was the cause of her death. Peria suffered in the same way as her mother, but fortunately she recovered. She is, however, said to be permanently injured and her case is that she will never quite recover from the permanent injury caused by the Broncho pneumonia from which she also admittedly suffered.

This is shortly the history of events as they happened according to the plaintiffs and their witnesses.

Dr Bahadurji, Dr Kapadia, Dr Lalauwalla, Dr Pitell and Colonels Meyer and Khareghat have been examined before me on the plaintiff's behalf.

The plaintiffs in both the suits contend that the illnesses of both Mrs Pitell and Peria were caused by the inhalation of gas which leaked into their compartment, that the whole of the party suffered from nausea, headache, dizziness, giddiness and irritation in the throat, that in consequence of the inhalation of gas which escaped into the compartment most of the people in it became sick and vomited during the journey and Mrs Hormusji suffered from vomiting on the following Sunday, the 16th of

December, that all got over the evil effects of gas inhalation after some time, but that Mrs Patell and Perin developed Broncho-pneumonia, that Mrs Patell died of Broncho pneumonia, and that although Perin recovered her lungs have suffered permanent injury. They assert that the Broncho pneumonia from which Mrs Patell and Perin suffered was the direct result of inhalation of gas during their journey from Jhansi to Bombay in the defendants' carriage. The plaintiff Ardeshir in his plaint charges —

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That the defendants wrongfully and negligently provided a carriage for the plaintiff's wife to travel—in such bad order and so constructed as to allow of the escape of gas in *large quantities* into the said carriage and that the said carriage was quite unfit for human beings to travel in. That the defendants' servants and agents although their attention was repeatedly called to the fact and they were requested to provide another carriage and to take steps to stop the said nuisance caused by the escape of gas as aforesaid failed and neglected to do so.

He says that the cause of his wife's death "was the inhalation of the gas in the defendant's second class carriage * * * which caused irritation and inflammation of the lungs." He pleads that the death of his wife is a source of great loss and damage to him self and his children and estimates that loss at Rs 50,000.

He has filed his suit under Act XIII of 1855 to recover this sum from the defendant Company on behalf of himself and his children.

Perin in her plaint charges that at Jhansi she and the members of her family "were put into a second class carriage that was in a dirty and unwholesome state and was so constructed and was so much out of order that large quantities of gas escaped into the said carriage from the apparatus for lighting the carriage and was inhaled by the plaintiff and other members of the family. The said carriage was quite unfit for human beings to travel in and the defendants were guilty of wrongful and negligent conduct in providing such a carriage and putting the plaintiff therein for the purpose of being carried to Bombay."

She complains that "the escape of gas into the said carriage from the apparatus for lighting the carriage and its inhalation caused" her to be seriously ill. She says her "lungs have been seriously affected and are believed to be permanently injured."

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In her plaint she repeats the complaint against the defendant Company's servants for not attending to their complaints and remedying the nuisance. She has filed her suit to recover from the Company Rs 10 000 as damages sustained by her ' by the discomfort and pain bodily and mental caused * * * by reason of her illness caused by the inhalation of the sulphur gas * * * and by the serious injury done to her health and constitution and general prospects of life by the injuries caused to her ' as stated by her in the plaint

This, I think, fully sets out all the allegations on which both plaintiffs base their claims against the defendant Company

The defendants deny all the material allegations of the plaintiffs. They deny that the carriage in which the plaintiff party travelled was dirty and unwholesome, or that it was so out of order or the gas apparatus so faulty as to allow large or any quantity of gas to leak into the carriage. They deny that complaints were made to their servants, they deny that the illness of plaintiff, Perm and her mother and subsequent death of her mother were due to inhalation of gas, they deny that they were guilty of any wrongful or negligent act and deny their liability to pay damages to the plaintiffs or either of them. The case put forward in the defendant's written statements which were filed about a year before the hearing of the suits, though sufficiently clear and explicit is put forward with moderation as compared with the case which they placed before the Court at the hearing. It seems to me the Company gathered strength in the interval and the case presented on behalf of the defendants was that no gas could have leaked into the carriage in which the plaintiffs travelled and that even if the gas did escape into the compartment it could not possibly have caused the illness and death as alleged by the plaintiffs, that the symptoms caused by the inhalation of the gas used in their carriages were very different to the symptoms described by the plaintiffs and their witnesses, and they deny that the inhalation of the gas used by them could cause the illness such as Mrs Patell and her son suffered from. They go further and they attempt to prove that as a matter of fact no gas did leak into the plaintiffs' compartment on the night in question. How far this attempt has been successful I will discuss later

Immediately after the pleadings were read plaintiffs Counsel Mr. Padshah, applied to me to allow him to amend his plaintiff

adding the following words at the end of para 13 (Ardeshir's P A Patell
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“The plaintiff further says in the alternative that the defendants were negligent in using gas apparatus in the train in question which permitted the escape or discharge of gas into the carriage in which the plaintiff's wife travelled and also in taking no steps to remedy the same when complained of”

In reply to the enquiry of Mr Robertson, Counsel for the defendants, Mr Padshah stated that by the amendment the plaintiffs did not intend to allege that the *system* of lighting the train was bad or defective. Throughout the hearing Mr Robertson constantly pressed me to call upon Mr Padshah to state in some definite tangible form what was or were the wrongful or negligent act or acts with which he charged the defendants. During the hearing Mr Padshah appeared most reluctant to be confined or restricted to any particular act or acts. I understood and appreciated his difficulty and allowed him to have an absolutely free hand in the conduct of his case. My impression was that, in addition to the theories as to the escape of gas which he had been prepared to urge before the Court, he wished to be left free to fish out and rely on other theories which he might be able to gather from the evidence of defendants' witnesses. When, however, the time for his final address to the Court came, he was constrained to place whatever theories he wished the Court to consider definitely before the Court. He stated that his case was that gas entered the compartment from one or more of the three following sources —

(1) Gas leaking below the carriage from the defective joints of the pipes with the cylinder or from the loose joints of the pipes or from the stop cock as the head of the carriage entered the compartment through the back of the water closet and the holes in the lavatory floor or through the windows of the lavatory

(2) Gas leaked through the Bye pass Cock attached to lamp A

(3) Gas leaked through the Union Nut of the lamp A

It appears to me that by far the most important question in these cases is — Whether there was any leakage of gas from the Gas Fittings attached to the carriage and whether there was any escape of gas into the compartment in which the plaintiffs travelled from any source whatever

Before entering upon a discussion of this question I think it is necessary to state something about the carriage and its

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fittings At the hearing it was admitted that the carriage in which the plaintiffs travelled was numbered 2142. It consists of two second class compartments with a lavatory at each end and a door of intercommunication between the two compartments. It is also now admitted that the position of the carriage in the Punjab Mail during the journey in question was as is shown in Plan Ext No 11. It was third from the end from Jhansi up to Reversing Station on the Mull Ghaats between Igatpuri and Karsara. The compartment in which the party travelled was the front one nearest the engine. After the Reversing Station the position was changed the carriage became the third from the engine and their compartment became the rear compartment of the carriage. The defendant Company's Carriage and Wagon Superintendent Mr Bell has been examined before me. His evidence impressed me most favourably. He was most accurate in his statements and those of his statements that were not within his personal knowledge were based on a study of records in the custody of the Company. He was present when I went over to the Victoria Terminus and inspected the carriage in question and the Company's Gas Factory there. Those of his statements in his evidence that were capable of being confirmed by personal observation were fully confirmed by what I saw of the carriage and its fittings. When I saw carriage No 2142 it was on an Examination Siding, which enabled me to inspect the cylinders and all gas fittings below the carriage with great ease. Specimens of some of the important fittings such as regulating valve lamp etc, and an accurate model of the carriage prepared under Mr Bell's supervision were put in as Exhibits at the hearing. I find the following facts in connection with the carriage and its fittings, the lamps—the gas burnt in it etc—established to my entire satisfaction by the evidence recorded by me in the cases—Carriage No 2142 originally belonged to the Indian Midland Railway Company. This Company was amalgamated with the G I P Railway Company, Mr Bell believes about 1901, and the carriage became the property of the defendant Company. The steel work of the carriage came out from England some time previous to July 1897. Messrs Craven and Company sent out the drawings and specifications for the superstructure and the carriage was built at the Indian Midland Railway Workshop at Jhansi. It began regular running on the 29th July 1897. The carriage was in the Parcel Workshop of

the defendant Company from the 4th of December 1905 to the 9th of April 1906. During this period it was thoroughly overhauled and repaired. It was during this period that the carriage was fitted up with its present gas cylinders, lamps and gas fittings. The gas used in the defendant Company's trains is oil gas prepared from kerosine oil by a system known as Pintsch's system. The way this gas is manufactured was fully explained to the Court by the witness David James Fraser, who was the Company's Gas Inspector at Jhansi in December 1906. The oil used at this time and for sometime previously was Cohra Brand Kerosine Oil supplied to the Company by Messrs W and A Graham & Co. It is a cheap brand because it has a low flashing point, but it is nevertheless pure kerosine oil. Fraser's evidence is supplemented by a Chart Ext No 10 which helps to explain the process of the manufacture of this illuminating gas. The dimensions of the two cylinders affixed to the carriage at its bottom is, taken together, 18 cubic feet. The contents of the two cylinders intercommunicate. Gas is filled into these cylinders by a pipe, one end of which is affixed to the inlet mouth of the cylinders and another to a ground valve near the line. Gas is sent at the high pressure from the Factory to the valve at high pressure by means of pipes. Cylinders are charged up to a pressure of 7 atmospheres which means that the two cylinders hold compressed within them gas seven times their dimensions that is, 126 cubic feet. The total air space in the compartment is roughly about 750 cubic feet. On each side of the carriage is affixed a gauge which at all times shows how much gas there is in the cylinders. A specimen gauge is Ext No 24. The gas in the cylinder is conveyed at the pressure in the cylinder to a Regulator Valve, a specimen whereof is Ext No 20. This is a contrivance whereby the pressure of gas is reduced and so regulated that the gas passing through it into the pipes which go up to the lamps reaches the burners at a regular and even pressure. At the head of the carriage and outside of it after the pipes leave the Regulating Valve there is a stop cock. That shuts off or lets in the gas to the lamp. In addition to the stop cock there is what is called a Bye Pass. That is an arrangement by which the lights in the lamps can be lowered and increased as may be required. In some of the carriages there is only one Bye Pass for the whole carriage and it is outside. In other carriages there is a Bye Pass attached to each lamp enabling the passenger to manipulate

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P A Patell the light of each lamp according to his requirements In
 G I P Ry carriage No 2142 each lamp has a Bye Pass affixed to it Mr
 and Hummel, an Assistant Engineer in the service of Pintsch
 A D Pitell Patent Lighting Company, happened to be in Bombay when
 G I P Ry these cases were being heard and he was examined before me
 I gather from his evidence that now practically all the Railways
 in India are lighted by that Company's system Over 10,000
 coaches in India are lighted by their system Over two
 hundred thousand Railway carriages are lighted by this system
 in other parts of the world The Company supply the plant for
 the manufacture of oil gas under their system and they also
 manufacture lamps suitable for burning the oil gas prepared by
 their system The three lamps in the plaintiff's compartment
 are lamps manufactured and supplied by this Company These
 lamps can only be lighted from inside the carriage There is a
 catch by which the Glass Globe inside could be opened and
 there is a small tap immediately below the burners in each lamp
 by which the gas can be turned on and off from the burners
 All the lamps in this carriage could be put out simultaneously
 by turning the gas off at the stop-cock outside the carriage
 The lights in each of the lamps could be lowered or increased
 by a turn of the Bye Pass attached to each of these lamps
 Each one of these lamps could be put out by the passengers by
 opening the Globe and turning the tap below the burners

Before discussing the main question as to whether there was
 any leakage in or escape of gas into the plaintiff's compartment
 I propose first to consider the narrower question Assuming that
 there was an escape of gas in the compartment, when did it
 begin and when did it cease? I take this question first before
 my finding on this question will effect the consideration of the
 main question to a great extent

The lamps in the carriage were lit at Jhansi sometime before
 the train left Jhansi at 5.39 p.m. that evening The smell of
 gas of which Mrs Pitell complained on entering the carriage
 evidently disappeared as soon as the train left Jhansi for the
 members of the plaintiffs' party were happy and cheerful up to
 an hour after they left Bina The train left Bina at 8.39 p.m.
 They were all laughing, chatting and giving recitations till they
 went to bed which according to the plaintiff was at about half
 past nine For four whole hours there was no smell of gas and
 no complaint on that score from any one of the party It is

admitted by the defendants that at stations where trains are charged passengers do feel the smell of gas and a little gas enters the carriage but it disappears as soon as the train is on the move. The obvious conclusion from these undisputed facts is that there was no gas in the compartment from 5-30 to 9-30 P.M. The gas that Mrs. Patell smelt at Jhansi must have been the gas liberated while the train was being charged at Jhansi. The first time the smell of gas is noticed was at 1-20 A.M. when the train stopped at Itarsi and the first person to notice it was Mrs. Patell again. This leads me to the inference that gas must have begun to enter the compartment, if it did enter at all, sometime between 9-30 P.M. and 1-20 A.M. Whichever was the source from which gas escaped into the compartment, the defect which led to the escape must have come into existence before 1-20 A.M. and after 9-30 P.M. Between the time the plaintiff's party entered the compartment and the arrival of the train at Itarsi the conditions were not changed. Lamp A had been burning dimly from the very beginning of the journey at Jhansi. It did not let out gas for four hours at least. If the plaintiffs' and then witness Hormusji's impressions about the presence of gas in the compartment are correct something must have gone wrong sometime after 9-30. What was it? Nobody has been able to say continuing to argue on the assumption that gas was leaking into the compartment when did it cease? In the earlier part of my Judgment I have set out passages in the evidence of the plaintiff Ardeshti on this head. On that evidence can there be any doubt that the smell disappeared after the lights were put out at Bhusawal. He deliberately committed himself to the statement, "After Bhusawal we got no smell of gas." This statement he later on qualified by saying he got no smell. I have not the least desire to suggest nor is there any ground for suggesting that the plaintiff Ardeshti is not honestly telling the Court what he firmly believes to be the truth. He candidly tells the Court his sense of smell is defective and he is guided in his belief that there was the smell of gas in the carriage after Bhusawal by the impression on the mind of his late wife and by what Hormusji stated. I am not forgetting Perm. I will deal with her a little later. The mischief of this mis-impression lies at Hormusji's door. He is a respectable man and again I do not wish to suggest that he is intentionally telling an untruth but he is a very feeble old man with by no means robust mental powers.

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He fainted in the witness box and his examination had to be postponed. He was by no means very clear in his mind as to what he said. He announced in the train after leaving Bhusawal that there was no smell of gas. No one contradicted him. The plaintiff Ardeshir accepted that statement as correct and what is still more significant is Mrs Patell accepted the statement and made no further complaint. Ardeshir himself says so. We know as a matter of fact that Mrs Patell suffered from a delusion long after she arrived in Bombay. The smell of gas was present to her imagination even after she reached home and long afterwards. Gas was the predominating idea on the minds of every one of the party. They all firmly believed that gas was the cause of their trouble. Sometime after coming home Hormuji probably wishing to appear more observant and wiser than the others says — "Oh, there was the smell of gas even after we left Bhusawal though none of you noticed it. I said there was none to comfort you and cheer you all up." Hormuji did not impress me as a person who was capable of cheering up anyone very much. The incidents of this journey must have been repeatedly discussed in the family. Every detail must have been repeated hundreds of times over and over again as each relative or friend of the family came to see Mrs Patell during her illness or condole with the family after her death. As is natural, the story grows and gathers strength each time it is repeated. Every day for weeks the child Porin must have heard the story repeated and discussed and she must have repeated the story of her journey over and over again to her friends and relations. Porin is a girl who has received very good education and is most intelligent. Her mind is young and receptive and Hormuji is responsible for impressing on her imagination that she smelt gas after Bhusawal. She has lost a good mother. She appeared to me to feel her bereavement most keenly even at this distance of time. She naturally believes from all that she hears discussed around her that it is the Railway Company's neglect and carelessness that has deprived her of her mother. Her mind is prone to believe all evil of the Company and her imagination has come into play and engrafted a firm and, I quite concede, an incorrect though mistaken belief that she smelt gas in the compartment even after the train left Bhusawal. She is a little girl who is bubbling with intelligent animation and, if she has smelt gas, she would have immediately contradicted Hormuji when he said the cheering announcement that the smell had disappeared.

Then again look at the conduct of the plaintiff Ardeshr at Igatpuri. He would not allow the lamps to be lit. Why? Because he did not wish the smell that had disappeared with the putting out of the lights to come back. He preferred that his carriage should go through the tunnels in the dark rather than that he should have lights and with it recurrence of the smell which had disappeared.

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On the evidence it is quite clear to my mind that there was no leakage, escape or smell whatever of gas in the compartment in which the plaintiffs travelled before 9.30 P.M. and that there was none after the train left Bhnsawal at 6.42 A.M.

This question is however of minor importance as compared with the principal questions in the suit —

- (1) Was there a leakage or escape at all of gas in the compartment of the defendant's carriage in which the plaintiffs travelled from Jhansi to Bombay
- (2) Was the illness of the members of the plaintiffs party during the journey due to the inhalation of gas in the compartment
- (3) Was the Broncho pneumonia of which plaintiff Ardeshr's wife died and from which his daughter Perin suffered caused by the inhalation of the gas in the compartment
- (4) Whether if there was any gas leaking or escaping into the compartment it was due to any wrongful act, default or neglect of the defendants

If my findings on these points are against the defendants I would have to consider the questions

- (5) Whether the defendants are liable to pay damages to both or either of the plaintiffs

and

- (6) What are the damages each of the plaintiffs is entitled to recover from the defendants

The first of these two suits is an ordinary Common Law Action in Tort by Perin against the defendant Company in which she seeks to recover damages for injury sustained by herself as set out in her plaint. The second is a suit filed by Ardeshr on behalf of himself and his children to recover from the defendants damages for the loss occasioned by the death of his wife.

This latter action is filed under Act XIII of 1855, which is an Act intended "to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong." This Act with certain verbal alterations is wholly copied from

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English Statute 9 and 10 Victoria Chapter 93, known as Lord Campbell's Act and often referred to as the Fatal Accident Act of 1846. The only material difference in the English Statute and our Act is that in Section 2 in the English Statute the damages are to be proportioned to the *injury* resulting from death whereas in our Act the damages are to be proportioned to the *loss* resulting from death. Under these circumstances English cases afford valuable assistance in considering under what circumstances a defendant in an action under this Act would be guilty of negligence and be held liable to pay damages for the loss of a life consequent on that negligence. The same considerations that apply to the case of Aidesir substantially apply to the case of his daughter Perin and I think it would be useful here to discuss this question of liability and ascertain the principles governing this question before proceeding to discuss the facts and the evidence in this case.

Act XIII of 1853 requires that the death of a person for whose loss damages are sought to be recovered must be caused by the 'Wrongful Act, Neglect or Default' of the party sought to be made liable. Ardeshir must therefore establish that the defendants were guilty of some 'Wrongful Act, Neglect or Default'. Perin's, before she can recover damages must prove that the defendants were guilty of negligence or breach of some duty which they owed to her.

What is Negligence in Law? "Negligence may consist in Acts of Commission or in Acts of omission." Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do or the doing something which a prudent and reasonable man would not do." (Addison on Torts, 7th Edn p 22 23) The nature of liability of Railway Companies and other carriers for negligence in the conveyance of passengers based on Case Law is admirably summed up in Section 360 of McNamara's Law of Carriers on Land in the 2nd Edition only recently published. It is there stated —

"Railway Companies as Carriers of Passengers are not insurers, but are bound to exercise the greatest care and forethought for securing the safety of their passengers, and are answerable for the smallest negligence on the part of their servants and agents but not for unforeseen accidents which care and vigilance could not have provided against or prevented."

"A Railway Company does not warrant that everything they need and use in the Conveyance of Passengers is absolutely free from defects likely to cause peril, and therefore they will not be responsible to a passenger for a defect in the carriage, which is such that it could not be guarded against in the process of construction nor discovered by subsequent examination"

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In the course of the hearing of some of the cases, where damages have been claimed either under the Fatal Accidents Act for loss of life or under the Common Law for injuries caused by the negligence of Railway Companies in the carriage of their passengers eminent English Judges have laid down certain general principles which are most excellent guides for other Courts considering similar questions and I propose to refer to a few of them *Redhead v. The Midland Railway Company*(1) where the plaintiff sought to recover damages for injuries received by him in consequence of a carriage of the defendant Company in which he was travelling getting off the line and upsetting in consequence of the breaking of the tyre of a wheel, it was held that "the contract made by a general carrier of passengers for hire with a passenger is to take due care (including in that term the use of skill and foresight) to carry the passenger safely, and is not a warranty that the carriage in which he travels shall be in all respects perfect for its purpose, that is to say free from all defects likely to cause peril, although those defects were such that no skill, care or foresight could have detected their existence Mr Justice MONTAGUE SMITH in delivering Judgment of the Exchequer Chamber says—"It seems to be perfectly reasonable and just to hold that the obligation well known to the law, and which because of its reasonableness and accordance with what men perceive, to be fair and right have been found applicable to an infinite variety of cases in the business of life is, the obligation to take *due care* should be attached to the contract "*due care* undoubtedly means, having reference to the nature of the contract to carry, a high degree of care and casts on carriers the duty of exercising all vigilance to see that what ever is required for the safe conveyance of their passengers is in fit and proper order But the duty to take *due care* however widely construed or however rigorously enforced will not, as the

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present action seeks to do, subject the defendant to the plain-justice of being compelled by the law to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill or care could either have prevented or detected".

In *MacCawley v The Furness Railway Company* (1) BLACKBURN J says —

"The duty of a carrier of passengers is to take reasonable care of a passenger, so as not to expose him to danger and if they negligently expose him to danger and he is killed * * *, they would certainly be liable to the relatives of the deceased in damages"

How this "reasonable care" is to be measured formed the subject of judicial consideration and pronouncement in *Pounder v The North Eastern Railway Company* (2) where Mr. Justice MATHEW observes —

"I desire to add that we are not laying down in this case any new principle of law. It was agreed on all hands in the course of the argument what the obligation of a Railway Company in such a case is. The Railway Company are bound to take reasonable care for the safety of their passengers. The controversy was as to how that reasonable care was to be measured, and I am clearly of opinion that it can only be ascertained by reference to the ordinary incidents of a Railway journey and by reference to what must be taken to have been in the contemplation of the parties when the contract of carriage was entered into

On the points involved in this case the decision of the Privy Council in the case of *The East India Railway Company v Kalidas Mukerji* (3) is very instructive. In that case, the plaintiff sought to recover damages for the loss of his son, who died from the effects of burns in a fire, which took place in one of the carriages of the Company in which he was travelling. The fire was caused by the explosion of certain fire works illegally introduced into the carriage by a fellow passenger. The case was originally heard by Mr Justice O'KINEALY who in a very elaborate Judgment held the Railway Company liable and awarded Rs. 1,500 as damages to the

(1) 1 L.R., 84 B., p. 57

(2) 1 L.R., 12 Q.B., 1802, p. 35

(3) 1 L.R., 28 Cal., 401 and 1 L.R., A.C. 1002, p. 306

plaintiff and gave him costs as between attorney and client. Against the decree the Railway Company appealed and the appeal was argued before the Bench of three Judges Sir FRANCIS MACLEAN, the Chief Justice, and Justices PRINCEP and AMEER ALI. The appeal was dismissed also with costs as between attorney and client. The case is fully reported in I L R 26 Cal. p 465. The Railway Company carried on the case to the Privy Council where the Judgments of both the Original and Appellate Courts were reversed and the Plaintiff's suit was dismissed.

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The Lord Chancellor Lord HALSBURY in the Course of his Judgment observes — One source of error which their Lordships think has been committed in the Judgments below is an apparent misunderstanding of what has been decided in the Courts of this Country as to the *true obligation* which exists on the part of a Railway Company towards its passengers. The learned Judge AMEER ALI in terms says —

Now it may be regarded as settled law that in the case of carriers of passengers under Statutory powers there exists an express duty, independently of any implied contract to carry them safely.

Their Lordships observe that in the course of Mr Asquith's argument yesterday he used the same phrase that the extent of the obligation of a Railway Company is to carry safely, in short that they are common carriers of passengers. This is not the law. It appears to have given rise to the impression that that being the state of the law, it was for the Railway Company to prove beyond doubt that they were not responsible for the accident that occurred. As a matter of fact, the argument would be illogical, because if they were carriers of passengers in the sense of being common carriers, they would be responsible quite independently of any question whether there was negligence or not. It would be enough to show that the passenger had not been carried safely, which would at once establish liability."

The Lord Chancellor after explaining how the errors arose in the minds of the Judges in India goes on to say —

"Then Lordships think it is desirable that the error should be plainly stated, because it may mislead others hereafter. It is enough to say that in their Lordships Judgment there is no such obligation on the part of the Railway Company."

Numerous cases were cited at the Bar in the course of the prolonged hearing of these cases before me, but I think the

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authorities I have referred to above make it fairly clear what the duties of the Railway Companies are towards its passengers and under what circumstances they would be held liable in the event of a passenger losing his or her life or receiving injuries while travelling in one of the carriages. The principles laid down in these cases will demand serious consideration in the event of the Court holding that there was leakage and escape of gas in the carriage and that the death of Mrs. Patel and the sickness of Perin Patel were directly due to that cause. As the case has been fully and exhaustively argued before me from all points of view I think it necessary that whatever may be my finding of facts, I should in my Judgment also discuss the question of the defendants' liability on the assumption that there was the leakage and escape as affirmed by the plaintiff and that the death of Mrs. Patel and the illness of Perin were directly due to that cause as affirmed by medical witnesses examined on plaintiffs behalf.

I will first consider whether as a matter of fact there was leakage or escape of gas in the compartment of carriage No. 2142 in which the plaintiffs travelled to Bombay. I have found that there was no leakage till 9.30 on the night of the 18th of December 1906. Was there leakage or escape of gas after that hour? The plaintiffs Ardeshr and Perin and their witness Hormusji Lala are most emphatic in their statement that they felt a *strong* smell of gas in the compartment between Itarsi and Bhusawal. I have dealt with the question as to the smell of gas after Bhusawal as deposed to by Hormusji and Perin. I will confine the present discussion to the presence of gas between Itarsi and Bhusawal. In addition to the evidence of the plaintiffs and Hormusji, I have also the fact that the deceased lady Mrs. Patel complained of the smell of gas. These three witnesses are not the sort of witnesses, who would invent this story simply for the purpose of fixing the Railway Company with liability and such a suggestion is at once negatived by the fact most satisfactorily proved in the case that the story about leakage and smell of gas was told by these three witnesses to other people long before any thought of making a claim against the Railway Company ever entered their minds. Ardeshr and Hormusji told the story to the Parsis who entered the adjoining compartment at Deolali. The plaintiffs witness Mr. Pavri confirms this and there is every reason to believe the evidence of Mr. Pavri. He is wholly unconnected with the plaintiffs. His identity was

traced with some difficulty and he has given his evidence in a manner which impressed me favourably. Then we have the very important fact that the plaintiffs, Hormusji and Mrs. Patell were from the very start firmly convinced that the vomiting, headache and throat irritation which they suffered from in the train were entirely due to the inhalation of gas in the compartment. They give the smell of gas the most prominent place in the history they give to their medical advisers. Mrs. Patell and others of the party mentioned the smell of gas as the cause of their miserable condition. To Dr. Bahadurji the moment they stepped on the Victoria Terminus. It formed in fact the principal feature in the history given from time to time to the rather numerous medical advisers consulted. The same story of gas inhalation was told to Dr. Kapadia, to Dr. Jehangir Lalauwala, to Colonel Khareghat, to Dr. Surveyor and to Cols. Meyer and Childe. The thought of holding the Railway Company liable entered the mind of the plaintiff Ardesher long after his arrival in Bombay and not until his wife's illness assumed a very serious aspect. His first letter to the Railway Company is written on the 20th. Long before that the story of the smell of gas in the compartment was told to Dr. Bahadurji, Dr. Kapadia, Dr. Jehangir and I have no doubt to a hundred other people who visited them. Not only am I not prepared to say that the plaintiffs and their witness Hormusji are witnesses who would retail a false story to fast a liability on the defendant Company, but I am prepared to go farther and say that they are not the sort of people who would intentionally make statements the truth of which they did not firmly believe. Then again it must be remembered that the story of the presence of gas in the carriage derives some support from the fact that Drs. Bahadurji, Kapadia, Lalauwala, Col. Khareghat, all say that the Broncho-pneumonia from which Mrs. Patell and Perin suffered was the result of the inhalation of gas. The case of the plaintiff under these circumstances is based on evidence which requires very careful consideration.

As against this evidence, the defendants' contentions are principally that there was no escape whatever of gas in the plaintiffs' compartment, that the gas fittings and apparatus to carriage 2142 were in perfect order on the occasion of the plaintiffs' journey from Jhansi to Bombay, that the escape of gas from any portion of the lamp, union nut or gas fittings outside the carriage into the compartment is an impossibility,

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P A Patell that the symptoms shown by the occupants of the compartment
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 and symptoms produced by the inhalation of the oil gas used in
 A D Patell their carriage and that the Broncho-pneumonia from which
 G I P Ry Mrs Patell and Perin suffered could not possibly have been
 caused by the inhalation of the oil gas The defendants finally
 contend that they are not guilty of any negligence whatever
 and they are not in any event liable to pay damages to the
 plaintiffs In support of their contentions, the defendants have
 called 39 witnesses amongst whom are certain medical men and
 gas experts, whose evidence is of great importance on the main
 question involved in the case and also demands the Court's
 most earnest attention

Let us begin the consideration of the questions as to whether
 there was leakage and escape of gas in the compartment and
 whether the symptoms shown by the members of the plaintiffs
 party were or could be caused by the inhalation of the gas used
 by the Company by the admitted facts in the case It is, as I
 have said above, admitted that the plaintiffs travelled in one of
 the compartments of carriage No 2142 In the course of the
 hearing Mr Padshah with a view to save the time of the Court
 admitted the following further facts —

That the gas used for illuminating the defendant's train was oil
 gas prepared according to Pintsch's system and that such gas was
 manufactured from kerosine oil Cobra Brand supplied to the defend-
 ant Company by Messrs W. & A. Graham and Co

That carriage No 2142 left Bombay on the 8th of December 1906
 for Delhi that it remained at Delhi till the 13th of December 1906
 when it was attached to the Punjab Up Mail of that day and came
 to Bombay

That the same carriage No 2142 was on the night of the 14th of
 December attached to the Madras Mail and left Victoria Terminus
 with the Madras Mail

It is proved that Victoria Terminus, Bhusawal and Jhansi are
 gas charging stations on the line between Jhansi and Bombay,
 and that at each of these stations there is a factory for the
 manufacture of gas and that at all these factories the system for
 manufacturing gas was Pintsch's system and that in December
 1906 and for some time prior thereto the oil used in all these
 factories for the manufacture of gas was Cobra Brand Kerosine
 Oil

There is therefore no doubt whatever that if the plaintiffs' party inhaled any gas in the carriage that gas was Oil gas manufactured by Pintsch's system out of Kerosine Oil

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Mr Pridshah at the hearing did make a suggestion that it was possible that the cylinders may have had on the night of the 13th of December some remnant of some other kind of gas manufactured at some other stations as the carriage had been running to various destinations as far apart as Madras and Delhi. The suggestion however is one that does not require to be seriously considered. The carriage when it passed Bhusawal on the 8th of December on its way to Delhi must have got its gas at that station and between the 8th and the 13th it ran on the line which has only Bhusawal, Jhansi and Bombay Terminus as charging stations, so that this suggestion, and it was at best merely a suggestion, does not require any consideration.

That the gas fittings when this carriage left Jhansi were in perfect order is abundantly established. The defendant Company have called a large body of evidence showing how their servants go over the trains when they arrive at stations and what is done in case anything is found out of order. I do not propose to discuss the mass of evidence in detail. It is sufficient to say that from the evidence I am quite satisfied that a most vigilant inspection of the defendant Company's trains takes place on their arrival at all principal stations, that anything found out of order is noted in books kept by the Company's servants and reported to proper officials of the Company. All such books and vouchers as are in existence have been produced before me without any reserve and I am quite satisfied that the defendants have kept nothing back. The evidence called by the defendants not only establishes that a strict general supervision is exercised over all incoming and outgoing trains, but it has further established that there was nothing wrong with this carriage No 2142 during its journey between Jhansi and Bombay. If there had been anything really wrong with the carriage noticed during this journey, it would have appeared in the books kept by their servants at the various important stations passed by the train. But the conclusions I have arrived at are based on other and surer grounds quite apart from the evidence of what the Company does in the way of general inspection and examination of carriages in outgoing and incoming trains. This carriage since its arrival in Bombay has been freely examined by the plaintiff

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Ardeshir his Solicitor and Counsel and all such other persons as the plaintiff Ardeshir desire to examine or his behalf

When I went over to the Terminus yard to examine the carriage the plaintiff's Counsel and Solicitor were with me. I examined the whole gas fittings attached to this carriage. They were in perfect order. There was not a vestige of a sign showing that recent repairs had been done to those fittings. The plaintiff Ardeshir spoke of a broken strap attached to a lavatory window. I found it there. It was nailed up where it had broken. It is a most significant circumstance that that broken strap was actually noticed at the Terminus when the Up Mail arrived on the 11th of December and actually noted in the book of James Isitt, the Carriage Examiner, at the Terminus in his 'Memoranda Handbook' (see Lst No 18). This shows that on arrival this carriage was carefully inspected. If anything was wrong with the gas fittings, how did it pass unnoticed at this inspection. Nothing was pointed out to me as affording the smallest indication that the gas fittings had undergone any repairs since its journey in question, and from the evidence given by the defendant I am quite convinced that no repairs of any kind were made to the gas fittings or lamps of this carriage since the 14th December 1906. One thing is quite certain as the carriage stands, it is impossible to find out how gas could have escaped into the compartment from defects in its own fittings or apparatus. It seems to me that this difficulty pressed upon the plaintiff's advisers and hence the application at the beginning of the hearing to be allowed to amend the plaint as to admit other possibilities. Mr Padshah after hearing the whole body of evidence in his final reply was driven to make three suggestions—each one of which to my mind is a very im- possible suggestion.

The first suggestion is that gas leaked from loose or defective joints of the pipes, where the pipes joined the mouth of the cylinder, or that it leaked from some other loose joints of the pipes at the head of the carriage or from the stop cock and entered the compartment through the opening of the water closet or through the holes in the lavatory floor or through lavatory windows. This means that gas escaped from the fittings outside the carriage and came into the compartment through the channels mentioned above. The suggestion that was pressed was that there must have been a very large leak at the bottom of the

carriage where the pipes came in contact with the cylinder. It must be remembered that the train was rushing through the air at the rate of between 40 and 50 miles an hour and that between Itarsi and Bhusawal it had only two stoppages of 10 minutes each. Supposing there was an escape of gas at the bottom of the carriage, how would the liberated gas have an impetus of 40 or 50 miles an hour to travel with the train and get inside through holes in the floor of the carriage. As pointed out by one of the defendants' witnesses the gas would be left behind while the train was rushing through the air. Again, if there was a leakage of gas in the stop cock or fittings at the head of the carriage the rush of the carriage would itself dissipate the gas before it could enter the carriage. Even assuming that there was an absolute stillness in the outside atmosphere the very draught created by the rush of the train would scatter the gas to the winds before the liberated gas could have any chance of entering the carriage. I asked Mr Padshah if he suggested that gas came in from the side of the carriage along which a pipe runs and from which branch pipes carry gas to the lamps and he said 'No', therefore it is unnecessary to discuss that possibility. It is not the plaintiffs' case either that gas escaped from inside the globe through any crevice between the metal rings attached to the globe and the upper part of the lamp. Although experts have been examined on this subject and Counsel have laboriously discussed all possibilities, it seems to me that one has to appeal to one's common sense to realise the conviction that gas slowly leaking from loose joints or defective fittings outside a Railway carriage attached to a train moving at the rate of 40 or 50 miles an hour could not possibly get into the carriage in any perceptible proportion.

The second theory was that gas leaked through the Bye Pass Cock attached to the lamp in the compartment which is marked A on the tracing Ext 1. It was stated that it must have got loose in some way and allowed gas to escape. When I saw the carriage and examined this lamp the Bye Pass Cock was in perfect order there was no suggestion that it was not then in order. The only suggestion that under the circumstances could be made was that it was set right subsequent to the night of plaintiff's journey in the carriage. It appears to me that the suggestion was made simply because some suggestion had to be made. I regret that the suggestion should have been made after the defendants had called what seems to my mind most complete and

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convincing evidence that no repairs whatever were made to the gas fittings of this carriage since the 14th of December. There was no justification for the suggestion after hearing the evidence of Mr Bell, a witness who struck me as most conscientious and reliable and the other witnesses on this point. The only evidence in support of the suggestion that the Bye Pass Cock was in some mysterious way out of order is in the evidence of the plaintiff Ardeshir. He says —

“I inspected lamp A and tried to turn the knob for increasing and decreasing the light but without any effect. The escape was just the same whether the knob was turned to off or on. The light continued to flicker whether the light was turned up or down.”

All that was urged against lamp A was that it burnt dimly and flickered and that it continued to flicker all the time.

The utmost that one could presume from this evidence assuming that Ardeshir's observations were accurate when he tried the knob is that the internal arrangement whereby a larger quantity of gas is allowed to reach the mouth of the two burners in the lamp did not work satisfactorily and that in consequence the light burnt dim. There could only be one reason for the lamp to flicker and that is that there was some obstruction at the mouth of the burner, which was constantly displaced by the issuing of the gas and which again got into position. Mr Bell says: “It is a mechanical impossibility that these lamps should flicker.” Without going as far as this I confess it is to my mind very unintelligible how a lamp such, as this one, could continue to flicker all the time without either going out entirely or displacing the obstruction. Ardeshir does not say that the Bye Pass was loose when he handled or that he ascertained by putting his nose near it and smelling that gas was issuing from this joint. It is most important to note here that no gas escaped from the Bye Pass Cock at all events till 9.30 P.M. for certain. What happened between 9.30 and 1.30 A.M. that allowed gas to escape from the Bye Pass—absolutely nothing, then how did gas begin suddenly to emanate from the Bye Pass, without any one touching it or anything happening to it?

The third suggestion that gas leaked through defective joining of the pipes with the Union Nut of the lamp is, I have no hesitation in saying, a very impossible suggestion. The Union Nut is outside of the carriage. The carriage has a double roof. The

inner roof is of sheet iron The Union Nut is above the inner iron roof of the carriage How gas could penetrate through an iron sheet into the carriage passes my comprehension

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It was no use attempting to disguise the fact that even after the most minute examination of the carriage and its gas apparatus and fittings the plaintiffs were wholly unable to suggest with any show of reasonable certainty where the gas which was supposed to be in the carriage that night came from That Mr Bell's examination was most thorough and exhaustive appears from the result of his examination of another carriage This is what he says of his examination of carriages Nos 2142 and 1020 —

"After correspondence when the carriage was brought up to Bombay in January 1907 I carefully examined the carriage No 2142 It is in just the same condition now as it was then I examined the carriage immediately on its arrival in Bombay We had it put on one side and I examined it very carefully I specially examined it with reference to its gas fittings I charged the cylinders to full pressure and then examined each joint I with my men did all that we possibly could to discover the cause which led to the complaint of Mr Patell We were unable to discover any cause of complaint This was one of the carriages I examined As at that time there was some doubt as to which carriage it was the plaintiffs' party travelled in, we examined No 2142 and we examined others The next carriage to this was carriage No 1020 I examined the gas fittings of this carriage too very carefully We discovered a very minute leak in its Bye Pass It was a Great Indian Peninsula Railway carriage It had one Bye Pass attached to each lamp, but there was one Bye Pass outside the carriage The Bye Pass is a long Bar stretching across the breadth of the carriage outside it The guard can manipulate it from the platform The leak was very slight We test leaks by putting soap water over the leak It took three minutes to form a bubble which shows that the leak was very minute This is all I found All other gas fittings were in order "

I find by a reference to Ext No 11 that carriage No 1020 was in front of carriage No 2142 from Jhaasi till the Reversing Station Assuming that the positions of its gas fittings were such that the Bye Pass and the pipes going up from the cylinder to the roof of the carriage were in front of the lavatory window No 10 of the plaintiffs' compartment instead of at the other end, was

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the leak sufficient to send gas from it to the plaintiffs' compartment.' This leak must be from a hole hardly bigger than a needle point, if it took three minutes to form a soap water bubble. This leak may possibly have sent now and again a whiff of gas in to the compartment immediately behind—though this possibility seems to me to be very very remote. It must be remembered that there is fairly large open space between the back of this carriage No 1020 and the lavatory window No 10 of carriage No 214. The quantity of gas issuing from the leak must necessarily have been very very small and most of it would be dissipated into the open air in the space between the two carriages and if any of this gas found its way into the plaintiffs' compartment, the quantity must have been infinitesimal and might have evidenced itself to the occupants by a very faint smell. It would be manifestly absurd to say that the gas escaping from this leak could possibly have been the cause of the internal disturbance of which the plaintiffs' party complained after leaving Itarsi. This little leak however is useful in one way. Its existence is the only possible explanation for the statement of Hormusji, Ardeshti, Perin and Mrs Patell that they felt the smell of gas in their compartment. Beyond this there is nothing to explain or justify their statement. The smell of gas which the occupants of the compartment of carriage No 2142 say they felt cannot possibly be attributed to anything whatever in that carriage either inside or outside of it. It may possibly have been due to this leak in the Bye Pass of carriage No 1020 or it may be a delusion.

The view that there was no leakage of gas in carriage No 214 on the night of the 13th and morning of the 14th of December derives additional strength from the fact that this carriage was on the night of the 14th only about 6 hours after its arrival in the Up Punjab Mail attached to the Madras Mail which left the Terminus that night. It was crowded with passengers so much so that two of the boys had to sleep on the floor of the carriage. From their records of Reserved Accommodation the defendants were able to trace some of the passengers who travelled in this carriage that night, three of these Messrs Kartikar Binyan and Cutley were examined before me and they all say there was no smell of gas whatever in the carriage. If any serious defect in the gas fittings had existed and was discovered the carriage would not have been attached the same night to the Madras Mail and there is nothing to show that any repairs whatever were done to the gas fittings of this carriage within the few hours

that it remained at the terminals on the 14th of December. In fact, that defendants have I think successfully proved a negative. They have proved to my satisfaction that not only no repairs whatever were done to the gas apparatus or gas fittings or the carriage on the 14th, but that none were made between the date the plaintiffs travelled in it and the date it was brought to Bombay and was examined by Mr Bell. Many of the witnesses have since its arrival most minutely examined the carriage and not one of them can detect the smallest defect in the gas fittings and gas apparatus attached to it.

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That it possibly was a delusion is not very difficult to conceive. Ardesbir was not by any means in the best possible health during this journey. He had slept badly. He was not feeling very well at Jhansi. His wife was much annoyed at being turned out of a comfortable compartment with bag and baggage and having to travel in what she felt was an old uncomfortable compartment without cushions on the seats on which they had to spend the night. The carriage was by no means in the cleanest of condition when she first entered it. They had undoubtedly felt the smell of gas when the train was being charged with gas at Jhansi. Eight of them were crowded into a small compartment which besides themselves contained their luggage consisting of trunks, beddings, etc. They had already had a long and tiring journey by the time they arrived at Itarsi. Ardesbir wakes up with a feeling of suffocation. His first impression was that it was his old complaint asthma. It seems to me his first impression must have been correct, however, when Mrs. Patell wakes up she smelt gas. Strongly gas seems to have been the predominating idea in her mind ever since she entered the carriage at Jhansi. She imagined she was smelling gas long after she reached home. Her statement that there was smell of gas in the carriage when she woke up at Itarsi is immediately accepted by Ardesbir and Hormusji. Both Ardesbir and Hormusji impress me as very helpless and unobservant men. Hormusji's mind seemed to me to be in keeping with his physique both feeble. Ardesbir's powers of observation are poor, his helplessness throughout the journey is remarkable and his combativeness and imagination after his misfortune are very noticeable. Ardesbir was thoroughly convinced while he was in the carriage that the mischief was in lamp A. Now that lamp has a spring attached to the ring of the

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glass globe by which the lamp could be opened from inside the carriage and there is a tap below the burners by which a passenger can put out the light Both the spring and the tap could be noticed as soon as one looks at the lamp What is more, at Khandwa the lamp was actually opened by the guard He saw it done and of course Hormuaji must have seen it Aideshir says speaking of what happened at Harda —

We were at the door when the Guard and the Station Master came up to our carriage We informed them of what had happened The Guard went inside He opened the lamp from inside and it seemed to me that he was satisfied that the lamp was not burning properly

The impression of both these witnesses was that something was wrong in the lamp—they say it was burning dimly—they say it was flickering—they believed this lamp was the source of the mischief—in short that gas was coming out of that lamp Why did not one or the other of them get on a trunk or on one of the seats, extend his hand, open the lamp, turn the tap and put out the light? They would then have been in a position to judge whether the smell on putting out the light in the lamp disappeared or not There is no explanation whatever why they did not do this Then again when they found that the smell in the carriage was oppressive and intolerable and made them all feel ill and when they found that there was no room in the train to permit of their being put in another carriage and when they found that the load on the train did not permit of another carriage being added, why did they not get out of the train and wait for the next train? All the stations—Itarsi—Harda—Khandwa—Blusawal—are large stations with comfortable waiting rooms Why did they not do this? They were a party on a holiday They were not pressed for time They were not expected to start for Broach till the 16th They could have taken the next train to Bombay and thus avoided the unpleasantness of the journey by a mere detention at a station for a few hours The idea never entered the minds of these two helpless men The helplessness again is manifest throughout their journey They were shouting for Guard and Station Master and the most they did in addition to shouting was getting out of their compartment and standing at the door Now why did not one of them walk up to the Guard's Brake at either end of the train or go into the Station Master's room and make an effort to find them at stations where they said they shouted and nobody came or at Harda somebody came too late to do any good Why did they helplessly shout

and do nothing more during the whole 10 minutes' wait at these stations. This conduct of inactivity and apathy is I think easily explainable. They may have smelt gas, they may have thought they smelt gas, but they could not have thought that their troubles were entirely due to that smell. If they thought the headache and vomiting with which some of the members of the party suffered was solely due to the smell of gas in their compartment they would most certainly have attempted to put out the light in lamp A, made more active attempts at getting some Railway Officials at halting stations to come in and put out the light in that lamp or as a last resort got out of the train and taken the next one on to Bombay. However helpless these two men may have been, I feel sure Mrs. Patell, if she had been convinced that the trouble was due entirely to the escape of gas, she would have insisted on getting out of the carriage at whatever inconvenience and trouble to herself and her children. From the evidence I feel convinced that whatever may have been the state of her general health she was an intelligent, active and resourceful woman. The fact seems to me to be abundantly clear that none of the adult members of their party seem to have regarded the nuisance as anything very serious and none of them could have attributed their discomforts wholly to the smell of gas, which they felt or thought they felt. Their subsequent conduct lends support to this view. When they arrived at the Terminus, they seem to have given no serious thought to this matter. It is true Mrs. Patell told Dr. Bahadurji at the Terminus about the smell of gas in the carriage, but they all seem to have regarded it as a matter of very small importance as a temporary inconvenience. They said not one word by way of complaint to any of the many Railway Officials present on the Terminus when the Punjab Mail arrived and they did not even look at the number of the carriage in which they travelled.

The subsequent death of Mrs. Patell seems to have filled Ardesahir with much resentment against the Railway Company and embittered his mind against them. This state of feeling is I think very natural under the circumstances. Incidents which were trivial and common place have since the unfortunate death of his wife loomed large in his mind and assumed importance which they originally never possessed. The more the Company attempted to convince him that there was no defect in their carriage and that Mrs. Patell's death was not due to their negligence, the more emphatic grew the conviction in his mind that

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P A Patell glass globe by which the lamp could be opened from inside the carriage and there is a tap below the burners by which a passenger can put out the light Both the spring and the tap could be noticed as soon as one looks at the lamp What is more, at Khandwa the lamp was actually opened by the guard He saw it done and of course Hormusji must have seen it Aideshir says speaking of what happened at Harda —

We were at the door when the Guard and the Station Master came up to our carriage We informed them of what had happened The Guard went inside He opened the lamp from inside and it seemed to me that he was satisfied that the lamp was not burning properly

The impression of both these witnesses was that something was wrong in the lamp—they say it was burning dimly—they say it was flickering—they believed this lamp was the source of the mischief—in short that gas was coming out of that lamp Why did not one or the other of them get on a trunk or on one of the seats, extend his hand, open the lamp, turn the tap and put out the light? They would then have been in a position to judge whether the smell on putting out the light in the lamp disappeared or not There is no explanation whatever why they did not do this Then again when they found that the smell in the carriage was oppressive and intolerable and made them all feel ill and when they found that there was no room in the train to permit of their being put in another carriage and when they found that the load on the train did not permit of another carriage being added, why did they not get out of the train and wait for the next train? All the stations—Itarsi—Harda—Khandwa—Bhusawal—are large stations with comfortable waiting rooms Why did they not do this? They were a party on a holiday They were not pressed for time They were not expected to start for Broach till the 16th They could have taken the next train to Bombay and thus avoided the unpleasantness of the journey by a mere detention at a station for a few hours The idea never entered the minds of these two helpless men Their helplessness again is manifest throughout their journey They shouted for Guard and Station Master and the more they shouted in addition to shouting was getting out of their compartment and standing at the door Now why did not one of them walk up to the Guard's Brake at either end of the train or go into the Station Master's room and make an effort to find them at stations where they said they shouted and nobody came or at Harda somebody came too late to do any good Why did they helplessly shout

and do nothing more during the whole 10 minutes' wait at these stations. This conduct of inactivity and apathy is I think easily explainable. They may have smelt gas, they may have thought they smelt gas, but they could not have thought that their troubles were entirely due to that smell. If they thought the headache and vomiting with which some of the members of the party suffered was solely due to the smell of gas in their compartment they would most certainly have attempted to put out the light in lamp A, made more active attempts at getting some Railway Officials at halting stations to come in and put out the light in that lamp or as a last resort got out of the train and taken the next one on to Bombay. However helpless these two men may have been, I feel sure Mrs. Patell, if she had been convinced that the trouble was due entirely to the escape of gas, she would have insisted on getting out of the carriage at whatever inconvenience and trouble to herself and her children. From the evidence I feel convinced that whatever may have been the state of her general health she was an intelligent, active and resourceful woman. The fact seems to me to be abundantly clear that none of the adult members of their party seem to have regarded the nuisance as anything very serious and none of them could have attributed their discomforts wholly to the smell of gas, which they felt or thought they felt. Their subsequent conduct lends support to this view. When they arrived at the Terminus, they seem to have given no serious thought to this matter. It is true Mrs. Patell told Dr. Bahadurji at the Terminus about the smell of gas in the carriage, but they all seem to have regarded it as a matter of very small importance as a temporary inconvenience. They said not one word by way of complaint to any of the many Railway Officials present on the Terminus when the Punjab Mail arrived and they did not even look at the number of the carriage in which they travelled.

The subsequent death of Mrs. Patell seems to have filled Ardeshir with much resentment against the Railway Company and embittered his mind against them. This state of feeling is I think very natural under the circumstances. Incidents which were trivial and common place have since the unfortunate death of his wife loomed large in his mind and assumed importance which they originally never possessed. The more the Company attempted to convince him that there was no defect in their carriage and that Mrs. Patell's death was not due to their negligence, the more emphatic grew the conviction in his mind that

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his misfortune was due entirely to their default. His mind was ready to believe any evil of his opponents and he has filed this suit not I think so much with the object of obtaining moneys from the defendants as with the object of vindicating his view that his wife's death was entirely due to their default and negligence. That this is his firm conviction I have no doubt, that it is his honest conviction I have no doubt, but equally I have no doubt that it is a baseless conviction.

That the powers of observation of the Plaintiff Ardeshir are faulty and unreliable may be gathered from one very striking incident in the case. In his evidence he maintained that the carriage in which he travelled had been repaired and altered since his journey in it and amongst the reasons he gave was that there was some wooden fixtures below the lower seats that were not there when he travelled in the compartment. He said his trunk could then go under the seat but now it could not and he attempted to verify his observation by going home measuring the height of the trunk and then going and measuring the open space under the seats. When he gave his evidence he was firmly convinced that the fixtures below the seats were not there when he travelled. What do we find? We find that this is a complete hallucination in his mind. The fixtures are Riffe Racks and they have been there ever since the carriage was built. Quite apart from the evidence of Mr Bell, who swears that the Riffe Racks were not put in the carriage since December 1906, one has only to open the seats and look at them to be convinced that there is absolutely no justification for suggesting that they were newly or recently put in to the carriage and subsequent to the date of the plaintiffs' journey.

That there was nothing wrong with the gas fittings of carriage No. 2142 and that there was no leakage or escape of gas is also proved by the evidence of Jugeshwar Pral the Gas Charger at Bhussawal and the evidence of Mr Bell. An entry in Pral's book Ex. No. 17 shows that when carriage No. 2142 arrived at Bhussawal its cylinders had 3 atmospheres of gas in them. They were charged at Jhansi to the full capacity of 7 atmospheres so that the gas used up between Jhansi and Bhussawal was 4 atmospheres. This Mr Bell says is the average consumption in a carriage similar to Carriage No. 2142 during a night's journey. Mr Bell bases his statement both on calculations and a test he personally made, and I have no reason to doubt the accuracy of Mr Bell's conclusions. Of course the test and the calculations

would not reach anything like mathematical accuracy as the consumption would fluctuate according as all or any of the lamps are turned down or allowed to burn at full pressure during the night, but the fact that roughly speaking 4 atmospheres is the average consumption and that 3 atmospheres of gas were left in the cylinders when the carriage arrived at Bhusawal shows that there was not any marked or appreciable wastage of gas between Jhansi and Bhusawal

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Then arises the question if there was no escape of gas in the carriage how do you account for the simultaneous illness of the members of the plaintiffs' party and the development of the same symptoms in all of them. How again do you account for the unanimous opinion of Doctors Kapadia, Lalauwalla, Bahadurji and Colonel Khareghat and to some extent Colonel Meyer. They say they suffered from headache, nausea, vomiting, giddiness, dizziness and irritation of the throat. The Defendants witnesses say the sickness must have been due to indigestion and chill. Here to a certain extent the Court is compelled to enter into the regions of speculation. There are certain facts from which the Court must draw its conclusion. The party started for a holiday. It consisted of four children Perin, Dara Dina and Naraj and four adults. The children were undoubtedly in good health when they started. Of Mrs Hormusji I have heard nothing but I have seen Hormusji and Ardeshir and I have fairly clear evidence as to Mrs Patell's state of health before she started on her journey. It would be important to ascertain their general condition previous to their journey. Ardeshir used to suffer from chronic nasal catarrh and asthma. He seems to have caught a chill in the very early part of his journey before he reached Cawnpore for, his nasal catarrh reappeared and he slept badly the first night he was not very bright at Jhansi. The discomfort of eight people travelling in a small compartment is by no means small. Movements of the body must necessarily have been very restricted and the fatigue consequent on a long and tedious journey of many hours must necessarily be very great. Ardeshir's condition could not have been bettering as the journey continued. When he went to sleep after Dina he could not have been in very fit condition. Hormusji as I have observed before is a very feeble old man. The smallest exertion evidently tells on him. He fell in a faint while giving his evidence, due apparently to nothing else than

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the fatigue of standing up and the exertion of recalling to his mind the events of a year and a half before the time he was in the witness box His examination had to be adjourned to another day and then he had to be accommodated with a chair while giving his evidence Mrs Patell appears to have been a lady of an active mind and cheerful disposition but in spite of the protestations of Aideshir and his daughter I have considerable difficulty in believing that she was physically robust Her medical attendant Dr Hindmarsh says he treated her for her lungs about 9 or 10 months before her last journey to Bombay She had a cold which left a slight degree of bronchial catarrh She also suffered from neuralgia In October 1906 Dr Bahadurji was visiting the Patells at Muzzafarpore, and stayed with them for a week or ten days While with them he found Mrs Patell not eating well and he prescribed for her He says she complained that 'she had not very good digestion' and that the prescription he gave her must have been for some form of Dyspepsia In addition to this I have before me two photographs one taken in Calcutta in December 1905 by Bourne and Sneyd (Ext A 1) and one sent with the Muzzafarpore Commission taken in November 1906 by an amateur in a group of the guests assembled on the occasion of the wedding of a Miss Warby at Muzzafarpore So far as appearances go the lady looks decidedly better from the point of view of her health in her earlier photo than in the one taken about a month before her death for according to Dr Hindmarsh the wedding took place on or about the 24th of November 1906 Mrs Patell's appearance in this photo is far from healthy I agree with Captain Tucker when he says that in the whole group she looks the 'least best nourished' person The lines below her eyes running downwards in the last photo are not indicative of good health Those near not have been there in December 1905 when the first photo was taken in which case it would show that her health had deteriorated during the interval that elapsed between the taking of the two photos or that the artist who took the first photo softened the disappearance those lines when retouching the negative The very masterly analysis of Mrs Patell's prescriptions in the report of Captain Gordon Tucker Ext No 40 helps one very considerably in judging of the state of Mrs Patell's general health The reasoning in the report appears to me to be sound and Captain Gordon Tucker has supported his views in his report very effectively in the evidence he gave before the Court Taking the evidence and the photos together I am inclined to

believe that Mrs Patell though a lady of active habits and cheerful disposition was a lady of delicate constitution with a weak digestion. I do not think she had any serious lung complaint at Muzzafarpore. The lung treatment which Dr Hindmarsh speaks of must have been for the ordinary slight lung affection which most people suffer from after having caught a bad cold.

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This is the party that started from Muzzafarpore. They had a hamper with them when they started. They made use of refreshment rooms during their journey. Their friends gave them another hamper at Cawnpore in addition to treating them to a breakfast consisting of dishes prepared for auspicious occasions as they were going to join a wedding party. The proprietors of refreshment rooms were forward advising the arrival of the plaintiffs' party ostensibly for the purpose of having good meals ready for them. Under these circumstances it is by no means a violent suggestion to make that the party probably ate more than what was good for them or ate something on their way before they went to sleep after dinner at Bina that disagreed with them and upset their stomachs. It is by no means a violent suggestion to make when one is on a long journey and takes his meals or refreshments at the refreshment rooms on Railway stations that he stands the chance of eating or drinking something stale or deleterious and likely to upset his stomach. All these considerations lead me to the conclusion that there is good deal of force in Mr Robertson's theory of "internal disturbance consequent on indiscretion in eating during this long journey. Then again there is the theory of a chill being caught by these people. It must be remembered that the plaintiffs party started from a very cold part of the country in about the coldest time of the year in the early morning. They were all according to the evidence warmly clad. They never changed their garments during journey. They must have undergone some very violent changes of temperature. According to the report of Captain Tucker (Fzt No 40) the temperature at Jhansi when they were there was 78.6°. The minimum temperature at Khandwa on the 13th and 14th of December 1906 was 50.1° and 50.6° respectively. They must thus have experienced a change of temperature ranging over twenty-seven degrees within each 24 hours of their journey and that without any suitable alteration in their garments.

P A Patell When they went to sleep windows Nos 7, 8, 10 and 12 were
 G I P Ry left open Lavatory door No 9 was left half open Ardeshu
 and says —

A D Patell There was something wrong with the lock The door could not
 G I P Ry be shut It was flapping and was scraping against the floor I tried to
 shut it but could not do so I noticed this before reaching B n "

This door shuts by a catch in the lock with the lavatory partition and it also opens full at right angles and the catch fits into the outer wall of the lavatory holding it in that position. Instead of making an effort to fix the door in either position Ardeshu puts some of his luggage and leaves the door half way open in the position shown in Ext I He is not sure if gauze or venetian shutters were put in at windows Nos 7 and 8 He thinks that either the gauze or venetian shutters of these two windows were put up but anyhow windows Nos 10 and 12 were fully open Leaving all other windows out of consideration for a moment, it seems quite clear having regard to the position of the door that all the draught coming in through window No 12 would sweep through the carriage catching Perin's head and Mrs Hormusji and Mrs Patell These three would catch the worst of the draught coming into the carriage What with their warm clothing, their rugs, blankets and overcoats with which they were all plentifully provided, it is not a matter of much difficulty to feel that some of them at least had rendered themselves immediately liable to an attack of chill from the cold bleak wind outside

The theory of Railway sickness started by Captain Sucker does not recommend itself to my mind It is an unsatisfactory one and I find it difficult to believe that more than one person succumbed to its attacks simultaneously or within a short time of each other

In support of their contention that the broncho pneumonia from which Mrs Patell and Perin suffered was due to inhalation of gas, the plaintiffs rely on the evidence of their medical witnesses They principally rely on the evidence of Dr Kapadia Dr Lalwalia and Dr Bahadurji These three Doctors are very decided in their opinion that the illness of Mrs and Mrs Patell was entirely due to inhalation of gas—they combat the theory of chill or indigestion and their evidence is supported in some measures by the evidence of Colonels Khareghat and Meyer Amongst the first three Doctors I have mentioned, Dr Bahadurji

has given by far the most important evidence on the plaintiffs' side. He is a well known medical practitioner in Bombay and he seems to have expended much labour on the questions on which he gave his evidence. He produced certain authorities before the Court as the result of his research in support of his statements. Dr Jehungir Lalanwalla is also a medical practitioner of good repute in Bombay. Captain Tucker the defendants' principal medical witness in speaking of Dr Kapadia said he was a very careful clinician. All these three Doctors have come to the conclusion that Mrs Patell and Miss Patell's illness was due to gas inhalation. They have been most elaborately examined and cross-examined and they had full opportunities to say all that they wished to urge in support of their theory. Their evidence if it stood by itself may have carried a certain amount of conviction and I confess I was at one time very favourably impressed with the view they urged, but the expert evidence called by the defendants most especially with reference to the gas used in their carriages and the effect of inhalation of such gas on human beings has completely shattered the foundation on which the whole fabric of the evidence of the plaintiffs' medical evidence was built.

All the medical witnesses agree in saying that the history of a case is one of the most important factors in diagnosing a disease. Now every medical man called in by the plaintiff for his wife and daughter was given the history of the case and the history was "We had a long train journey. We smelt gas during the night continuously and for a long time. The smell made us ill. We vomited. We had all severe headaches, etc." This was accepted by all the medical witnesses of the plaintiffs as the correct history of the case. That there was escape of gas in large quantities in the carriages was accepted by them as a settled fact which was beyond region of the smallest doubt—that the illness in the train was caused by the inhalation of gas seems also to have been accepted by them as another fact beyond dispute, as none of them seem ever to have considered till they were cross examined the possibility of other causes having caused the illness. They also never considered by far the most important question in this case. What gas it was that their patients inhaled if they did inhale any gas. They had in their mind only one gas and that was coal gas. They based their reasoning and their opinions on the assumption that gas inhaled was an irritant gas. No one ever gave them chance of considering the possibility

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of there being no escape of gas or escape in infinitely small quantities so that they might search for other causes. Nobody told them that the gas used in the train was not coal gas. Neither of the three Doctors Bahadurji, Kapadia and Lokuwalla have any actual experience of gas poisoning cases. They have made no special study of irrespirable gases. Dr Bahadurji seems to have made some research into the question of oil gas during the intervals that elapsed during the long time he was in the witness box, but his acquaintance with gases and their component parts and the effect of different gases and human lungs is very limited. He is undoubtedly an efficient physician but that does not involve technical knowledge of the different irrespirable gases. In this respect the defendants have an immense advantage over the plaintiffs. They examined witnesses who were experts in the subjects they deposed to, experts in the truest and best sense of the term. Mr Ellis and Mr Pandit speak from long experience of and familiarity with petroleum oils and petroleum oil fumes and vapours. Mr Burch the Manager and Chief Engineer of the Bombay Gas Company brought up almost all his life and in an atmosphere of gas. Captain Dickinson has had unusual opportunities of studying oil gases and manufactured oil gas in the early part of his life. As a Chemical Analyser to Government, he has varied and unique opportunities of studying and analysing amongst other things gases. His method of analysis contrasts much more favourably with the simpler and cruder method of analysis employed by the plaintiffs' witness Father Storp. Add to this the very careful and elaborate discussion in the latter part of Captain Gordon Tucker's report Ex No 40 on oil gases and their effect on the human body and there could be no doubt left that this body of evidence is most valuable evidence such as Mr Burch, Captain Dickinson and Captain Gordon Tucker gave and is not expert evidence in the ordinary sense in which expert evidence is generally spoken of. It is not based on mere theories, hypotheses and speculation. It is based on experience of the most valuable kind in the case of Mr Burch and Captain Dickinson and on the part of Captain Gordon Tucker on study and research which cannot fail to evoke one's admiration. Both Captains Tucker and Dickinson based their opinions on authoritative, chemical and medical works.

This portion of the evidence called on behalf of the defendants not only forced convictions on my mind, but I am free to admit

it did something more—it entirely displaced and destroyed certain fairly strong impressions formed on my mind while I was listening to the plaintiffs' evidence

For the plaintiffs great stress was laid on the fact that all the members of the plaintiffs' party complained of exactly the same symptoms—that most of them were sick and vomited within a short time of each other and that those symptoms were persistent and eventually led to an attack of bronchopneumonia in the cases of Mrs Patell and Perin. It was further strenuously argued that all these symptoms could not be produced by indigestion or chill or both combined as they were persistent and stomach ache and diarrhoea the usual accompaniment in cases of indigestion were conspicuously absent in all of them. It is argued that chill and indigestion must therefore be excluded from consideration and that having excluded that nothing remains to account for the illness except inhalation of noxious gas. Doctors Bahadurji Kapadia and Lalwulla support the view with considerable emphasis. Colonel Meyer gives very cautious evidence in respect of Mrs Patell. He saw her when she was dying and then he disturbed her very little as her condition when he was called in was quite beyond all hope of saving her life. He was examined principally as to Perin's condition. He, however, does in a way support the other medical witnesses of the plaintiffs by saying—in speaking of Mrs Patell's case—'I thought then and I still think that the escape of gas in the Railway Carriage was a contributory cause of her illness'. In speaking of Perin's case he says—"I thought in this case too that the gas escape was a contributory cause for the attack". This is based on the assumption that gas was escaping in their carriage.

Colonel Khareghat never saw Mrs Patell, but he supports the theory of the other Doctors in their contentions that the symptoms described to him negate the suggestion that the cause of the illness of the members of the plaintiffs' party was indigestion. He bases his conclusion entirely as did Colonel Meyer on the history of the case given to him, the principal feature of which was an assumption that gas did escape in the carriage. All these witnesses never gave a thought to what the gas was and assumed that it must be coal gas or some other similar irritant unrespirable gas.

Colonel Childe had committed himself to similar views, but as soon as he was informed that the gas supposed to be inhaled by

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the people in the carriage was oil gas and furnished with an extract from Captain Dickinson's Report of the analysis of the oil gas used, he withdrew his statement (see Ex No 39)

In view of these circumstances I think it is desirable to scrutinise the history of the symptoms and the illnesses a little more closely and not assume as proved what was so often repeated very loosely before me 'We all were sick We all vomited We all had the same symptoms All the symptoms were persistent,' etc Who were sick and vomited? None amongst the four adults except Mrs Patell, the only one amongst them who is proved to have a weak and impaired digestion and was dyspeptic Ardesbir did not vomit Nor musji, though old and weak did not vomit and Mrs Hormusji did not vomit I speak of Mrs Hormusji advisedly I am not forgetting that it was stated that she vomited on Sunday, the 16th, and Dr Lita prescribed for her It seems to me very absurd to suggest that Mrs Hormusji's vomiting on a Sunday afternoon could possibly be due to inhalation of noxious gas on previous Thursday night or Friday morning Therefore the persons who vomited were the children and Mrs Patell What were the symptoms of the simultaneous presence of which so much is said? Nausea—vomiting—headache—dizziness—giddiness and sore throat

Assuming that all the people in the carriage developed the symptoms, is there anything in their being produced simultaneously or within a short time of each other which negates the possibility of their being produced by indigestion? To say that indigestion is never unaccompanied by stomach ache is to say something that is contrary to human experience for many a deleterious substance in food or drink may produce irritation of the stomach and in many cases of indiscretion in food may produce indigestion which evidences itself by headache, nausea and vomiting unaccompanied by any stomach ache or diarrhoea I am inclined to agree with the view Captain Dickinson took of these symptoms when he said—"Nausea begets vomiting—vomiting begets headache Giddiness and dizziness are the same things and follow vomiting General depression and weakness would follow these symptoms Therefore I view these symptoms may be produced from a trifling cause The view seems to me to be sound, to be consistent with common sense and the ordinary experience of human beings

The only other symptom that remains to be considered is irritation of the throat. That this irritation was of the most innocent kind is clear from the evidence of Dr Kapadia and from the prescription he gave for the ailment. He says 'When I examined the throats I found them red—more red than throats normally are. That is what I mean when I say the throats of all of them were congested. The congestion was persistent. It was there in all the patients' throats on the following day when I saw them.'

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For the redness in the throat Dr Kapadia prescribed the very homely remedy, glycerine and tannin, as appears from his prescription put in when Dr. Field was examined *De Bene Esse*.

The explanation for the presence of sore throats in his patients is also to be found in Dr Kapadia's evidence, for he admits that "Retching for vomiting and vomiting might cause sore throat." I am inclined to think that a warmly clad body and the neck exposed to cold night wind sweeping through the carriage from the open windows might account for much worse throats than Dr Kapadia's patients appear to have had.

I now come to consider another branch of the defendants' case. They assert that the illness of the members of the plaintiffs' party during the journey and the subsequent attack of broncho-pneumonia in the case of Mrs Patell and Perin was not due to inhalation of gas in their carriage. In support of this branch of their case they call a large body of evidence. The principal witnesses on this head are Messrs Ellis, Pundit, Hummell, Burch, Captain Fucker and Captain Dickinson. The defendants base their contention mainly on the fact that the symptoms produced by the inhalation of oil gas are quite different from the symptoms that the plaintiffs and their witnesses Hormusji say the members of their party developed and they sought to establish this by the evidence of witnesses who were familiar with petroleum oil vapours and fumes and oil gases and their effects on human beings.

Mr Hummell is an Associate Member of the Institute of Civil Engineers and an Agent of Pintsch's Patent Lighting Company. He says he has been frequently in atmosphere heavily charged with oil gases and has at times remained in the atmosphere for lengthened periods. He has been in such atmosphere in the testing rooms where a large quantity of gas has to be let off first to clear the pipes, and also when the covers of purifiers are

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lifted and large quantities of gas get liberated and mix with the air. He says he has felt no inconvenience or discomfort from being there. Of course inhalation of this gas for a lengthened period would lead to certain symptoms and death in the end, if the man is not removed from the spot in time. He gives an instance of the evil effects of oil gas inhalation. He says 'I sent my workman into the bell of the gas holder before it was properly exhausted of gas. The man behaved like a drunkard. He began laughing and singing. We asked him to come out but he would not. He seemed to be enjoying himself. We had to pull him out. He got all right afterwards.'

It appears from the evidence of men competent to speak with authority on the subject that the effect of inhalation of petroleum oil gas and the symptoms produced by such inhalation are the same as those produced by the inhalation of the vapours or fumes that emanate from the oils.

Mr Ellis, an Assistant in Messrs Graham and Co, who was in charge of their oil installation when it was at Mody Bay had at times to send men into their oil tanks to clean them out after the oil was drawn off. He says "When the oil is drawn off the tanks the gas remains in the tanks. The effect of that gas on the men is that they appear to be intoxicated. They become excited and unsteady not knowing exactly what they are doing. They try to run about in the tanks. We send in other men and have them taken out. They are laid on their backs out in the open. They seem to recover after that. I have noticed no bad effects from the result of the gas."

The next witness on this point is Mr Pundit who is in charge of the Burmah Oil Company's Installation in Bombay. His experience is larger than that of Mr Ellis. He has been in charge of the Bombay Installation since 1904. Before that he was in charge of the Company's Calcutta Installation for 10 years. He has come across cases of poisoning by fumes or vapours escaping from petroleum oil both in Bombay and Calcutta. These cases, according to him, occur from putting the men too soon in the tanks to clean them out after the oil is drawn off. He says "In the cases I have noticed after the men have been in the tanks about half an hour they become exhilarated and begin to run about. That is the first sign of the effects of the vapours. We are always on the look out for this sign. As soon as the men exhibit these signs

we get them out I have tried to order them to come out but they look at me and laugh in a foolish way so I had to send other men to bring them out "

Mr. Pundit then describes how after the men are brought out they are laid on their backs and recover in some cases after being sick. It seems from his evidence that they are never sick during the earlier period when they show signs of exhilaration and that the signs of exhilaration pass away as soon as they are brought out in the fresh air. As soon as the men vomit they are supposed to have recovered and they go back quite cheerfully a second time when their power of resistance is much greater than when they go in first. According to Mr Pundit, the men seem to regard going into these oil tanks as a cheap way of getting drunk and during all these years of Mr Pundit's experience he has never known these men to suffer from any permanent evil effects from these vapours.

These are witnesses who speak on this subject from their practical experience of petroleum oils and the fumes or vapours which they let off at certain temperatures. We have on the same subject the evidence of Captain Dickinson and his evidence is by far the most valuable and most convincing of the whole body of evidence called by the defendants on this subject. He is Chemical Analyser to the Government of Bombay and Professor of Chemistry and Physics, also of Medical Jurisprudence and Toxicology in the Grant Medical College. Part of his duty is to lecture on poisonous and irrespirable gases. Before he took to the study of Medicine he was a Chemical Analyser in England and used to manufacture oil gas for illuminating a mill in County Durham. He has analysed this gas by the most delicate method known to Chemical Analysers. He points out, and I think very effectively, that Father Sierp's method of analysis was crude and faulty. The instrument he used, namely, Bunte's Burette, Captain Dickinson shows by an authoritative quotation to be unsuitable for the purpose for which Father Sierp used it. Plaintiff's case all along has been that the poisonous effect on them was produced by carbon monoxide, which they say is present in all illuminating gases, that is the view pressed upon the Court by their principal expert witness Doctor Bahadurji. Father Sierp was called to prove that carbon monoxide is present in illuminating oil gases. He obtained two samples of gas from the Bombay Boreah and Central India Railway Company

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P A Patell and analysed that gas. He found that carbon monoxide was
 G I P Ry^v present on his analysis. The gas, however, which he analysed
 A D Patell^{and} was not petroleum oil gas but gas manufactured from shale oil,
 C I P Ry^v as appears from the evidence of Mr William Ramsey. As
 against Father Sierp's statement that carbon monoxide is present
 in illuminating oil gases we have the actual experiments made
 with the very gas used in the defendant's carriage by Captain
 Dickinson. There can be no doubt that he is Chemical Analyser
 to Government and has at his disposal all the instruments and
 implements most suitable for delicate analysis. He subjected
 this gas to the most delicate test known to Analysers and he
 states as a result "I found no carbon monoxide in the gas I
 analysed." He is most emphatic in his opinion. He described
 the method he employed and carried his experiments to a point
 where he could have detected carbon monoxide even if it had
 been present in as minute a proportion as 0.05 per cent. (See his
 report Ext. No. 38)

I prefer to rely on actual experiments made with the very gas
 in question by a capable and qualified man to any statement in
 books however high in authority the writer may be considered.
 Captain Dickinson impressed me as a man who was scrupulously
 careful in his statements and never ventured to take up any
 position and make any definite statement which he was not able
 to support from his own experience and knowledge or from that
 of recognised authority. He says "I have analysed the sample
 of gas sent to me and I am of opinion that inhalation of such gas
 in any quantity could not have caused the Pneumonia as described
 in the case of Mr Patell and her daughter. Even if this gas was
 breathed pure without the admixture of air it would not cause
 pneumonia. Pneumonia could not be caused by a non-irritating
 gas such as I analysed."

Captain Dickinson says, with reference to the evidence given
 by Messrs Ellis and Pundit as to the effect of oil vapours "Chemically the constituents of the oil vapours in the tanks and
 hydrocarbon gases produced by heating process are precisely
 the same. The proportion present of some of the constituents
 may vary. Inhalation of oil vapours or fumes, I believe, pro-
 duce the same symptoms as inhalation of gas manufactured from
 petroleum oils."

He tells us what the symptoms produced by inhaling hydro-
 carbons are. In his own words they are—"I sent me

incoherent speech, laughter, which is a leading symptom and eventually a staggering gait. If the inhalation continues there would be insensibility and death by suffocation."

He explains this more fully in another part of his evidence. He says—"If a man inhaled carbon monoxide for say six hours, he would suffer from symptoms of acute poisoning, such as headache, nausea, vomiting, giddiness, loss of power of movement, inability to move, stupor, flushed face, difficulty in being roused, insensibility, coma and death. Acute poisoning by carbon monoxide is that of a cerebral narcotic. Narcotic symptoms are very often early symptoms."

The whole body of expert evidence called on behalf of the defendants establishes beyond all doubt that the symptoms exhibited by the inmates of defendants' carriage No. 2142 during their journey to Bombay were not the symptoms that would result from inhalation of petroleum oil gas. The medical experts who give evidence on behalf of the plaintiffs were misled into their conclusion by initial mistakes. They first assumed as a matter beyond dispute that their patients had inhaled gas in the carriage and they assumed that it must have been ordinary illuminating gas that they inhaled, namely, coal gas.

Ordinary illuminating gas that one is familiar with is coal gas. Coal gas is an irritant gas. It contains ammonia and it contains sulphur dioxide which are both irritating gases. Oil gas is very differently constituted. It has no irritating constituent and carbon monoxide is either entirely absent from it or is present in infinitely small quantities, so small that it is difficult of detection except under the most delicate tests. Father Sierp detected carbon monoxide in the gas he analysed, but then it must be remembered that besides the methods of analysis employed by him being not by any means the best, the gas he analysed was manufactured from shale oil and not petroleum oil. Captain Dickenson on this point says—"In shale oil I believe there are substances which contain oxygen and, consequently, there should be larger proportion of carbon monoxide in gas prepared from that oil than in the gas prepared from pure petroleum oil."

A good many things were said before me about poisoning by carbon monoxide and plaintiff's Counsel resorted to many books and much outside information in trying to prove that the evil effects produced on the plaintiffs and the members of their travelling party was due to the presence of carbon monoxide in the

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gas that was used in the carriage and which gas it was stated they breathed. The whole argument was based on the assumption that carbon monoxide was always a component part of all illuminating gases and that it is present in such gases in poisonous proportions or at all events in such proportions that inhaling it must prove injurious to human system. The one witness who knew all about gases and could speak with authority was Captain Dickinson, and his evidence on this point is most clear and convincing. He says — "Where oil gas is at its best, carbon monoxide is at its lowest. If the gas is manufactured by a proper process under proper supervision and from good oil, the carbon monoxide that may be found in it should be less than 1 p c. The process employed by the G I P Railway fulfils all these conditions and the gas manufactured would contain, if any, a very small proportion of carbon monoxide, certainly under 1 p c. Sometimes it is entirely absent if the gas is carefully and properly prepared. In the two instances when I analysed the Company's gas, carbon monoxide was entirely absent. Carbon monoxide is formed by the oxygen of the air getting into the vapours and not being properly burnt into carbon dioxide."

The very first thing that was stated on behalf of the plaintiff was the theory of incomplete combustion enunciated by Dr Baradurji in the course of his evidence. The contention on behalf of the plaintiffs when it assumed definite shape came to this. Even if carbon monoxide is not present at all in oil gas or is present in proportion too minute to account for the illness of which we complain carbon monoxide is generated by incomplete combustion and it was so generated in lamp A on the last night of the plaintiffs' journey in defendants' carriage.

The statement made on behalf of the plaintiffs that lamp A was burning dimly or not as brightly as the others encouraged the theory of incomplete combustion. This theory of incomplete combustion is knocked on the head by the very conclusive evidence Mr Burch gives on the subject, and here again we have a man who speaks from knowledge and experience. He says — "I don't quite understand how incomplete combustion could have taken place in this case. If the lamps and their fittings were in the condition in which I inspected them, complete combustion could have taken place. * * * Assuming that there was incomplete combustion, the products would

go out into the outer air through the chimney * * * * There must be considerable increase of hydrocarbons and considerable decrease of atmospheric oxygen before you get incomplete combustion * * * * The first sign of incomplete combustion in an illuminating gas would be black smoke. The globe in a lamp like this (Ext No 21) in case of incomplete combustion would be full of smoke and quite black. The porcelain reflector would also be quite black.

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This subject is dealt with by Captain Dickinson, a witness again most competent to speak upon it. What does he say as to the possibility of the plaintiffs and those with them having inhaled carbon monoxide generated by incomplete combustion — "Incomplete combustion," he says, "generates carbon monoxide in very small quantities, and such quantity is not injurious. Every time a lamp smokes or a gas jet flickers by a draft of wind carbon monoxide is generated and it is generated also by an ordinary lamp or an ordinary gas jet which appears to be burning well. Chemically *that* combustion is not complete and every household illuminant or lamp which is lighted produces a certain amount of carbon monoxide, but it is in such small quantities that it is negligible and does not hurt. This is a subject of my lectures and I have made a special study of it."

At best this suggestion of incomplete combustion was put forward as a possible theory and I think it is effectually disposed of by the evidence of the defendants' witnesses. None of the plaintiffs nor their witnesses have said that there was any trace or indication of smoke in any of the globes of the lamps or deposit of soot or appearance of blackness on the porcelain reflectors of these lamps in the carriage.

As I said before by far the most important witness in the case is Captain Dickinson. He has not only relied on his knowledge and learning for the conclusions he arrived at, but he has verified his conclusions by experiments which he has detailed in his report, Ext No 38, and which experiments afford very instructive reading. He was not in any sense a partisan witness and everything he said he supported by good and sound reasons and by reference to books of authority. That he believed in the correctness of his conclusions and that he had the courage of this conviction seems to be abundantly clear from what he said to the plaintiffs' Counsel Mr Padshah in the course of his cross-

P A Patell examination Ho said —“After I had repeated my experiments
 G I P Ry I was so sure that I said I would not mind being in the carriage
 and all night with all the gas in the three lamps turned fully on and
 A D Patell unlit I am prepared to do that now I would not mind now
 G I P Ry being in that carriage a whole night with all the gas turned on
 and unlit and the globes open and the window shut I would
 do so with two lamps lit and one unlit and with gas on’

The last answer was given with reference to that portion of the evidence of several of the expert witnesses called on the defendant's behalf, who pointed out, in combating the theory of escape of gas in the carriage, that, if gas escaped in the carriage to the extent suggested, it would have mixed with the air in the carriage and formed an explosive mixture and such mixture would certainly have exploded in the carriage, having regard to the fact that three lights were burning in the carriage and the same devices or outlets, which would allow gas to come out of the globes, would allow the explosive mixture to enter the globe and come in contact with the flames and thus explode

Colonel Collie joins Captain Dickinson in the offer to travel in the carriage with the gas on and unlit and with the globes open

This offer is not made of mere bravado It is made from a conviction that the gas would go out through the opening at the top of the lamp, if the windows are shut and the atmosphere in the carriage is still, or, if the windows were left open, that it would be constantly swept out of the carriage even if the draft prevented its going straight up through the chimney, past the baffling apparatus, out into the open air, over the roof of the carriage

There remains another portion of the defendants' case that remains to be discussed That is with reference to the large body of evidence consisting of its servants called by the defendants to show that there was no negligence on their part Had our findings on the points already discussed by me been the other way, this portion of the case would have been of considerable importance As matters stand, it is unnecessary to discuss the evidence at any length I find from the evidence that the defendant Company have an elaborate system of keeping an effective and vigilant watch over all its trains and that an effective staff of servants is always ready at the principal stations to see that everything with all incoming trains is in order and

anything wrong is discovered it is immediately remedied. Some of these witnesses were called to contradict the statement of the plaintiff and his witnesses that they made complaints at various stations. With the exception of the witness Plair and in some degree Sellers, I accept the evidence given by the servants of the Company as correct. It is possible in their case where they contradict the evidence of Ardeshir and Hormusji that they may have honestly forgotten the incident. I am not prepared to hold that the evidence of Ardeshir and Hormusji when they say that they complained at the various stations (that evidence) is not true. I believe they did complain, but it seems to me that the complaint was not seriously made or insistently pressed. It is possible that the Station officials may have regarded this as one of the many trivial complaints that passing passengers make and their attention was never reverted to it and it passed out of their minds and that, when shortly afterwards they were asked by the Company for their report, they really remembered nothing of the incident. The same I cannot believe of Plair, the guard in charge of the Punjab Mail on the occasion in question between Harda and Bhusawal. None of the other witnesses Ardeshir could identify, but Plair was immediately recognised by him as soon as he entered the witness box. I believe the Plaintiff Ardeshir's evidence as to what occurred at Klandwa, I do not believe that guard Plair could have entirely forgotten the incident. I am not able to say with any certainty whether the man with him was Assistant Station Master Sellers, or not, but if he was the man in company of Plair then I do not think he could have wholly forgotten the incident. It appears to me that what must have happened was Ardeshir calling the guard and Station Master as they passed and complaining to them that one of their lamps was not burning properly and there was a smell of gas. Plair entered the carriage and opened and examined the lamp and, finding nothing very seriously wrong with the lamp, passed on and gave no importance to the occurrence. This occurrence, however unimportant, he could not have forgotten entirely when he was called upon, as were all other servants, to report on plaintiff's complaint soon after the occurrence. It would have been more straightforward if Plair had stated that a complaint was made, he went into the carriage and found nothing wrong, and could detect no escape of gas. That would have been the truth, but he probably anticipated getting into trouble having regard to the heavy claims made against the

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P A Patell Company and thought it safer to deny that any complaint was
G I P Ry made

A D Patell and Porosha Maneckji Javeri, the Manager of the refreshment
G I P Ry Avari, the Manager of the refreshment room at Bhusawal at
the time of this occurrence, have both given false evidence where
ever they have contradicted the evidence of Ardeshir and Hormusji, and the conduct of the latter of the two witnesses in doing
this is all the more disgraceful having regard to the fact that he
had experienced kindness at the hands of Hormusji and was the
recipient of his hospitality. Their evidence is, however, of no
importance and nothing more need be said of them.

I think it is desirable to record my finding on the question of
permanent injury of which Perin complains and for which she
seeks to recover damages from the defendant Company. The
medical evidence in the case, though apparently conflicting is
really not irreconcilable. Dr Bahadurji and Colonel Meyer
and Khareghat have given evidence on behalf of the plaintiffs
as against Colonel Collier and Dr Field who were examined for
the defendants. There is no doubt in my mind, after a careful
study of the evidence of these five medical gentlemen, that there
is some damage still left at the base of the right lung of Perin
as the after effect of the broncho-pneumonia she suffered from.
Colonel Khareghat believes that the injury is "more or less
permanent," but he thinks it may improve. Colonel Meyer
examined Perin in January 1907, and again in June 1908. In
June 1908 he found her "decidedly better" than when he saw her
in January 1907. Colonel Meyer thinks that if Perin continue
to be in good health the symptoms will disappear to external ex-
amination. While Colonel Collier takes a very optimistic view of
the condition of Perin's lung, he admits in his report, Ext No 41
that the "respiratory murmur was weak at places." Dr Baha-
durji takes a more serious view, and he is in the best position to
judge as he has had Perin constantly under his treatment and
for a long time under his observation. Colonel Collier says he
knows of cases of consolidation of lungs clearing up after a long
period and maintains that in chronic cases of disorder nature
always makes compensations.

Perin is a bright vivacious young lady apparently of cheerful
temperament and in good health. The evidence establishes that
the broncho-pneumonia she suffered from has left marks of some

injury to her right lung, and it is possible that it may be permanent. The only inconvenience it causes her at present is that she gets out of breath after exertion, such as running. As time goes her days of running will come to an end and I sincerely hope that when she has grown a little older the compensatory action of nature of which Colonel Collier speaks, will have removed all traces of the inconvenience she now complains of.

This case has taken 28 days of hearing and fifty-two witnesses altogether have been examined before me. In addition to this witnesses have been examined on Commission at Muzzafarpore and Cawnpore and Dr Inld was examined *De Bene Pse* before his departure for England. The study and analysis of the evidence together with the Exhibits put in at the hearing has necessarily entailed some labour but having the whole of this evidence before me and having had the advantage of hearing the elaborate addresses of the learned Counsel on both sides, the conclusions forced upon my mind are clear and definite.

As I said before my first impressions in these cases were entirely favourable to the plaintiffs. When the circumstances of the case were stated they evoked my warmest sympathy for the unfortunate plaintiffs in this case. The Plaintiff Ardeshr travelled hundreds of miles down to join the wedding procession of his brother. Instead of that, he had to form one of the funeral procession of his wife. Young Perin came to Bombay in hopes of having a happy merry holiday. Instead of that she saw her mother die and come perilously near dying herself. A young life full of hope and happiness was cut off under circumstances truly saddening.

Judges are after all human beings, and if the circumstances of the case did not evoke feelings of sympathy in any one listening to the story as it was told before me, he would be less than human. I noticed with much satisfaction that the attitude of those connected with and representing the Company was throughout the hearing most sympathetic and Mr Robertson's conduct of the case throughout the prolonged hearing was distinguished by great consideration and kindly feeling towards the plaintiffs. Mr Pad-ha in the conclusion of his address appealed to me to give sympathetic consideration to the plaintiff's case. If sympathy was the only consideration governing my Judgment plaintiffs would not lose their cases before me. The first impressions formed on my mind, while I listened to the evidence of the plaintiff.

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iff Ardeshr and Dr. Bahadurp, have been entirely destroyed by the evidence called by the defendants. That evidence leaves no room for doubt or hesitation. They force convictions on my mind and I have taken the trouble to write this very lengthy Judgment showing how these convictions have forced themselves on my mind.

My finding of facts are —

- (1) That the gas apparatus and gas fittings attached to carriage No 2112 were on the night of the 13th and the morning of the 14th December 1906 in perfect order and there was nothing defective or faulty in any part of the apparatus and fittings
- (2) That there was no leakage or escape of gas in the defendants carriage in which the plaintiffs travelled from Jhansi to Bombay in December 1906
- (3) That the symptoms exhibited by members of the plaintiffs party in the early morning of the 14th December 1906 and thereafter during the rest of their journey were not symptoms produced by inhalation of gas used in the defendants carriage in which they travelled
- (4) That the Broncho pneumonia from which Mrs Patell and Pearl Patell suffered subsequent to their journey to Bombay in the defendants carriage was not the result either directly or indirectly of inhalation of the gas used in the defendants carriages
- (5) That Mrs Patell's death was not due either directly or indirectly to inhalation of gas in defendants carriage
- (6) That the plaintiff Pearl has traces of some injury which may become permanent such injury being the after effects of Broncho pneumonia from which she suffered

In coming to the conclusion that there was no leakage or escape of gas in the carriage, I am not unconscious that it is very unsatisfactory to brush aside the evidence of the plaintiffs and their witness Hormusji and statement of the deceased lady that they all smelt gas as a mere delusion. They are not witnesses to whom I am prepared to attribute deliberate untruth and if I am driven to the conclusion that what they said they felt must after all be a delusion—they are responsible for driving me to that conclusion. Have they been able to help me to arrive at any other conclusion? It may be that it is the plaintiffs' misfortune that they have not been able to help the Court. On the other hand the defendants have made it absolutely impossible for me to hold that there was or could possibly have been any escape or

leakage of gas in the carriage in question. They have produced their books and other records and they have produced witnesses which prove beyond all doubt that the gas apparatus and fittings of the carriage have not been touched, repaired or set right since the night the plaintiffs travelled in it. They have submitted that gas apparatus and fittings to minute examination and investigation of many independent witnesses who swear that there is absolutely nothing that is wrong or faulty in the apparatus and the fittings. They have allowed the plaintiffs' experts and legal advisers to have a full and complete examination of the carriage and not a single witness for the plaintiffs—not even the plaintiff Aideshir can point to any reasonable or even possible theory as to how and wherefrom the gas came. Mr Padsha was driven to propound 3 theories, but they were demonstrably bad and wholly untenable and I will not refer to them again as I have discussed them at some length.

But let me suppose for a moment that my findings of fact had all been the other way, would that have made any difference to the plaintiffs in the result of the suits? The plaintiffs would still have been faced by a legal difficulty and I cannot conceive how they could have surmounted that difficulty. The defendants could have asked as they have repeatedly done: 'What do you charge us with? How have we been guilty of negligence? What is our negligence? What was the duty which we owed to you and which we have not performed? How have we failed in carrying out our obligations towards you? What is the act of omission or commission with which you charge us? What do you say we ought to have done, and did not do? What did we do that we ought not to have done?' Supposing what you say about gas in the carriage be true supposing what you say about complaining to our servants is true, how do you suggest we should have acted to prevent that gas coming in and what should our servants have done to prevent gas from further leaking or escaping in the carriage? To these questions the plaintiffs have no answer. They have failed in spite of their best efforts to find out where the gas they complained of came from. Mr Padsha says apply the legal doctrine contained in the maxim *res ipa loquitur*. That maxim has no applicability here. Before you apply that maxim, you must show that something, such for instance as a collision between two trains, undoubtedly happened and from that something you may deduce conclusions. But here the something has not undoubtedly happened. The

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alleged happening of the something is the main point of controversy between the parties. If there was no question as to the presence of gas in the carriage, the defendants' negligence may have been inferred from that fact, but one of the most vital questions in the case raised by the defendants is, was there gas in the carriage? and in the face of that how can I allow a thing to speak for itself when the very existence of that thing is most stoutly denied.

But again, assuming for the moment that my findings had been in favour of the plaintiffs to the extent of holding that in some unaccountable mysterious manner gas did get into the compartment and that the illness of the two ladies and the death of one of them was caused by the inhalation of that gas would the plaintiffs have been in any other position. I think not because from the authorities I have discussed in the earlier portion of my Judgment, it is quite clear that, before I could hold the defendant Company liable, I must find affirmatively that they were guilty of acts of negligence such as "care and vigilance could have provided against or prevented," that the escape of gas in the carriage was not and could not have been an unforeseen accident that to whatever defect such escape was attributable to that such defect could have been "guarded against in process of construction" and "discovered by subsequent examination" and that the escape was not due to some "latent defect which could not by any reasonable diligence or skill be discovered."

The facts proved in this case would make it impossible for me to hold that there was such negligence on the part of the defendant Company as would in law make them liable to the plaintiffs in damages. Even if it had been proved that gas was captured in the plaintiffs' carriage and the inhalation thereof was the cause of the mischief the plaintiffs complain of, the onus of the proof of negligence lies in the first instance on the party charging it and in these cases the parties charging the defendant Company with negligence have failed completely to prove any negligence on the part of the Company. Their Counsel have made several attempts to fix the defendant Company with negligence from every conceivable point of view, but those efforts were wholly unsuccessful. The question of damages has been argued before me, but having regard to my findings it is unnecessary to discuss the matter. I would however like to remark here that when the plaintiff Ardeshr was cross examined on the question of his loss and how he assessed his damages he was, I think with

unprepared to answer those questions and seemed to have devoted very little consideration to that part of the case. Although I agree with Mr Robertson's arguments that sentimental considerations must not enter in the assessment of damages and that pecuniary loss alone must be taken into consideration, I think that there would have been no difficulty in my way in assessing damages if the result of my other findings had made that necessary. The loss of the service of a wife to a husband with a young family—the loss of the service of a mother to children of tender age—are losses that are quite capable of being measured from a pecuniary point of view, and if the plaintiffs have succeeded in proving their case the plaintiff Ardeslur at all events would have secured a verdict of very substantial damages from me. I cannot conclude without expressing my sense of appreciation of the excellent manner in which the defendant Company's case was prepared by their legal advisers and placed before the Court. The Company must feel indebted to their Solicitor for the admirable manner in which their case was prepared and to their Counsel for the manner in which the case was placed before this Court.

I must now find on the issues.—My findings on issues in suit No 427 of 1907 are as follows—

I find Issues Nos 1 and 2, in the negative

On Issue No 3 I find that the plaintiff and his party did travel in a reserved carriage although they were not entitled to claim reserve accommodation as they held Christmas Concession Tickets

I find Issues Nos 4, 5 and 6, in the negative

On Issue No 7, I find that the plaintiff is not entitled to damages

I find the 8th Issue in the negative

On the 9th Issue I find that the death of the plaintiff's wife was not caused by any act of negligence or breach of duty on the part of the defendant Company

I find Issues 10 and 11 in the negative

It is unnecessary to find on Issues 12 and 13 in view of my findings on the previous issues

I find Issue 14 in the negative, and on the General Issue I find that the plaintiff in this suit is entitled to no relief against the defendant Company

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In suit No 426 of 1907, my findings on Issues are as follows—

On the 1st Issue I find that the plaintiff did travel in a reserved compartment, but was not entitled to do so as she travelled under a Christmas Concession Ticket

I find Issues 2, 3, 4, 5, 6 and 7 in the negative

In view of my findings on the previous issues it is unnecessary to find formally on the 8th Issue. I have expressed my views on the question covered by the issue in the body of my Judgment

I find the 9th Issue in the negative, and on the General Issue I find that the plaintiff is not entitled to the relief claimed in this suit

I regret the decision to which I have arrived. I feel that the result of these two suits will add to the burden which the plaintiff Ardeslur had to bear owing to the loss of his wife, but beyond expressing my deep sympathy for the unfortunate plaintiffs I can do nothing for them

I dismiss both suits. The defendants must have their costs, but having regard to the fact that the plaintiff Peria succeeds on the issue as to her allegation of permanent injury I direct that the plaintiff do pay to the defendants all their costs, except the costs of two days hearing

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APPELLATE CIVIL

Before Mr. Justice Benson and Mr. Justice Wallis.

KOMMIREDDY SURYANARAYANAMURTHY.

(PETITIONER), APPELLANT,

v

THE MADRAS RAILWAY COMPANY BY ITS AGENT AND
MANAGER (DEFENDANT), RESPONDENT*.

*Indian Railways Act, IX of 1890, S. 67—Benefit of Section not waived by
Railway Company when they grant reserved accommodation under
the rules* 1907
Feb 7 & 12

The provision in Section 67 of the Indian Railways Act that 'fares shall be deemed to be accepted and tickets deemed to be issued subject to the condition of there being room available in the train for which the tickets are issued' is introduced for the benefit of Railway Companies and can be waived by them. One of the Rules under which reserved accommodation is granted is, 'Reserved carriages in Mail trains can be provided when the load of the train permits'. In granting reserved accommodation on the terms embodied in the rules the Company does not contract itself out of the benefit conferred by Section 67 and is not liable in damages for refusing to attach a reserved carriage to a Mail train already fully loaded.

Suit to recover damages from the defendant Company for refusing to attach a carriage reserved by plaintiffs from Cocanada to Madras at Samalkot Junction, in consequence of which the plaintiffs had to return to Cocanada. The suit was dismissed by the Munsiff and a revision petition against his decree was also dismissed by Mr. Justice Moore.

The plaintiffs appealed under clause 15 of the Letters Patent

T. V. Seshagiri Ayyar for Appellant

Mr. D. Chamsier for Respondents

* Appeal No. 63 of 1906 presented under Clause 15 of the Letters Patent against the orders of Mr. Justice Moore dated the 6th day of August 1906, in Civil Revision Petition No. 420 of 1906 (File L. I. A. Nos. 66, 67, 68 and 69 of 1906).

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JUDGMENT —We think the learned Judge was right in dismissing the Civil Revision Petition against the Judgment of the Subordinate Judge. The plaintiffs who were passengers from Cocanada to Madras by the night train on the 20th December 1905, seek to recover damages for breach of contract by the Railway Company in not carrying them from Cocanada in the reserved carriage which had been allotted to them from Cocanada to Madras. At Samalkot Junction, where the branch line from Cocanada joins the main line to Madras the Railway authorities refused to connect the plaintiffs' reserved carriage with the Mail train to Madras on the ground that the latter was already too heavy, and the plaintiffs failing to find accommodation in the Mail train were obliged to return to Cocanada. The question is was there any breach of contract on the part of the Railway in failing to carry the plaintiffs in their reserved carriage to Madras. The only written contract between the parties is to be found in the tickets issued to the plaintiffs. Under Section 67 of the Indian Railways Act, IX of 1890, "fares shall be deemed to be accepted and tickets to be issued subject to the condition of there being room available in the train for which the tickets are issued. Here the tickets were issued for the Mail train from Samalkot to Madras. This is a provision introduced for the protection of the Railway, and on the principle *Quilibet potest se nunciare jure pro se introducto* it may be that they could waive the benefit of this section, but the question is have they contracted to do so? If the plaintiffs had left Cocanada in an unreserved carriage the Railway would, we are clearly of opinion have been protected by Section 67, if owing to the Mail train being full they had been unable to carry the plaintiffs on that night beyond Samalkot, and we do not think they can be considered to have waived the protection of the section merely because they allowed the plaintiffs to take advantage of the rule which entitles five second class passengers when travelling together to a reserved compartment when practicable. The reserved compartment must in our opinion, be deemed to have been applied for by the plaintiffs and to have been granted by the Railway Company on the usual terms embodied in the rules as there is no evidence that any special terms were made and one of the rules is that "reserved carriages in Mail trains can only be provided when the load of train permits." In our opinion the Railway Company did not contract themselves out of the benefit of Section 67, and the plaintiffs must be deemed to have had notice

that then reserved carriage could not be attached to the mail train unless the law permitted, which in this case it did not. We think therefore the plaintiffs were only entitled to the statutory relief given by Section 67 of the Indian Railways Act, and this has been given them by the decree. We dismiss the appeals but under the circumstances make no order as to costs.

Messrs Orr, David and Brightwell for Respondents.

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ORIGINAL CIVIL JURISDICTION.

Before Mr. Westropp, C.J. and Mr. Sargent, J.
PRATAP DAJI, PLAINTIFF

v

**THE BOMBAY, BARODA AND CENTRAL INDIA
RAILWAY COMPANY, DEFENDANTS ***

*Act XVIII of 1851 Section 17—Act XXI of 1871, Section 2—Indian
Company—Ticket—Infringement*

1875
November 27

The plaintiff entered a carriage on the defendants' Railway at Surat with the purpose of proceeding to Bombay. By an oversight and without any fraudulent intent, he omitted to procure a ticket at Surat. On arriving at Nawanri he applied to the Station Master for a ticket to Bombay, but was refused; he was, however, allowed by the defendants' servants to proceed in the same train to Bilal, where he again applied for a ticket and was again refused, but was directed by the defendants' servants to get into the train and not leave it again. At Dhaudu he again got out and applied for a ticket to the Station Master. During a discussion between the plaintiff's master and the Station Master, the plaintiff, at the direction of his master, re-entered the train. Ultimately the Station Master refused to give the plaintiff a ticket, and ordered him to get out of the train, and on his not complying with this order, sent a sepoy who forcibly removed the plaintiff from the carriage. In an action by the plaintiff to recover damages for the forcible and illegal removal of the plaintiff from the carriage and for the illegal detention of the plaintiff at the Station at Dhaudu and for the illegal refusal of the defendants to allow the plaintiff to proceed in the train to Bombay.

* Reference from the Court of Small Causes. Suit No. 1522 of 1874.

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Held, 1st, that the latter portion of Section 2 of Act XXV of 1811 amending Section 1 of Act XVIII of 1804, which provides for payment to be made by persons failing to produce their tickets when demanded by the servants of the Company, applies only to the case of a person who has received a ticket and will not or cannot produce it and not to a person travelling without having obtained a ticket with no intent on to defraud,

2nd —That the absence of a fraudulent intention did not make the entry into the carriage less unlawful and consequently that the plaintiff started from Surat as a trespasser,

3rd —That the conduct of the Railway officials at the Stations intervened between Surat and Dhandu, if it amounted at all to leave and leave to the plaintiff to proceed without a ticket could only operate as such until the train stopped at the next station

4th —That there was no legal obligation on the Station Master to issue a ticket to the plaintiff to enable him to proceed from Dhandu

This was a case referred from the Court of Small Causes at Bombay for the opinion of the High Court under Section 35 of Act IX of 1850. It appeared from the evidence that the detention complained of by the plaintiff was not forcible. After he had been ejected from the carriage in which he was sitting, he was told that there would not be another train for Bombay for 24 hours, and on enquiring where he was to pass the interval, was told he must remain in the Station. The other facts of the case are fully stated in the Judgment.

At the hearing of the reference before WESBROFF, C J, and SARCENT, J

Farran, for the Defendants in support of the rule for a new trial —The plaintiff not having a ticket was a trespasser, and as such liable to be removed. Act XVIII of 1854, Section 17. There was no waiver of the trespass on the part of the defendants, as the guard and porters who at Nowari and again at Bilsar suffered the plaintiff to proceed, were acting beyond the scope of their authority in so doing. At any rate, the plaintiff became a trespasser at Dhandu in refusing to leave the train when ordered to do so by the Station Master. The latter was not bound to receive the fare tendered to him by the plaintiff after the arrival of the train at Dhandu.

Marriott, for the Plaintiff —The defendants were bound to convey the plaintiff, and therefore he was no trespasser even at Surat, still less can he be held to be a trespasser after Nowari, whence he proceeded with the express leave and license of the defendants.

The plaintiff's obligation to take a ticket is imposed on him by Section 2 of Act XXV of 1871, amending Section 1 of Act XVIII of 1854. This section must be read as a whole, and so reading it the defendants might be justified in exacting the penalty therein prescribed for the violation of its provisions, but not in treating the plaintiff as a trespasser. Section 3 of Act XVIII of 1854 provides only for the case of a passenger travelling without a ticket with intent to evade the payment of his fare, and it is clear that there was no such intent here. The tender of the fare at Dhandu imposed on the defendants the common law obligation of carriers to carry the plaintiff.

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Farran, in reply.—The leave and license, if any, was determinable at the will of the defendants, and they determined it at Dhandu. The latter portion of Section 2 of Act XXV of 1871, amending Section 1 of Act XVIII of 1854, applies only to the case of a passenger who has taken a ticket but fails to give it up when required. It would be unreasonable to expect the defendants to issue tickets and accept the tender of a fare whenever and wherever required to do so.

Cur ad audit

The Judgment of the Court was delivered on November 27th 1875 by

SIRFAT, J.—This matter comes before us on a case stated for the opinion of the High Court under Section 30 of Act IX of 1850, and arising out of an action brought by the plaintiff, in the Small Causes Court to recover from the defendants the sum of Rs. 200 as damages for the forcible and illegal removal of the plaintiff from one of the defendants' carriages at Dhandu Station, and for illegal detention at the aforesaid Station, and for illegal refusal of the defendants to allow the plaintiff to proceed in the train to Bombay. At the hearing of the cause, the Fourth Judge of the Court was of opinion that the defendants had committed the several illegal acts with which they were charged and passed judgment for the plaintiff for the full amount of his claim and costs. A rule nisi was obtained by the defendants for a new trial, and came on for argument before the First and Fourth Judges of the Court who were divided in their opinion,—the First Judge being of opinion that there had been no illegal removal of the plaintiff from the carriage nor illegal detention, and that, even supposing (which the learned Judge did not admit) that the defendants' servant was bound to give the plaintiff a

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ticket on tender of the fare at Dhandu, still that as the plaintiff did not say he had suffered any damage from the defendants refusal to give him a ticket, the plaintiff's claim of Rs 200 could not be supported, and that, therefore, the rule should be made absolute. The Fourth Judge, on the other hand, adhered to the opinion he had expressed at the hearing, and held that the rule must be discharged. The facts, so far as they are material are stated in the case as follows:—"On the 30th June 1874 the plaintiff, who is a sepoy in the service of Syriell Leith Esq, Barrister at Law was with his master at Surat, and his master being about to proceed by the defendants' Railway to Bombay the plaintiff, in attendance on his master, got into the train at Surat, his master being in another carriage in the same train, and the plaintiff and his master started by the train for Bombay. When the plaintiff got into the train at Surat, he had no ticket nor had any been taken by him or on his behalf by his master or any other person. The omission by the plaintiff to procure a ticket arose from a mere mistake or misunderstanding and there was not on the part of the plaintiff or his master at any time any intention of evading the payment of his fare or of travelling without a ticket. In fact the plaintiff supposed that his master had a ticket for him while his master was under the belief that the plaintiff had his own ticket. At Nowsari Station the plaintiff, for the first time, ascertained that his master had no ticket for him. His master immediately provided him with money to buy one, and the plaintiff applied to the Station Master at Nowsari for a ticket to Bombay but was refused, on what ground it does not distinctly appear, but he was permitted by the defendants' servants to proceed in the train without a ticket. When the train arrived at Bilsar, the plaintiff again applied for a ticket but again failed to get one, and the guard of the train put him into the carriage and warned him not to get out again, as the train stopped a very short time at the station south of Bilsar. On arrival at Dhandu the plaintiff again got out and applied to the Station Master there for a ticket and explained to the Station Master how he happened to be without one. An explanation of the matter was also offered by the plaintiff's master to the Station Master, who, however refused to give the plaintiff a ticket. While at Dhandu, and while a discussion was going on between the plaintiff's master and the Station Master about the case, the plaintiff's master ordered the plaintiff to get into his carriage and remain there while he (Mr

Leith) would arrange matters with the Station Master. There is no doubt, and we find as a fact, that the plaintiff was all along ready and willing to pay for his ticket, and that at Dhandu, Mr. Leith, on behalf of the plaintiff, offered to pay any sum that might be demanded by the Station Master, provided the plaintiff was given a ticket. The Station Master however, refused to give him one, and finding that the plaintiff had gone into the train again, ordered him out, and on the plaintiff not coming out of the carriage, sent a sepoy who forcibly removed the plaintiff from the carriage. The plaintiff, being unable to obtain a ticket from the defendants' servants at Dhandu and not being allowed to enter the train without one, was left behind at Dhandu and was practically unable to go to Bombay before the departure of the next train for Bombay, which involved a detention of 24 hours. Before the arrival of the next train he purchased a ticket and proceeded in that train to Bombay. In this state of facts, the important question for determination is whether the plaintiff was in the train at Dhandu Station under circumstances which constituted him a trespasser. If the Company were entitled to regard him as such then, whether under the express provision of Section 17 of Act XVIII of 1854 or in exercise of the right which the law accords to every proprietor to remove a trespasser, using only such force as may be necessary for the purpose the defendants were we cannot doubt justified in removing the plaintiff from the train. It was contended, however, for the plaintiff that although Section 2 of Act XXV of 1871 makes it unlawful for a passenger to enter a carriage without having first paid his fare and obtained a ticket, still that such prohibition must be read in connection with the rest of the section, and that as it expressly provides that in case the traveller does not produce his ticket he is to pay the fare or increased fare, the Company might enforce that provision, but could not treat the plaintiff as a trespasser. This argument assuming that the section is to be read as a whole derives some support from the remarks of COLLINGE, J., at the conclusion of the Judgment in the *Great Northern Railway Company v. Harris* (1) but it is not necessary for us to express an opinion on the point as we think that the latter part of the section applies only to the case of a person who has received a ticket and will not or cannot produce it and not to a person as in this case travelling without having paid for and obtained a ticket with no intention

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Pratab Daji v B & C Ry to defraud Such was the construction placed on indently the same words embodied in a bye law of the Lancashire and Yorkshire Railway Company in the case of *Dearden v Toinsend* (1) "It seems to me," says Cockburn, C J, (2) "that the bye law relates to the case of a person having a ticket, but failing to conform to the regulations of the Company by producing it", and Lush, J, says (3) — "The bye law seems only to be pointed at what is to be done with the ticket with which the passenger is required to provide himself and at the consequence of not producing and delivering it up as required" Lastly, it was urged that there was no fraudulent intention Now, a fraudulent intention is doubtless by Section 3 of Act XVIII of 1854 made an essential condition of travelling on a railway without payment of the fare being dealt with as an offence, but the absence of such intention does not make entry into the carriage less unlawful or of itself afford any ground for depriving the Company of the right of putting an end to such unlawful occupation Having started, therefore, from Surat under circumstances which we think, entitled the Company to treat the plaintiff as a trespasser, the question arises whether anything subsequently occurred which changed the character of his occupation of the carriage It appears that at Nowseri Station having for the first time ascertained that his master had not taken a ticket for him, the plaintiff applied to the Station Master for a ticket but was refused He was, however, allowed to continue his journey At Balsar the plaintiff repeated his attempt to obtain a ticket, but was again refused However, he was allowed by the guard to proceed with the train, and did so until it arrived at Dhandu This conduct on the part of the Railway officials at intermediate Stations, if indeed it amounted to leave and license to the plaintiff to travel in the train without a ticket, could only operate as such until the train stopped at the next Station On arriving at Dhandu, where it appears tickets were examined both the plaintiff and his master, on his behalf, made strenuous efforts to obtain a ticket, offering at the same time to deposit with the Station Master any sum he might require Not only, however, was this refused, but the plaintiff was forbidden by the Station Master to enter the carriage and upon his doing so, was removed by his orders and not allowed to continue his journey to Bombay The Judge, who tried the

(1) 1 L R Q B 10

(2) 1 J 15 14

(3) 1 J 15 15

cause, held that the Station Master was bound to give the plaintiff a ticket, and if this were so, it might be that the Station Master would not have been justified in treating the plaintiff as a trespasser and removing him. We are, however, of opinion that there was no such legal obligation. The common law right of a traveller to be conveyed, by the carrier of passengers on his readiness to pay the usual fare is subject to the condition that he offers himself as a passenger at a reasonable time and place. It would be most inconvenient and unreasonable, we think, regarded from a public point of view, were we to hold that a passenger by a train has a right to require the Station Master, on the arrival of the train at an intermediate Station to leave the platform, where he has special duties connected with the train and passengers, and return to his office for the purpose of procuring him a ticket. It is the general practice at intermediate Stations for the Station Master to close the office for the distribution of tickets on the arrival of the train. This practice has been adopted to enable the officials, and more especially the Station Master, to attend to the particular matters which arise during the stoppage of the train in the Station and we can see no ground upon which a passenger by a train can claim to have the distribution of tickets resumed on his behalf, which had been already closed for the public outside the Station. In the present case, moreover, it would have been necessary in the first place for the Station Master to have heard the plaintiff's story, decided upon its correctness, and determined what he was bound to pay as far as Dhindu, before he could, with due regard to the interests of the Company, have given him a ticket from Dhindu to Bombay, as otherwise it is plain that the fare from Surat to Dhindu might have been lost to the Company. We think therefore, that there was no such legal obligation on the part of the Company to furnish the plaintiff with a ticket as was contended for, and that the Station Master was, under the circumstances justified in removing the plaintiff from the train. The rule must, therefore, be made absolute. Parties to pay their own costs of the rule for a new trial and of the reference.

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In the Chief Court of the Punjab

REFERENCE SIDE

Before Themlett and Spitta, J J

MR. BEAN (PUNJAB NORTH STATE RAILWAY), PLAINTIFF,

v.

v.

CAPT. SANDYS, DEFENDANT

CASE No 6 OF 1885

1885
May, 18*Railway Receipt Condition of—Parties bound—Contract—Right to collect undercharge—Ignorance of the terms of Receipt Note*

The defendant delivered to the plaintiff at Sialkot certain live stock for conveyance to Rawalpindi and obtained a Receipt Note in the usual form from the Railway in which the freight charge was calculated at the rate of three annas per mile per truck instead of six annas, the correct rate. On arrival of the consignment at the destination the freight charge entered in the receipt was duly paid by the defendant. On the mistake being discovered the difference between the rate charged and what ought to have been paid was demanded from the defendant. As he refused to pay the amount, this suit was instituted for its recovery.

Held, that as the Receipt Note is the contract between the parties and contains the conditions on which the goods were delivered to and accepted by the Railway for carriage and one of the conditions entered in the Receipt being that the Railway is entitled to correct clerical errors erroneously made in regard to the goods conveyed by them, the Railway is entitled to collect the undercharge at the destination.

The amount of cash entered in the receipt is only an estimate and is subject to revision.

Held also that the fact that the defendant at the time he despatched the goods and paid the freight was ignorant of the conditions of the Receipt Note will not in any way exonerate him from paying the excess charge claimed subsequently inasmuch as the defendant delivered the consignment for carriage under the terms of the Receipt Note. The fact that he failed to sign the Receipt Note is not material as there is no question of limitation made with regard to the liability of the Railway by a special contract.

CASE referred by Captain C J DENNIS, Judge, Small Cause Court, Sialkot, under Section 617 of Act XIV of 1882
Sinclair for Respondent.

The facts of this case and the question referred for the opinion of the Chief Court fully appear from the following Judgment of

SPIITA J — From the case stated, it appears that on the 3rd of May 1884 the defendant consigned certain live stock to the Punjab Northern State Railway for carriage from Sialkot to Rawalpindi. A Receipt Note in the usual form was delivered to the defendant by the Railway, in which the freight charged was calculated at the rate of 3 annas per mile per truck, instead of 6 annas, the correct rate.

The goods were duly delivered to the consignee (the defendant) at Rawalpindi, and the amount of freight at the incorrect rate of 3 annas was duly paid by him. This rate was inserted in the Receipt Note by an oversight of the booking clerk at Sialkot. On the mistake being discovered, the difference between the rate charged and what ought to have been paid was demanded from the defendant. He having refused to pay the amount, this suit is brought to recover it.

The Receipt Note admits the receipt of the animals by the Railway for conveyance to Rawalpindi and the payment of Rs 25-14 0 freight, at the rate of 3 annas per mile.

On its face are the words "For conditions of contract see back," and below this is a certificate which should be signed by the consignor, admitting that he is aware that the Railway has received the goods subject to the conditions noted on the back, and agreeing that the Railway should receive them subject to those conditions. Underneath this is a space for the 'sender's signature'. In the present case this is blank, the Receipt Note not having been signed by the sender. On the back of the note are several printed conditions, and among them at the bottom of the note appear the following —

'NOTE — It must be distinctly understood that the State Railway Department claims the right to correct any charges made on goods that may be undercharged in the Railway Receipt, and that it reserves the right of remeasurement, reweighment and recalculation of charge at the place of destination. The amount of cash entered above is only an estimate and is subject to revision.'

It is found as a fact by the Judge that the defendant at the time he despatched the goods and paid the mistaken freight was ignorant of the rights reserved by the above condition to the Railway. In other words, that he neither read nor signed the Receipt Note.

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Under these circumstances the Judge has referred the question whether the defendant is bound by the conditions printed on the back of the Receipt Note, and whether he is liable or not to pay to the Railway the extra freight now claimed under any contract express or implied. I am of opinion that the defendant is liable for the following reasons —

The Receipt Note is the contract between the parties and contains the conditions on which the goods were delivered to, and accepted by, the Railway for carriage, the fact that the note is not signed by the defendant is not material, as there is no question arising here under Section 10 of the Railway Act IV of 1879, of any limitation being made or attempted to be made of the Railway's liability as carrier by a special contract. It was under the terms of the note that defendant delivered the goods for carriage, and he cannot claim exemption from any of those terms on the ground that he omitted to inform himself of them. The question referred to has often arisen in England, and the whole current of the recent decisions goes to show that, under similar circumstances to those here disclosed, the terms of the Receipt Note are binding on both parties to the contract. The latest case in which all the previous decisions are reviewed, is that of *Walkins v Rymall* (1). In that case the plaintiff left a wagonette to be sold at the defendant's repository, and received a receipt, which he put into his pocket without reading it. The receipt contained the words "subject to the conditions as exhibited on the premises," and one of the conditions so exhibited was that on the lapse of a month property might be sold by auction without notice to the owner, unless the charges were paid. The defendant after the lapse of a month sold the wagonette to defray his charges, and on suit brought by the plaintiff it was held that the plaintiff was bound by the condition aforesaid, and Judgment was entered for the defendant. In their Judgment in this case the learned Judges say — "Thrown into a general form the result of the authorities considered appears to be as follows. A great number of contracts are, in the present state of society, made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the

form is accepted without objection by the person to whom it is tendered, this person is, as a general rule, bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document, or otherwise informs himself of its contents, or not. To this general rule, however, there are a variety of exceptions. In the first place, the nature of the transaction may be such that the person accepting the document may suppose not unreasonably, that the document contains no terms at all, but is a mere acknowledgment of an agreement not intended to be varied by special terms. Some illustrations of this exception are to be found in the Judgments in *Parker v S E Railway Co*,⁽¹⁾ and in the language of some of the Lords in *Henderson v Stenenson*,⁽²⁾ though these must be received with caution for reasons given by Lord BLACKBURN in his Judgment in *Harris v G W Railway Co* ⁽³⁾. A second exception would be the case of fraud, as if the conditions were printed in such a manner as to mislead the person accepting the document.

"A third exception occurs, if without being fraudulent, the document is misleading, and does actually mislead the person who has taken it. The case of *Henderson v Stenenson*⁽²⁾ is an illustration of this.

"An exception has also been suggested of conditions unreasonable in themselves or irrelevant to the main purpose of the contract. Lord BRAMWELL suggests some illustrations of this in his Judgment in *Parker v S E Railway Co* ⁽¹⁾. One is the case of a ticket having on it a condition that the goods deposited in a cloak room should become the absolute property of the Railway if not removed in two days. We are aware of no absolute decision on this point nor is it material to the present case."

The Court then proceeded to point out that none of the exceptions applied, and under the general rule held the plaintiff bound by the conditions referred to in the receipt.

Applying the principles contained in the above extract to the present case, it is obvious that it also falls under the general rule enunciated. Can it be brought under any of the exceptions? The only one which could apply to it is the first. Can it be said that the nature of the transaction between the defendant and the Railway was such that the defendant might suppose, not unreasonably, that the Receipt Note contained no terms at all

(1) 43 L J Q B 708 (2) L R, 2 P C App 470 (3) 45 L J Q B, 729

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but was a mere acknowledgment of an agreement not intended to be varied by special terms? In my opinion it is impossible to suppose that this can have been the case. To use the words of Lord BRAMWELL in *Parler v. S E Railway Co*

"The plaintiff puts into the hands of the defendant a paper with printed matter on it, which in all good sense and reason must be supposed to relate to the matter in hand. This printed matter the defendant sees, and must either read it and object to it if he does not agree to it, or if he reads it and does not object or does not read it at all, he must be held to consent to it."

It follows that the Receipt Note and the conditions to which it refers constituted an express contract between the parties, and that the Railway is entitled to correct the undercharge erroneously made in respect of the goods conveyed for the defendant. The condition on the back of the Receipt Note is one which, I believe, adopted by every Railway in India, and its validity was incidentally recognised in the case of *Bansi Lal v The S P and D Railway Co* (1). In that case also the Receipt Note was treated as containing the terms of the contract made between the consignor and the Railway Company.

For the above reasons I would answer the two questions referred in the affirmative.

I think it right in conclusion to call the attention of the Judge to the very irregular form of the plaint by which this suit has been instituted. It does not contain the particulars required by Section 50 (a), (b) of the C. P. Code, nor is it verified by the plaintiff. The Railway being a State Railway, the suit should have been instituted in the name of the Secretary of State for India in Council (Section 416, Civil Procedure Code), and not in the name of the Assistant Traffic Manager. This is an error which the Court can however correct under Section 27 of the Civil Procedure Code.

TEMPLETT, J.—I concur

The Bengal Law Reports, Vol. XIV. Page 209.

PRIVY COUNCIL

*Before Sir J W Colvile, Sir B Peacock,**Sir R P Collier, and Sir L Peel*

THE MADRAS RAILWAY COMPANY (PLAINTIFFS)

v

THE ZEMINDAR OF CARVETINAGARAM (DEFENDANT)*

*Duty of Zemindar—Ancient Tanks—Negligence—Statutory Powers—Liability for Damage occasioned by overflow of Tanks*1874
June 11 12
&
July 3

The public duty of maintaining ancient tanks and of constructing new ones was originally undertaken by the Government of India and upon the settlement of the country has in many instances devolved upon Zemindars. Such Zemindars have no power to do away with these tanks in the maintenance of which large numbers of people are interested but are charged under Indian law by reason of their tenure with the duty of preserving and repairing them. The rights and liabilities of such Zemindars with regard to their tanks are analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed.

Such a Zemindar if the banks of any tank in his possession are washed away by an extraordinary flood without negligence on his part is not liable for damage occasioned thereby.

Waters v The North Kent Railway Co (1) approved. *Reynolds v Fletcher* (2) distinguished.

APPEAL from a Judgment of the High Court at Madras (HOLLOWAY C J, OFFICER, and INNES, J.), dated the 15th February 1871, affirming a decision of the Judge of Chittoor, dated the 20th September 1870.

The suit was brought by the Madras Railway Company to recover from the defendant, the Zemindar of Carvetinagaram, the sum of Rs 15 000 as the aggregate amount of damage alleged to have been sustained by the plaintiffs by reason of injuries done in the years 1865 and 1866 to a portion of their railway and to certain portions of the works connected therewith, and to

* Appeal from the High Court of Judicature at Madras.

(1) 27 L J, Ex, 417.

(2) L R 3 H L 330.

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portions of the embankment and to small bridges and to several culverts constructed and necessary to allow the flow or escape of water, when accumulated in large quantities, through the Railway embankments, and these damages included the alleged amount of traffic lost by the break of the line in consequence of the bursting and consequent escape of the water of two ancient tanks situate in the defendant's Zemindari

The plaint did not contain any charge of negligence on the part of the defendant, nor any charge that the injuries were caused by his wrongful act

The defendant contended, *inter alia*, that if the injuries complained of did take place, they were not the result of any influences subject to his control, but rather the consequences of *vis major* or the act of God, that the tanks referred to in the plaint had existed from time immemorial, and were absolutely necessary for the cultivation and enjoyment of the land, which could not be otherwise irrigated, and that the practice of storing water in such tanks in India, and particularly in the district in question, and in the Zemindari of Carvetinagaram and the adjacent districts, was lawful, and was sanctioned by usage and custom

On the 21st January 1869, the Civil Court dismissed the suit with costs, holding that in the absence of a charge of negligence or default there was no cause of action alleged

This decree was, on the 18th January 1870, reversed by the High Court of Madras, which directed the Civil Court to investigate the case on its merits. On the 20th September 1870, the Civil Court dismissed the suit. The Judge said—"I find that the defendant was bound only to use all reasonable care and precaution to prevent the occurrence of ordinary accidents arising from the bursting of the tanks, that he did use such reasonable care and precaution with respect to the tanks referred to in the plaint, that the bursting of the tanks in December 1865 was an extraordinary accident against which defendant was not bound to provide, and that he is not liable to plaintiffs for the damages sustained by them in consequence of the bursting of the said tanks"

This decree was, on the 15th February 1871, confirmed by the High Court (1)

The plaintiffs appealed to Her Majesty in Council

Sir J Karslake Q C, Mr Watkins Williams, Q C, and Mr Mansel Jones, for the Appellants referred to *Rylands v Fletcher*,⁽¹⁾ which they contended laid down the correct principle of law applicable to cases like the present see especially the Judgments of Lord Cairns and Lord Cranworth in that case see also *Filliter v Plappard*,⁽²⁾ *Tibbervil v Stamp*,⁽³⁾ *Jones v The Festiniog Railway Company*,⁽⁴⁾ *Vaughan v The Taff Vale Railway Company*,⁽⁵⁾ *Ruck v Williams* ()

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It is not a natural user of land to store up water in quantities so large as may escape and damage one's neighbours. A water tank should be constructed large enough to provide against all contingencies, as well ordinary as extraordinary which are reasonably likely to occur. A downfall of rain in unusual or unexpected quantities is not such an improbable or impossible event as to come within the category of acts of God for the injury done by which no one is responsible. The damage resulted directly from this artificial structure which the defendant placed on his land, and in erecting which he did not exercise due care and make due provision for ensuring immunity to his neighbours, see *Tipping v The St Helen's Smelting Company* (7). It is impossible for the defendant to plead a prescriptive right to allow water to escape.

Mr Leith, Q C, and Mr Grady, for the Respondent contended that the English Law was not applicable to the special circumstances of the case, that decision in *Rylands v Fletcher* (8) was not applicable, and, that if it were, the present case came within the exceptions there laid down. The act for which the defendant was held responsible in *Rylands v Fletcher* (1) was a voluntary act. Here the tank was an integral part of the Zemindar's property, which he received with the land, which he was under obligation to maintain, and which it would have been a crime to displace. The escape of water was the result of unavoidable circumstances, and the Zemindar, being neither guilty of nor charged with, negligence, could not be held responsible. They referred to *Mayor of Lyons v The East India Company* (9).

(1) L R, 3 H L 330

(7) 11 Q B 347

(3) 1 Salk, 13

(4) L R 3 Q B 733

(5) 29 I J Ex 247, 8 C 5 H & N, 679

(6) 27 L J, Ex 357

(7) L R 1 Ch, 66 S C in Dom Proc., 11 H L Ca., 542

(8) 1 Moore & P C, 175.

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The Judgment of their Lordships was delivered by

SIR R P COLLIER.—The Madras Railway Company claimed in this suit damages against the defendant, the Zemindar of Carvetinagaram, for injuries occasioned to their Railway and works by the bursting of two tanks upon his land.

The defendant denied that the injuries complained of resulted from the bursting of the tanks, he asserted that if they did so arise, the bursting was caused by no act or negligence of his but by *vis major*, or the act of God. He further pleaded in these terms—

'4 The tanks referred to in the plaint have existed from time immemorial and are requisite and absolutely necessary for the cultivation and enjoyment of the land which cannot be otherwise irrigated and the practice of storing water in such tanks in India and particularly in this district and in the Zemindari of Carvetinagaram and the adjacent districts is lawful and is sanctioned by usage and custom. The said Zemindari is a hilly district and the ryots will be unable to carry on their cultivation without such tanks, they being the chief source of irrigation, and the omission to store quantities of water in such tanks will be attended with consequences dreadful to the inhabitants of the country.

'7 The defendant could not have avoided collecting a quantity of water in the tanks during the monsoon, and he has not failed to use any reasonable care that may be expected from him. There were also several tanks and channels above his tank belonging to Government and other people which also burst at the same time.

He also contended that the damage arose through want of proper care on the part of the plaintiffs in the construction of their works, but this contention was abandoned. It was found by both Courts, and is not now disputed, that the works of the plaintiffs did suffer serious damage from the bursting of the tanks, these last two questions, therefore, need not be further referred to.

The issues, as far as they are material to this appeal agreed to by the parties, were—

1. Whether the injuries complained of were the result of *vis major*, or the act of God, or other influences beyond the defendant's control?

2. Whether defendant is liable for any, and, if so, what damages sustained by the plaintiffs?

The evidence given in the cause may be summarized as follows.—It was shown that the tanks of the defendant which were ancient tanks, the date of their origin not appearing were

constructed in the usual manner, that the banks were properly attended to and kept in repair, that sluices and outlets for the water were provided of the kind usually employed both in private and Government tanks, and usually found sufficient, and which had proved sufficient to prevent any overflow or bursting of the tanks in question for twenty years, but that an improved description of sluice, of recent introduction, would be still more efficacious, that at or some days before the accident there had been an unusual and almost unprecedented fall of rain, described by the Deputy-Inspector of the Railway as the heaviest he had ever seen during his residence of thirteen years in the locality, and by witnesses for the defendant as exceeding any fall of rain for twenty years, that this extraordinary flood, which caused the neighbouring river to overflow, and possibly brought down to the tanks, whose overflowing is complained of the contents of other tanks at higher levels, proved more than the sluices could carry off that the banks of the tanks were overflowed, and finally carried away

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Upon these facts the Acting Civil Judge of the Civil Court of Chittoor found for the defendant, holding that he was not liable in the absence of negligence, and that he had not been negligent

This Judgment was affirmed by the High Court on appeal

The appellant now contends that the Judgment of the High Court should be reversed on two grounds—

1st—That the defendant, by storing up water on his land, rendered himself liable in damages should it escape and do injury to other persons, even though he might not have been guilty of negligence

2nd—That both the Indian Courts have applied an erroneous rule of law to the consideration of the question of negligence

The case mainly relied upon in support of the first contention is *Rylands v Fletcher*,⁽¹⁾ which it becomes necessary to examine. In that case the plaintiffs, the owners of a mine, sued for damages, the defendants, owners of some adjacent land, who had constructed a reservoir on their land for the purpose of working a mill, from which reservoir water flowed through some disused mining works into the plaintiff's mine, and flooded it. It was held by the Exchequer Chamber and by the House of Lords that the plaintiffs were entitled to damages against the defendants

(1) L R, 3 H L 331

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The grounds of this Judgment are stated very clearly and shortly by the then Lord Chancellor (Lord Cairns), and Lord Cranworth. The Lord Chancellor says — "The principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of enjoyment of the land, be used, and if, in what I may term the natural use of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing some barrier between his close and the close of the defendants, in order to have prevented the operation of the laws of nature. On the other hand if the defendants, not stopping at the natural use of their close had desired to use it for any purpose which I may term a non natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, and if, in consequence of their doing so or in consequence of any imperfection in the mode of their doing so, the water came to escape and pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril, and if, in the course of their doing it, the evil arose —

of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then, for the consequence of that, in my opinion, the defendants would be liable."

Lord Cranworth thus states the principle of the decision — "If a person brings or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage and the doctrine is founded on good sense. For when one person in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non laedat alienum*."

But the principle that a man, in exercising a right which belongs to him, may be liable, without negligence, for injury done to another person, has been held inapplicable to rights conferred by Statute

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This distinction was acted upon in *Vaughan v The Taff Vale Railway Co*, (1) where it was held by the Exchequer Chamber that a Railway Company were not responsible for damage from fire kindled by sparks from their locomotive engine, in the absence of negligence, because they were authorized to use locomotive engines by Statute. COCKBURN, C J, observes — "When the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence, that if damages result from the use of such a thing independently of negligence, the party using it is not responsible." This view is fortified by the consideration that the Legislature may be presumed not to have conferred special powers on persons or Companies without being satisfied that the exercise of them would be for the benefit of the public, as well as of the grantees. On the same principle it was decided that a Waterworks Company laying down pipes by a statutory power, were not liable for damages occasioned by water escaping in consequence of a fire plug being forced out of its place by a frost of unusual severity—*Blyth v The Birmingham Waterworks Co* (2)

On the other hand, in *Jones v The Festiniog Railway Co*, (3) it was held that a Railway Company which had not express statutable power to use locomotive engines, was liable for damage done by fire proceeding from them, though negligence on the part of the Company was negatived.

It has been argued on the part of the respondent that the case of *Rylands v Fletcher*, (4) decided on the relations subsisting between adjoining landowners in this country, has no application whatever to India. Though that case would not be binding as an authority upon a Court in India not administering English Law, their Lordships are far from holding that, decided as it was on the application of the maxim *sic utere tuo ut alienum non laedas*, expressing a principle recognized by the laws of all

(1) 5 H & N 679

(3) L R 3 Q B, 533

(2) 25 L J, Ex., 212

(4) L R 3 H L, 330

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civilized countries, it does not afford a rule applicable to circumstances of the same character in India,—they are of opinion, however, that the circumstances of the present case are essentially distinguishable

The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognized by Hindu and Mahomedan law, by Regulations of the East India Company, and by experience older than history, as essential to the welfare, and indeed, to the existence of a large portion of the population of India. The public duty of maintaining existing tanks and of constructing new ones in many places, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved on Zemindars, of whom the defendant is one. The Zemindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian law, by reason of their tenure, with the duty of preserving and repairing them. From this statement of facts, referred to in the judgment of the High Court, and vouched by history and common knowledge, it becomes apparent that the defendant in this case is in a very different position from the defendants in *Rylands v Fletcher* (1)

In that case the defendants, for their own purposes, brought upon their land and there accumulated a large quantity of water by what is termed by Lord Cairns “a non-natural use” of their land. They were under no obligation, public or private, to make or to maintain the reservoir, no rights as it had been acquired by other persons, and they could have removed it if they had thought fit. The rights and liabilities of the defendant appear to their Lordships much more analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed. The duty of the defendant to maintain the tanks appears to their Lordships a duty of very much the same description as that of the Railway Company to maintain their Railway, and they are of opinion that, if the banks of his tank are washed away by an extraordinary flood without negligence on his part, he is no more liable for damage occasioned thereby than they would be for damage to a passenger on their line, or to the lands of an adjoining proprietor occasioned by the banks of the Railway being washed

away under similar circumstances, see *Withers v The North Kent Railway Co* (1)

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The second ground on which the appellant relied was not so clearly stated. Their Lordships understood it to be, in substance, that the Court below and the High Court estimated by a wrong standard the amount of care which the law requires of the defendant. It should be observed that the question of negligence was little if at all, argued in the High Court.

The Judge of the Court below quotes and applies to the case the following definition of negligence by Baron Alderson — "Negligence consists in the omitting to do something that a reasonable man would do, or in the doing something that a reasonable man would not do," in either case unintentionally causing mischief to a third party, (2) and the High Court confirm this view of the law. Without adopting every expression of the Judge of the inferior Court, their Lordships are unable to say that the case has been decided on an erroneous view of the law. On the question of fact whether or not negligence was proved by the evidence, they see no sufficient reason for departing from their ordinary rule of not disturbing the concurrent finding of two Courts.

For these reasons their Lordships will humbly advise Her Majesty that the Judgment of the Court below should be affirmed, and the appeal dismissed with costs.

Appeal dismissed

Agent for the Appellants *Messrs Freshfields*

Agents for the Respondent *Messrs Laurie, Keen, and Rogers*

(1) 7 L J Ex 417

(2) *Blyth v The Birmingham Waterworks Co* 25 L J Exch 213

The Indian Law Reports, Vol. XIV. (Madras.) Series,
Page 18.

ORIGINAL CIVIL

Before Mr. Justice Handley.

MADRAS RAILWAY COMPANY (PLAINTIFFS)

v.

THOMAS RUST (DEFENDANT)*

1890
July 23

Stamp Act—Act I of 1879, S. 3, Cl. 4—Bond—Specific Relief Act—Act I of 1877, Ss. 20, 54, 57—Contract Act—Act IX of 1872, S. 30—Contract for personal service—Contract for more than three years—Interim injunction

The defendant signed an agreement in England with a Railway Company, whereby he contracted to serve the Company exclusively for four years in India under a penalty of £100. The defendant having come to India at the expense of the Company and served it for two years left its service for that of another employer, alleging that he had not been fairly treated by a Locomotive Superintendent.

Held, (1) that the instrument executed by the defendant was an agreement merely and did not require to be stamped as a bond.

(2) that the defendant had no right to rescind the agreement and the plaintiff Company was entitled to an interlocutory injunction restraining defendant from serving others on the terms that the plaintiff Company should consent to retain him in its employ.

MOTION for an *interim* injunction restraining the defendant from serving, working for, or being employed by any person or persons other than the plaintiff Company pending the disposal of the suit.

The plaintiff in the suit prayed for an injunction restraining the defendant as above during the term of an agreement entered into by him and the plaintiff Company, dated 20th June 1888, and for damages for breach of the agreement. The plaintiff stated and it was admitted by the defendant—

“That by an agreement bearing date the 20th day of June 1888 entered into between the defendant of the one part and the plaintiffs of the other part, the defendant thereby engaged himself in the service of the plaintiffs for four years from the day

" of his embarkation or departure for Madras on the following
 " conditions (*inter alia*) —

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- (a) " That he should proceed to Madras, and, while in India,
 " should employ himself as might be required by the
 " Board of Directors or their Agent at Madras or
 " Locomotive Superintendent for the time being or
 " other officer appointed in that behalf
- (b) " He should faithfully and diligently employ the
 " whole of his time in the service of plaintiffs as a
 " carriage painter, or in such other manner as the
 " Board of Directors or their Agent at Madras or
 " Locomotive Superintendent or other officer as afore-
 " said should require
- (c) " He should in all things be subservient to and obey
 " the orders and directions of, the Board of Directors
 " and of their Agent at Madras or Locomotive Super-
 " intendent or other officer appointed in that behalf
- (d) " And in consideration of the agreement thereinbefore
 " contained on the part of the defendant to be done
 " and performed and of the due and faithful service to
 " be rendered by him to the plaintiffs for four years,
 " the said Directors promised and agreed with him in
 " manner following —
- (e) " That the Board of Directors should pay the expence
 " of the passage of the defendant to Madras and
 " should pay him, during the continuance of his
 " services, the sum of Rs 200 per mensem, any in-
 " crease of pay after or beyond the first annual incre-
 " ment of Rs 13 per mensem to be subject to the
 " defendant passing the Government examination in
 " the vernacular, the amount of such salary to com-
 " mence from the day of defendant's embarkation for
 " Madras
- (f) " And, lastly, the defendant thereby bound himself
 " under a penalty of £100 to the said Directors dili-
 " gently and faithfully to perform the various matters
 " and things contained in that agreement

' (The agreement provided also for the dismissal of the defend-
 " ant on three months' notice)

" That the defendant left England on or about the 21st day of
 " June 1888 and in due course arrived in Madras and was, from

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"the date of such arrival, employed by the plaintiffs at the
"Workshops at Perambur, Madras, under the orders and directions
"of the Locomotive Superintendent and continued to be so employ
"ed under the terms of the said agreement up to the 31st day of
"March 1890

"That the defendant, on the 1st day of April 1890, absented
"himself and has since absented himself from the plaintiffs' said
"Workshops and has been, plaintiffs are informed, since the said
"1st day of April 1890, working for Mr Arcot Dhanacoti
"Moodelly in Madras."

The defendant admitted that he was working for the person
named, but claimed that he had a right to cancel the agreement
on the grounds that Mr Phipps, the Acting Locomotive Superin-
tendent, had insisted on his disclosing a trade secret which he
possessed, and that the language and manner of Mr Phipps
towards the defendant was such as to injure his feelings and
lower him in the estimation of the men working under him, &c

On the motion coming on, Mr R. F. Grant for Defendant
objected that the document put in for the plaintiffs in proof
of the agreement containing the above terms, which was signed
by the defendant only, was not admissible for want of a stamp as
a bond for £100 and he relied on *Reference by Board of Re-
venue, N. W. P., under Act I of 1879* (1)

Mr K. Brown for Plaintiffs The reasoning of the dissenting
Judgment in that case is correct and is in accordance with the
decision in *Gisborne and Co v Subal Bouri* (2) The document
should not be regarded as a bond, but an agreement for the pur-
poses of the Stamp Act

HANDLEY, J., ruled that the document did not require to be
stamped as a bond, but was an agreement merely

Mr K. Brown This is a case for an interim injunction under
Civil Procedure Code, Section 493, as on the pleadings and affi-
davits the plaintiffs would be entitled to the injunction prayed for
in the suit *Nusserwanji Merwanji Panday v Gordon* (3) Specific
Relief Act, Section 57, governs the case Compare the illu-
strations, which refer to cases of personal service and *Lund v
Wagner* (4) and *Montague v Flockton* (5) There is nothing in the na-
ture of the contract which bars this remedy, see *Brahmaputra*

(1) 1 L R, 2 A.H., 659

(2) 1 L R, 3 Cal., 235

(3) 1 L R, 6 Bom., 266

(4) 1 De G M & G 604

(5) 16 Fq 127

o, Ltd v Scarth⁽¹⁾ distinguishing *Oakes & Co v Jackson*⁽²⁾ the defendant's affidavit discloses no ground for rescinding it.

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R F Grant The defendant was justified under Contract Section 39, in rescinding the contract. In any view, however, since this contract could not be enforced by a decree for its performance as being a contract of service and also as lasting over a period of three years (see Specific Relief Act, ss 12, 21) under Section 34 it should not be enforced by an injunction. Section 57 has never been applied to a case where the two objections to specific performance above stated concurred. Further the agreement is unfair, one sided and lacking in mutuality. Moreover on the face of it it appears the plaintiff regarded money payment as sufficient compensation for each. Before granting an injunction the Court must regard the balance of convenience and weigh the consequences of an injunction on the defendant against the substantial mischief done to plaintiffs by rescission of the contract. See *Shamnugger Factory Co v Ram Narain Chatterjee*,⁽³⁾ *Doherty v Morgan*⁽⁴⁾ *Mogul Steamship Co v McGregor, Gow & Co*,⁽⁵⁾ *Don v Pender*⁽⁶⁾

K Brown in reply. The argument as to balance of convenience fails in view of the circumstances of the case and that money compensation is not supported by the penal clause in the agreement, see Specific Relief Act, Section 20. There was no ground for rescission by the defendant.

JAMES —I consider that this is a case in which an interim injunction should be granted.

A sufficient reason is shown in defendant's affidavit for his breach of the agreement. If any question arose between him and the Plaintiff as to his right to conceal any trade secret he passed or if he had any complaint to make as to his treatment by the Plaintiff, he should have brought the matter before the managing authority of the Company and not have thrown up his employment in direct violation of his contract. It is argued that there is no mutuality in the contract because the Company has executed the agreement, and because they can dispense with defendant's services on three months' notice. As to the first, the Company sets up the agreement and of course is bound

1) I L R 11 Cal 516

(2) I L R 1 M 1 134

3) I L R 14 Cal 199

(4) 13 Q B D 476

5) I R 3 App Cas 709

(6) 27 Ch D 43

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by it equally with the defendant. As to the second point, the Company does enter into certain covenants with the defendant, and whether on the whole the bargain is more advantageous to them or to the defendant is a question not now to be determined. The defendant made the contract, and, in the absence of fraud or duress, must be bound by it.

And I do not think that pecuniary damages will adequately compensate the Company for the defendant's breach of contract. Unless persons who enter into contracts of this sort, on the faith of which their passage out to this country is paid, are kept to their agreement, the consequences will be very serious to employers who will often be unable to secure the services of persons to supply the places of the defaulters in a short time.

It is argued that when the remedy by specific performance of a contract is expressly refused by Chapter II of the Specific Relief Act, then by virtue of Section 54 clause 2, an injunction cannot be granted, and therefore that this contract, being one extending over more than three years and therefore not capable by Section 21, clause (g) of specific performance, cannot be the subject of an injunction. It seems to me that this argument would make Section 57 of the Act nullity. That section provides in the case of an affirmative agreement coupled with a negative agreement express or implied, that an injunction may be granted though specific performance could not, and it gives as illustrations some of the contracts, specific performance of which is precluded by Section 21, clause (b). If an injunction may be granted in the case of contracts, specific performance of which is refused by Section 21, clause (b), why not in the case of those specific performance of which is refused by Section 21, (g)? It is also argued for the defendant that an injunction should not be granted because the agreement provides for a penalty for its non performance. But Section 20 of the Specific Relief Act provides that this should be no bar to the remedy by specific performance and the same principle applies to injunctions. I think a case has been made out for the interference of the Court by *interim* injunction, but it must be on terms that plaintiff Company take back the defendant into their service if he is willing and do not, pending the decision of this suit, exercise their powers under clause 7 of the agreement of dispensing with his services on three months' notice. Upon these terms there will

be an injunction as prayed Costs of this application to abide
the result of the suit

Barclay & Morgan — Attorneys for Plaintiffs

Champion & Short — Attorneys for Defendant

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The Bengal Law Reports, Vol. XIV. Page 1.

ORIGINAL CIVIL.

Before Sir Richard Couch, Kt, Chief Justice, and

Mr Justice Macpherson.

C HALFORD (PLAINTIFF),

v.

THE EAST INDIAN RAILWAY COMPANY (DEFENDANTS)

Railway Company—Fire caused by Spark from Engine—Action for Damages—Negligence Statutory Powers

1874
May, 22 &
26 & June 17

The East Indian Railway Company was incorporated under 12 and 13 Vict c xem ' for the purpose of making and constructing working and maintaining ' the East Indian Railway ' including all necessary accessory or convenient extensions, branches, &c as might be agreed upon between the Railway Company and the East India Company, and by agreement between the Railway Company and the East India Company, dated 17th August 1840 the Railway Company was ' authorized and directed to make and maintain such stations, offices, machinery and other works and conveniences connected with the making maintaining and working the railway,' and ' to provide a good and sufficient working stock of engines, carriages, and other plant and machinery for working the said railway ' The plaintiff was the owner of a piece of land adjoining the railway line at Bharmatta, a station on the Chord Line of the Company's railway, on which land was erected a bungalow, with stables and out houses adjoining In an action brought by the plaintiff against the Railway Company to recover compensation for damages occasioned by fire caused by a spark from one of the engines of the Company, the plaintiff alleged want of due care on the part of the defendants in the management of the line by allowing dry grass of too great a length to remain on the railway banks, and in driving their engines along the line without due precautions being taken to prevent the explosion of sparks Held, that the defendant Company was authorized to run locomotive engines on the lines of railway constructed by the Company under the statutory powers given to it, and, therefore, the Company were not liable for damage caused in working the line under such statutory powers, without proof of negli-

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gence Held also on the evidence that neither in the construction of their engines nor in the condition of the railway banks was any negligence shown on the part of the Company

APPEAL from a decision of Pontifex, J, dated 22nd April 1874

Suit to recover Rs 6,500 as damages sustained by the plaintiff by reason of the negligence of the defendants The plaintiff alleged that the plaintiff was the owner of certain land and a bungalow with stables and other out-offices thereon, at Kbarhatta, a station on the Cherd Line of the East Indian Railway, which was in the possession, and under the management, of the defendant Company, that, on 21st March 1873, by the negligence of the defendant Company, and the want of due care in the management of their line, the dry grass which was allowed to remain on the railway banks, became ignited by sparks of fire emitted from one of their locomotive engines, which was driven along the line without due precautions being taken to prevent the expulsion of sparks, and that the fire thereby occasioned spread from the defendants' line of railway and banks into the plaintiff's land which closely adjoined the line near the point where the fire originated, and set on fire some thatching grass which was stored thereon, and thence spread to and destroyed the bungalow and out houses belonging to the plaintiff, in respect of which the damages were claimed

The defendants stated in their written statement that they were a corporation empowered by Statute to use locomotive engines on the line of railway in question, that the engines employed by them were properly constructed, and such as they had a right to use, that they had used all due care in the management of their engines, and had not been guilty of any negligence in the use of such engines The defendants denied that there had been on their part any want of due care in leaving grass on the bank of the railway, and that the fire by which the plaintiff's bungalow was burnt down was caused by sparks from their engines as alleged in the plaint but they alleged the fire had originated from the ignition, by some means for which they were not responsible of the thatching grass stored on the plaintiff's land, and was there communicated to the buildings destroyed They further submitted that, even if the fire had originated on their premises and from their negligence there was such contributory negligence on the part of the plaintiff as disentitled him from recovery

The defendant Company was incorporated under 12 & 13 Vic c xciii, for the purpose of making, and constructing, working and

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maintaining the East Indian Railway, "including all necessary accessory or convenient extensions, branches, stocks, and works as may be agreed upon by the Railway Company and the East India Company, and also of doing and performing all such matters and things necessary or convenient for carrying into effect the object and purpose aforesaid," and by an agreement of 17th August 1849, entered into under that Statute between the East India Company and the Railway Company, and subsequently confirmed by the Imperial Government, the Railway Company was authorized and directed to make and maintain such stations, offices, machinery and other works and conveniences (connected with the making, maintaining, and working the railway) as might be deemed necessary and expedient by the East India Company and "to provide a good and sufficient working stock of engines, carriages, and other plant and machinery for working the said railway."

The material facts and evidence are sufficiently stated in the Judgment appealed from, which was delivered by

POYNTREX, J.—This case is almost the same in its circumstances as the case of *Smith v. The London and South Western Railway Co.*, (1) but with a difference to which I shall presently refer.

The plaintiff is the owner of a piece of land adjacent to the Chord Line of the East Indian Railway Company about two hundred and fifty yards nearer Calcutta than the Khamatta Station. Between such piece of land and the railway runs a public road about twenty feet wide, of which only the centre portion is used for traffic. The plaintiff's land was separated from the road by a wooden fence, and on such land, in a line proceeding east from the railway, stood a stable about seventy five feet from the railway fence, then a bath house, and then, at some distance, a bungalow. On the morning of the 24th March 1873, and for some few days previously, two heaps of thatching grass were lying on the land between the road and the stable. Opposite, and to the west of the plaintiff's land and the public road, the defendants' Railway runs through a cutting of a depth for some distance of from eight to ten feet, and gradually diminishing in depth as it approaches the station. The railway is separated from the road by a wire fence. The eastern bank of the railway and cutting was covered with growing grass. With respect to the length of such grass there is a considerable conflict of evidence.

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About half-past ten on the morning of the 24th of March 1873 a fire occurred, which burnt the grass growing on the eastern bank of the railway, the heaps of the thrutching grass, the stable, and the bungalow. Certain out-houses and trees were also burnt.

The plaintiff alleges that the fire was caused by the emission from a passing engine of live sparke or cinders, which were blown by a strong westerly wind prevailing at the time on to the railway embankment, and setting fire to the grass on the embankment that such fire spread, crossed the road and occasioned the damage of which the plaintiff complains, and which, in his plaint, he states to amount to Rs 6,500.

The defendants deny that the fire was caused by any passing engine, and they have adduced evidence with a view to show that no train in fact passed at the time when the fire must have originated.

This evidence is to my mind not satisfactory, and I am prepared to find that an engine did in fact pass at the time when the fire originated, and in the absence of other evidence did in fact occasion the fire, and that the fire commenced first on the railway bank, and was communicated therefrom to the plaintiff's premises.

Under this state of circumstances, the plaintiff claims to be compensated for the damage he has sustained by the fire. The claim is supported on two grounds. First that the defendants had no statutory power of running locomotive engines, and therefore are responsible for the damage occasioned by the fire, according to the principles laid down by the Court of Queen's Bench in *Jones v The Festiniog Railway Co* (1). I said during the argument and I am still of opinion, that the East Indian Railway Company have a statutory power of running locomotive engines on the Chord Line, and therefore, according to the principles of the decisions in *Vaughan v The Taff Valley Railway Co* (2) and *The Hammer-smith Railway Co v Brand*, (3) unless they are proved to have been guilty of negligence, they are not responsible for the consequences of the fire. To use the words of Cockburn, C J in *Vaughan v The Taff Valley Railway Co*, (2) "When the Legislature has sanctioned the use of a particular means for a given purpose, it appears to me that that sanction carries with it the consequence, that the use of the means itself for that purpose is authorised."

(1) L R 3 Q B 775

(2) 29 L J, N S, Fc 21

(3) L R, 4 H L, 171

every precaution which the nature of the case suggests has been observed) is not an act for which an action lies, independent of negligence."

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The second ground on which the plaintiff rests his claim is, that the defendants were in fact guilty of negligence, and were therefore responsible for the result of the fire, even though they could not have reasonably anticipated that the damage which actually happened would occur. I agree that if the defendants were guilty of negligence, the case would be governed by *Smith v The London and South Western Railway Co*,⁽¹⁾ and the plaintiff would be entitled to recover.

Now the negligence imputed is two-fold: first, with respect to the construction of the engine, and, second, with respect to the condition of the railway tanks: and it is necessary to deal separately with these particulars.

With respect to the engine, the defendants have produced for the inspection of the plaintiff and his witnesses the engine No 508 which they say was the engine of the No 10 goods train, and was the only engine that could have passed at or before the commencement of the fire.

Assuming the fire to have been occasioned by the engine, the plaintiff's case is that it may have happened either from sparks emitted from the funnel, or from live coals or cinders dropped from the ash-pan of the engine, and he insists that the defendants must be considered guilty of negligence unless appliances were attached to the funnel and ash-pan to confine or arrest the sparks and cinders. It is not disputed that, in other respects, the engine is of the best construction. The plaintiff's witnesses have proved that appliances called spark-arresters or catchers are frequently attached to, or connected with, engine funnels for the purpose of preventing the emission of sparks.

On the other hand, the defendants have produced evidence to show that such appliances are only used with engines designed to burn wood fuel, that no exclusively coal-burning locomotive engine in India, or in England, is ever furnished with such appliances, and that such appliances could not be constructed to arrest the small sparks emitted from coal-burning locomotive engine funnels, without unreasonably interfering with the working of the engine.

(1) L R, 5 C P, 93 S C m Ex Ch, L R 6 C P, 14.

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I am myself inclined to think that the fire was more probably occasioned by a live coal or cinder from the ash pan than by a spark from the funnel. But however this may be, I am of opinion upon the evidence that the defendants were not guilty of negligence so far as relates to the construction of the engine funnel, and that in that respect the engine was properly constructed and worked.

With respect to the ash pan, only one of the plaintiffs witnesses has spoken to the possibility of any appliance for preventing the falling of live coals or cinders when steam is on and that appliance has only been used with engines of very recent construction designed for the partial consumption of wood as fuel. I am of opinion on the evidence that the defendants engine was properly constructed and worked, so far as relates to the ash pan and that the charge of negligence with respect to the engine fails, and, therefore, on the first head of negligence, I find in the defendants' favour.

✓ The other imputation of negligence relates to the condition of the railway banks. The plaintiff's witnesses have stated that the grass on the banks had been cut about two months before the fire and that, at the time of the cutting, it was about six feet in length of which about two feet were left standing. On the other hand Mr Roberts, an Inspector of Works on the East Indian Railway line whose residence is close to the station, and who was in his house when the fire commenced, has positively sworn that the grass on the steeper part of the cutting was only from six to eight inches long while on the less steep slope it had been cut down by cattle. He further states, that the grass on the embankment had been cut only about a fortnight, or it might be three weeks, before the fire, that it was rather thick and very dry, and that he had himself seen it after it was cut, and that it had not regrown, and that it was part of his duty to look after the banks. I may observe that this witness did not appear to give his evidence at all hostilely or unfairly to the plaintiff.

✓ ✓ Taking it therefore, as I am prepared to find that the grass was about a foot high, would that fact be conclusive and recent negligence on the part of the Railway Company? It seems to me that if I were to hold that leaving grass a foot high along the line of railway was such negligence as would render the Railway Company responsible for damage like that occasioned by the fire it would, in this country, be equivalent to imposing upon them a

impossibility,—namely, the duty of keeping the banks of their line trimmed like a lawn, or altogether preventing vegetation thereon. The imposition upon them of such a liability as that was not, in my opinion, intended by the Legislature which gave them power and authority to run trains and locomotive engines. And I accordingly, find that the defendants were not guilty of negligence so far as relates to the condition of the railway banks.

But it has been very strongly urged upon me that the case of *Smith v The London and South Western Railway Co* (1) is in fact an authority to show that the condition of the railway bank in this case was in itself conclusive proof of negligence. In *Smith v The London and South Western Railway Co* (1) the circumstances were as follows.—It was proved that the defendants' railway passed near the plaintiff's cottage and that a small strip of grass extended for a few feet on each side of the line, and was bounded by a hedge which formed the boundary of the defendants' land beyond the hedge was a stubble field bounded on one side by a road, beyond which was the plaintiff's cottage. About a fortnight before the fire, the defendants' servants had trimmed the hedge and cut the grass and left the trimmings and cut grass along the strip of grass. On the morning of the fire the Company's servants had raked the trimmings and cut grass into small heap. The summer had been exceedingly dry, and there had been many fires about in consequence. On the day in question shortly after two trains had passed the spot a fire was discovered upon the strip of grass land forming part of the defendants' property, the fire spread to the hedge and burnt through it and caught the stubble field and a strong wind blowing at the time the flames ran across the field for 200 yards crossed the road and set fire to and burnt the plaintiff's cottage. There was no evidence that the defendants' engines were improperly constructed or worked there was no evidence except the fact that the engines had recently passed, to show that the fire originated from them. There was no evidence whether the fire originated in one of the heaps of trimmings or on some other part of the grass by the side of the line, but it was proved that several of the heaps were burnt by the fire.

The Judge on the trial does not appear to have charged the jury, but a verdict was taken by consent for the plaintiff, subject to leave reserved to set it aside on the ground that there was no evidence of negligence, to go to the jury. A rule was accordingly

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(1) L R 5 C P 485 C = Ex Ch 1 R 6 C P 14.

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obtained in the Court of Common Pleas, and was after argument discharged. Upon an appeal to the Exchequer Chamber that decision was affirmed.

After a careful perusal of the report of *Smith v The London and South Western Railway Co*, (1) I am of opinion that no one of the Judges before whom that case was argued would, even under the circumstances of that case, if sitting as a jury, have found that the defendants were guilty of negligence. But there being circumstances which ought properly to have been mentioned to the jury as data from which they were to find whether there had or had not been negligence, and a verdict having been taken by consent at the time which would only be set aside if there was no evidence to go to the jury, none of the Judges considered himself justified in disturbing that verdict.

But in that case there appears to me to be a particular negligence of a material character, and which is not to be found in the present case. I referred to the heaps of hedge trimmings and cut-grass raked together on the railway bank. It seems to me that the Judges in that case looked upon this collection into heaps in the light of an active proceeding on the part of the Railway Company in a slight degree comparable to strewing petroleum or other inflammable matter along the line. Had these raked together heaps not existed I take it that every one of the Judges in *Smith v The London and South Western Railway Co* (2) would have decided that there was nothing on which to base a charge of negligence.

In the Exchequer Chamber, the Judges make the following observations. Kelly, C. B., said: "I think, then, there was negligence in the defendants in not removing these trimmings and that they thus became responsible for all the consequences of their conduct." Martin, B., said: "There was evidence of the trimmings being improperly left by the side of their line, and that a spark from a passing engine fell on them and caused the fire, which was thus due to the defendants' negligence." Blackburn J. said: "I have still some doubts whether there was any evidence that they were negligent, but as all other Judges are of opinion that there was evidence that they were, I am quite content that the judgment of the Court below should be affirmed." He then goes on to say: "I agree that if they have the land at the edge of the line in their own occupation, they ought to take all reason

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able care that nothing is suffered to remain there which would increase the danger. Then comes the question, is there evidence enough in this case of a want of that reasonable care? It can hardly be negligent not to provide against that which no one would anticipate. I have no doubt that if the Company, strewed anything very inflammable, such as to put an extreme case, petroleum along the side of their line they would be guilty of negligence. The reasoning for the plaintiff is that the dry trimmings were of an inflammable character, and likely to catch fire. Further on he says, "I do not say that there is not much in what is said with respect to the trimmings being the cause of the injury, and not the state of the hedge, but I doubt on this point, and, therefore doubt if there was evidence of negligence." Pigott, B. says, "KEATING, J., says, that he was pressed with the consideration that leaving some very inflammable substance along the side of the line where trains were frequently passing was some evidence of negligence. It comes to this, that in a dry summer, with a knowledge of the risk of fire which must be crused, the defendants left heaps of combustible matter along the side of their line, then, whether the fire did arise from those heaps was a question for the jury, and it seems clear that it either came from, or was at any rate increased by, the heaps." LUSH, J., says, "The heaps added to the intensity of the fire, and thus caused it to burn the hedge and stubble."

On the whole therefore, I am of opinion that there is such a material difference between the facts of this case and the case of *Smith v The London and South Western Railway Co* (1) that the latter is no authority binding me to decide in favour of the plaintiff but, on the contrary, except under its peculiar circumstances it is an authority upholding the decision in *Vaughan v Taff Vale Railway Co* (2).

I must, therefore dismiss this suit, and as the plaintiff wholly fails, I must dismiss it with costs but of course it will be in the discretion of the defendants whether they exact such costs.

From this decision the plaintiff appealed on the following grounds ✓

That the Judge was wrong in holding that the defendant Company had power to use locomotive engines upon the Chord Line

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obtained in the Court of Common Pleas, and was after argument discharged. Upon an appeal to the Exchequer Chamber that decision was affirmed.

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But in that case there appears to me to be a particular negligence of a material character, and which is not to be found in the present case. I referred to the heaps of hedge trimmings and cat-grass raked together on the railway bank. It seems to me that the Judges in that case looked upon this collection into heaps in the light of an active proceeding on the part of the Railway Company in a slight degree comparable to strewing petroleum or other inflammable matter along the line. Had these raked together heaps not existed, I take it that every one of the Judges in *Smith v. The London and South Western Railway Co* ⁽¹⁾ would have decided that there was nothing on which to base a charge of negligence.

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(1) L. R., 6 C P, 294; S C in Ex. Ch., L. R., 6 C P, 14.

such precautions are not used there is negligence in running the locomotives see *Brand v Hammersmith Railway Co* (4) A Company is bound to use the powers given to it not in a negligent manner—*Bisco v Great Eastern Railway Co*, (1) *Freemantle v London and North Western Railway Co* (2) In the latter case evidence was given by the defendants to show that the engine was so constructed that it was unnecessary to use any safeguards or appliances which on behalf of the plaintiff it was suggested might have prevented the accident, and it was there found there was negligence on the part of the defendants in not using such appliances. If a Company has not express powers given them to use locomotive engines, they are liable for the injury done by employing them general words are not sufficient to give the power—*Jones v Festiniog Railway Co* (3) The learned Counsel went through the Acts giving powers to the East Indian Railway Company 12 & 13 Vict, c xciii, 16 & 17 Vict, c cxxvi, 19 & 20 Vict c exvi, 27 & 28 Vict, c clvii, and contended that they contained no express provision empowering the Company to use locomotives (Couch, C J—You cannot take what is said with reference to the case of *Jones v Festiniog Railway Co* (3) as applicable to such a line or railway as this MACPHERSON, J—In *Jones v Festiniog Railway Co* (3) the employment of locomotives was never contemplated by the Legislature in giving the statutory powers) See per Blackburn, J, in *The Hammersmith Railway Co v Brand*, (4) where he says that where there is no express authority to use engines, the Company might employ them, but on the terms of being liable for injury done by their use See also *Rajmohun Bose v East India Railway Co* (5) where it was held that the erection of certain workshops, etc, near the plaintiff's premises, on the ground that the nuisance had been caused by them in the reasonable exercise of powers conferred on them by the legislature (MACPHERSON J—In that case there was no necessity to erect the workshops in the particular place where they were erected, they might have been put elsewhere Here the company are obliged to run their engines over the portion of the line where the fire occurred) In the case of *Rajmohun Bose v East Indian Railway Co* (5) it is said, "It cannot be said that the

(1) L R 16 F 1, 636

(3) L R 3 Q B 733

(5) 10 B L R 241

(2) 10 C R N, S 89

(4) L R, 4 H L, 199

(6) 10 B L R, 241, at p 252

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near the plaintiff's land without being liable for injuries caused by such engines, unless caused by actual negligence on the part of the defendant Company

That the Judge was wrong in holding that the defendant Company was not guilty of negligence in the construction, management, or working of the engine which he found caused the fire, nor in the care and management of the banks of the railway near the plaintiff's land

Mr Lowe and Mr Phillips for the Appellant

Mr Evans and Mr Macrae for the Respondents

Mr Phillips contended, that the defendant Company was using their line of railway without any such powers as would render them exempt from liability in respect of the damage complained of, unless there was proof of negligence on their part. The Company employs locomotive engines at its own risk, it had no such express legislative authority to employ locomotives as would make it necessary for the plaintiff to prove actual negligence on the part of the Company. In *The King v Pease* (1) the Company had statutory authority to use engines, but that case shows that they would have been liable for the nuisance caused, if there had been no such authority, or at least they would have had to show that all practicable means had been taken to prevent it. So in *Vaughan v The Taff Vale Railway Co* (2). In that case also the Company had legislative authority to use engines, and had taken precautions to prevent damage being done by employing them. From that case it appears that if there had been no such authority, the not taking all reasonable precaution to avoid accidents would be a proof of negligence, and the Company would have been liable. (Couch, C J—It does not follow that anything short of the precautions there used would have been proof of negligence.) It is submitted so from the ground on which the decision is given. (Couch, C J—There must be negligence in using the engines, or negligence in using a badly constructed engine. If it be negligence not to use all the latest scientific appliances for preventing sparks, etc, the case of *Smith v The London and South Western Railway Co* (3) would have been decided without considering whether leaving the heaps of grass at the side of the line was negligence.) All reasonable precautions must be used, and the cases cited show that if

(1) 4 B and Ald, 30

(2) 5 H and N, 679

(3) L R, 5 C 1, 93 S C in Ex Ch, L R, 6 C P, 14

such precautions are not used there is negligence in running the locomotives see *Brand v Hammersmith Railway Co* (4) A Company is bound to use the powers given to it not in a negligent manner.—*Biscoe v Great Eastern Railway Co*, (1) *Freemantle v London and North Western Railway Co* (2) In the latter case evidence was given by the defendants to show that the engine was so constructed that it was unnecessary to use any safeguards or appliances which on behalf of the plaintiff it was suggested might have prevented the accident and it was there found there was negligence on the part of the defendants in not using such appliances If a Company has not express powers given them to use locomotive engines, they are liable for the injury done by employing them general words are not sufficient to give the power—*Jones v Festiniog Railway Co* (3) The learned Counsel went through the Acts giving powers to the East Indian Railway Company 12 & 13 Vict, c xciii, 16 & 17 Vict, c cxxvi 19 & 20 Vict c cxxi, 27 & 28 Vict, c clvi, and contended that they contained no express provision empowering the Company to use locomotives (Couch, C J—You cannot take what is said with reference to the case of *Jones v Festiniog Railway Co* (3) as applicable to such a line or railway is this MACPHERSON, J—In *Jones v Festiniog Railway Co* (3) the employment of locomotives was never contemplated by the Legislature in giving the statutory powers) See per Blackburn, J, in *The Hammersmith Railway Co v Brand*, (4) where he says that where there is no express authority to use engines, the Company might employ them, but on the terms of being liable for injury done by their use See also *Raymohun Bose v East India Railway Co* (5) where it was held that the erection of certain workshops, etc, near the plaintiff's premises, on the ground that the nuisance had been caused by them in the reasonable exercise of powers conferred on them by the legislature (MACPHERSON, J—In that case there was no necessity to erect the workshops in the particular place where they were erected they might have been put elsewhere Here the company are obliged to run their engines over the portion of the line where the fire occurred) In the case of *Raymohun Bose v East Indian Railway Co* (6) it is said, "It cannot be said that the

(1) L R 16 E L 636

(3) L R 3 Q B 733

(5) 10 B L R 241

(2) 10 C B N, S 89

(4) I R, 4 H L, 199

(6) 10 B L R, 241, at p 252

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Government, simply because in the exercise of statutory powers it has taken the land on paying its value, can create a nuisance on it to the injury of the owner of adjoining land." In Act VI of 1857, Section 24, provision was made for compensation to persons whose land was taken, the original Acts of the Company did not contemplate any damage to individuals, for they did not give them any compensation. Acts giving powers of this kind must be construed strictly against the Company, and liberally in favor of the public—*Parker v Great Western Railway Co*, (1) *Scales v Pickering*, (2) see also *Cloues v Staffordshire Potteries Waterworks Co* (3). The defendants were guilty of negligence also in keeping the grass on the bank at the height at which it was the fact of the fire having occurred by igniting the grass goes to show that the evidence of the plaintiff's witnesses in saying the grass was long is more correct than those of the defendants, who allege it was cut short.

Mr Lowe on the same side went at some length into the evidence as to the length of the grass the Company would be bound to keep it at such a length as would be reasonably likely to prevent danger from its becoming ignited by passing trains, as it had become ignited, it was a reasonable presumption that they had not done so. The defendants had dug a trench between their premises and the plaintiff's since this damage occurred, though before it had not been thought necessary to do so there was evidence of negligence on the part of the defendants.

Mr Fane, for the respondents, went at some length into the Acts under which the Company was empowered to construct the line, etc., and especially 12 & 13 Vict c xxi, and contended that the Company had power, under the provisions contained in those Acts, to run locomotive engines on their line. The word "locomotives" is used expressly in the Subscription Contract (Mr Lowe—that is not in evidence in the case). If, however, there were no express mention of locomotives contained in those Acts by giving power to construct a railway of the size and nature contemplated by the Acts, the Legislature must be presumed to have intended that power to use locomotives should be included. The length of the line and the magnitude of the works connected with it preclude the idea of its being worked without locomotives. Unless, therefore, the Legislature have wholly failed to carry out

(1) 7 M & G 253; at p 248

(2) 4 B & G 419; at p 422

(3) 5 L R, Ch, 125

their intention by words, the Company has power to use locomotive engines, and therefore, unless there was negligence on their part, they are not liable. The learned Counsel then contended on the evidence that the defendants had not been guilty of any negligence with regard to the construction of their engines: the evidence showed they were well constructed, and were similar to those in ordinary use. Taking the test of negligence as in *Blamires v The Lancashire and Yorkshire Railway Co* (1) there was no negligence in this respect on the part of the Company. Further as to the state of the banks there was no negligence with regard to them: the injury done was not of such a character as the defendants could have contemplated as the ordinary or likely consequence to result from the necessary use of their line, see *per Bovill, C J*, in *Sharp v Poell* (2).

Mr Loe in reply

Our Adj. Vult

The Judgment of the Court was delivered by

Couch, C J.—The plaintiff in this suit stated that the plaintiff was the owner of a bungalow and dwelling house, with stables and out offices thereto adjoining, at Kharmatta, in the defendants were possessed of, and had the care and management of, a line of railway, called the Chord Line, running near the said bungalow and premises with banks belonging thereto and forming part of the said railway and were possessed of locomotive engines containing burning substances, which engines were used and employed by the defendants for the drawing and propelling of carriages, wagons, and trucks along the said line of railway, yet by the negligence and improper conduct of the defendants and the want of due care and management of their said line of railway banks and engines the dry grass which was allowed and permitted to be and remain upon the railway and bank, became and were ignited by sparks of fire emitted from a locomotive engine of the defendants which with a goods train attached thereto, was driven along the line of railway near to the plaintiff's bungalow and premises without proper precautions being taken to prevent the expulsion of such sparks and fire from the engine. *PONTIFEX, J*, has dismissed the suit, and this is an appeal from his decision.

I concur with the learned Judge in the conclusion that it was shewn that the defendants had authority to use locomotive

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engines on this part of the railway. In fact the form of the plaint does not raise this question, for if the defendants had not, as was argued before us by the plaintiff's Counsel, and I believe before PONTREX, J., also, authority (by which I mean legal authority) to use locomotive engines on that part of the line, it was not necessary to make in the plaint the allegation of negligence which the plaintiff made. The plaint is drawn, as it might be expected to be, on the supposition that the East Indian Railway Company had, as I should think that everybody would conclude that they had, authority to use locomotive engines on the Chord Line. It would be extraordinary if they had not lawful authority to do so and had only power to use the line as the small line in England of the Fostonog Railway was authorized to be used.

The real question in this case is whether there was negligence on the part of the Railway Company or their servants, and in considering this I cannot do better than quote the language of Williams J., in *Freemantle v The London and North Western Railway Co.* (1) in which the subject of negligence on the part of Railway Companies, in cases like this, was fully considered, and there was a most careful summing up of the evidence by the learned Judge. Williams J., after laying down that it was necessary to prove negligence, says: "Now, gentlemen, it remains to consider what is to be regarded as negligence on the part of the Company for the consequences of which they are to be held responsible. Now, as to that, the Company, in the construction of their engines, are not only bound to employ all due care, and all due skill, for the prevention of mischief accruing to the property of others, by the omission of sparks or any other cause, but they are bound to avail themselves of all the discoveries which science had put within their reach for that purpose, provided that they are such as, under the circumstances, it is reasonable to require the Company to adopt." Upon an application to the Court of Common Pleas for a new trial in that case, the learned Judge held that the summing up to the jury was quite correct, and that no fault could be found with it.

In a later case Sir William Ilke laid down the rule as to negligence. In *Ferri v London and South Western Railway Co.*, (2) that eminent Judge said: "A Railway Company is bound to use the best precautions in known practical use to secure the safety

of their engines, but not every possible precaution which the highest scientific skill (according to speculative evidence) might have suggested. In a still later case before Keating, J.,—*Dimmock v North Staffordshire Railway Co* (1)—the jury found that there had been no negligence on the part of the Company, in the omission of means to prevent the emission of sparks from their engines, the means suggested being such as practical men stated would impede the engines and would not be effectual for the object. This I consider is the law as to the liability of Railway Companies for the emission of sparks or fire caused by the use of their engines.

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In the present case there certainly is not evidence that the engine, which was used on this occasion, was negligently constructed and different from the engines of the best construction which are now in use. The witnesses show that it was an engine of the best construction of the kind, and that no appliances were omitted which, under the circumstances, it would be reasonable to require the Company to adopt. It appears to me that both in respect of the construction of the engine and the mode in which it was used by the servants of the Company at the time, there was no evidence of negligence which would make them liable for the consequences of the fire.

But the Company are bound not only to use due care in the construction and use of their engines, but also to use due care in keeping the line of railway and the land belonging to them on each side of it in a proper state. This appears from the case of *Smith v London and North Western Railway Co* (2) which is referred to by PONTREX, J., in his Judgment, where it was sought to make the Railway Company liable, not on account of any defect in the construction of the engine or of not adopting means to prevent the emission of sparks or the falling of live cinders from the ash pan, but because the servants of the Company had allowed dry grass to be on the land of the Company on each side of the railway in what was alleged to be a negligent manner, and that thereby the fire was caused which burnt the plaintiff's cottage. Bovill, C J., in his Judgment in that case, says "Seeing that the defendants were using dangerous machines, that they allowed the cuttings and trimmings to remain on the banks of their railway, in a season of unusual heat and dryness and for a time

(1) 4 F & F, 1038

(2) L R 5 C P, 29 at p 106

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which, under these circumstances, might be fairly called unreasonable, and that there was evidence from which it might reasonably be presumed that their engines caused the ignition of those combustible materials, and that the fire did in fact extend to the cottage, I think it is impossible to say that there was not evidence from which a jury might be justified in concluding that there was negligence as regards the plaintiff, and that the destruction of the cottage in which the plaintiff's goods were was the natural consequence of their negligence.

Now, in considering whether there was due care in keeping the land of the Company on each side of the railway in a proper state, we must keep in mind (as is said by Bovill, C J,) that if the Company are using an engine which emits sparks and causes a risk of fire, it is incumbent on them, although they may be entitled to use it, to keep the line of railway in a proper state with reference to such danger. We have therefore to consider whether, on the evidence in this case, the plaintiff has shown that there was negligence on the part of the servants of the Company in the manner in which the grass had been cut and the state in which it had been allowed to remain up to the time when the fire happened.

The plaintiff's witness, Ahoo Khan said that "when the grass was cut, about two feet from the root were left and the top only was cut. When the grass was cut, it was about the height of a man. It was cut to thatch bungalow, and for what other purpose I don't know." In another part of his evidence he said "The railway grass has been cut about two months before the fire, about 2 feet were left, the top was cut off. It was dead, and was dry grass." The next witness, the Mallee, said, that "the grass was jungly grass—straw stumps of jungly grass, of which the top had been cut off about 2 feet was the height of the stumps." The other witnesses, for the plaintiff Balokee, Jeetun Mundle, and Dooluh Roy, all depose to the same effect. In fact there was a similarity in this respect in the evidence of the plaintiff's witnesses, which is not at all unusual in this country.

A witness for the defendants, the engine driver, said, "the grass was from six inches to a foot high." Brownsmith, the guard, spoke of it as about two feet high. As to him, part of his evidence is such that it cannot be believed. When he spoke about the fire, he wished it to be believed that it had actually

broken out before the train arrived at the spot. That part of his evidence is to my mind, utterly untrustworthy. It is, however, possible that when he spoke of the height of the grass, he was saying what he believed to be true.

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Mr Roberts, a very important witness, the gentleman who had charge of that part of the line, said on this subject,—“at the time the fire took place the grass on the Railway Company’s land was from six to eight inches long as far as the fence. On the steep slope, it was six to eight inches long. On the right slope it was eaten down by cattle. The grass on the embankment had been cut before,—about a fortnight before. I don’t know personally who cut it. I had given leave to my Baboo to cut it.” The Baboo was not called. It would have been more satisfactory if we had heard what he had to say. But Mr Roberts appears to me to be a gentleman whose evidence may be fully trusted, and POTTER, J., remarks in his Judgment, that he did not appear to be in any way hostile to the plaintiff. It would not be right to infer from his being a servant of the Railway Company, and holding the position which he did at this time, that his evidence is given more in favour of the Railway Company than he justly believed it should be. I place considerable reliance on what Mr Roberts has said. Then Mr Prestage, who is a gentleman of considerable experience and whose evidence on this matter is from his position very valuable, says, that “the Railway Company could not engage at reasonable cost to keep the bank free from grass.” He showed that the question is at what height the grass should be allowed to remain after it has been cut, and said that on his railway the grass would be left at from six to eight inches in height. This is what Mr Roberts speaks to, and is the height at which in my opinion it was left at this place.

There is another witness whom I have not yet noticed, who may help us in coming to a conclusion on this point,—Mr William Halford, the brother of the plaintiff, who went to the place five days after the fire. It occurred on the 24th of March, and he says that he arrived at the place on the 29th. Now I think it cannot be supposed from the evidence in the case that the fire had burnt the grass on the line of railway in every place so completely that if, as the plaintiff’s witnesses say, it was left two feet high, there would not have been on some parts of the bank,—perhaps not close to where the plaintiff’s bungalow had been, but in other parts,—grass of that height. It is not likely

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that in cutting the grass they would only leave that part of it which was near the bungalow, and where the fire happened, two feet high and cut it lower in other parts. It appears to me improbable that if, on the 29th of March, when Mr William Halford went to the spot, there had been any appearance of the grass having been in the state which the plaintiff's witnesses describe, he would not have noticed it. It is possible that he might not, but it appears to me improbable that when he came down to look at the effects of the fire which had destroyed his brother's property, and which would he immediately supposed to have arisen from an engine on the railway, he would not have observed any appearance, if there were any, of negligence on the part of the Railway Company in the state in which the grass had been left. He said fairly that he did not recollect noticing anything of the kind. He said "The cleared remains which I saw at the railway premises appeared to me to have been grass, I don't recollect what was the length of the grass which was not burnt. There was no appearance of any grass having been burnt on the road. As far as appearances went, it appeared that there were two distinct fires altogether, one on the railroad and another on our premises." This agrees with the evidence that there was a portion of land, where the road was, which was free from grass, or on which the grass was so slight that there would not be any appearance of fire. It appears to me therefore that Mr William Halford, in the absence of any recollection of the appearance of the grass where it had not been burnt, confirms the evidence which Mr Roberts gave as to the state in which the grass was left. It was incumbent on the plaintiff, who charges that the fire was caused by the negligence of the defendants, to satisfy the Court that there was negligence. And if the case is left in such a state, and the evidence is so evenly balanced, that it is impossible for the Court to say that there was negligence, we should not be justified in making the defendants liable. We must be satisfied that they were guilty of negligence before we can make them liable for the consequences of the fire, however unfortunate that may be for the plaintiff. We cannot help sympathizing with a gentleman who has suffered a loss like this, but still we must see whether it is made out by the evidence that there was negligence on the part of the defendants. I think it has not been made out. The evidence does not satisfy me that the grass was left in the state which is described by the plaintiff's witnesses or in a state other than

what Mr Prestago says it might fairly and reasonably be left. And the fact that we are asked to reverse the decision of the Judge who tried the case, must not be left out of consideration. Upon the whole, therefore, after carefully going through the evidence in this case, and considering it, I am unable to say that the decision of POWELL, J., is wrong, and I think that the appeal ought to be dismissed with costs.

Appeal dismissed

Attorneys for the Appellant *Messrs Berners, Sanderson, and Upton*

Attorneys for the Respondents *Messrs. Chauntrell, Knowles, and Roberts*

The Bombay High Court Reports, Vol. VI. Page 116.

APPELLATE CIVIL

Before Couch, C. J., and Lloyd, J.

TAPIDAS GOVINDBHAI (APPELLANT)

v.

THE B B & C I RAILWAY COMPANY (RESPONDENTS) *

THE B B & C I RAILWAY COMPANY (APPELLANTS)

v.

TAPIDAS GOVINDBHAI (RESPONDENT) *

Land taken up for Railway Company—Damages caused to adjoining lands—Separate suit when maintainable—Compensation—Act VI of 187

1869
June, 16

When land is taken up for a Railway Company under Act VI of 1857 the owner should claim for all damages likely to be caused to his adjoining lands by the works of the Company, and no suit will lie for damages so caused if they could reasonably have been foreseen at the time of the fixing of compensation.

Whether such damages could reasonably have been foreseen or not is a question of fact to be determined by the lower Courts.

THESE were cross Special Appeals from the decision of W HUNTER, Acting Judge of the Konkan District at Thana, in Appeal Suit No 173 of 1868, reversing the decree of the Munsif of Bissein

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Tapidas Govindbhai sued the Bombay, Baroda & Central India Railway Company to recover damages caused, from the year 1863 to the year 1866, to the fields and crops of the plaintiff by reason of the defendants having failed to provide a proper passage for the waters of a certain creek

The defendants' railway adjoined the land of the plaintiff on the eastern side, and, when the rains came down, led to a vast accumulation of the creek waters which were thus thrown back upon the lands of the plaintiff and caused the injury complained of

The defendants pleaded, *inter alia*, the law of limitation as to the damages that accrued for the first three years, that culverts and openings had been provided where necessary, that the line had been constructed under the sanction of Government, that the suit was not maintainable against the Company, as it had not been provided in the Act incorporating the Company that they should be responsible for such damages

The Munsif of Bassem rejected the claim, but in appeal the Acting District Judge reversed his decree, and awarded to the plaintiff Rs 297 8 for injury to the crops of 1866, together with Rs 0 4-6 for expenses incurred by the plaintiff, on the grounds stated at length in appeal No 38 of 1868(1). The District Judge rejected the claim of the plaintiff for the injury caused to his crops for the preceding years. The following is an extract from the finding of the Judge in Appeal Suit No 38 of 1868 —

"Although I have held that the plaintiff cannot claim a servitude from the Railway Company's land, nor demand that an outlet for this water should be made through their line, still I think he can claim damages for the injury which has been shown to have been caused to his crops through the negligence of the Railway Company in omitting to provide sufficient waterway at this spot in the construction of their line. It has been urged that according to Section 24 of Act VI of 1857 the compensation originally awarded to the plaintiff for the land that was once his and is now the Company's must 'include any damage which may be sustained by any of the persons interested therein in respect of any adjoining land held therewith,' and that this fact must constitute a bar to the claim, but in the case of *Laurence v The Great Northern Railway Company*, (2) where by the construction of the

railway, without sufficient openings, the flood waters could not spread themselves as formerly, but were penned up and flowed over a bank upon the plaintiff's lands, it was held that, though there was no express clause in their Act obliging the Railway Company to make openings for flood waters in that district yet that an action would lie against the Company for the injury to the plaintiff's lands, and that, though the amount of compensation awarded covered all damage known or contingent by reason of the construction of the railway on the lands purchased, and all other damage arising from the construction of the railway at other places, which was apparent and capable of being ascertained and estimated when the compensation was awarded, yet that it did not include any contingent and possible damage which might arise afterwards by the works of the Company at other places which could not have been foreseen by the arbitrator. Now, in the case before us, although the flood waters of the two years in question were unusually large, the evidence shows that these floods have occurred more or less in each year, and caused damage to the crops sown in this land in each year, until the Railway Company recently made an outlet through that part of their line, ostensibly to carry off the water that stagnated within their own limits, but just as probably to obviate the damage caused by the flood to the crops of the adjoining land for want of an outlet, at any rate an outlet exists now which did not exist when the damage in question occurred, and as the damage could have been obviated, as is proved by the plaintiff's witnesses, by the construction of an outlet in the first instance, I think I must hold that this was a contingent unforeseen damage for which no provision was secured by the Government from the Railway Company, and which therefore was not covered by the amount of compensation awarded to the plaintiff, and that the Company have, by a negligent exercise of their statutory powers, and by a disregard of the maxim *Sic utere tuo etc.*, rendered themselves liable for the damage sustained by the plaintiff as a result of their negligence—(Addition on Wrongs, Chapter XVI) The plaintiff, therefore, has a right of action."

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The Special Appeals were heard this day before COHEN, C J, and LLOYD, J

Green (with him Winter) for the Appellant, in the second appeal (and with him Shantaram Narayan) for the Respondents in the first. These damages should have been claimed and

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determined at the time when the amount of compensation for the plaintiff's land taken for the Company was fixed under Section 24 of Act VI of 1857, since floods are of annual occurrence, and the damages likely to be caused by them could have been foreseen and estimated. That is the principle deducible from the cases decided in England under Section 63 of the Lands Clauses Consolidation Act (8 and 9 Vict., c. 18), and that section does not materially differ from Sections 24 and 25 of Act VI of 1857.

Nanabhai Haridas for the Appellant in the first appeal, and Respondent in the second. Whether the damages were foreseen or not is a question of fact, and the Judge has decided that they were unforeseen.

Couch, C.J. — In *Chamberlain v. The West-End of London and Crystal Palace Railway Company*,⁽¹⁾ Lord Chief Justice ERLE observed: "It is well-known law that under these statutes a party must make one claim for damages, once and for all, for all damages that can reasonably be foreseen, and have one inquiry and one compensation." The question therefore which the Judge ought to have determined in this case was, whether at the time the compensation was awarded for the land taken the damages to the adjoining land could reasonably have been foreseen. If they could have been, the only mode in which the plaintiff could have obtained compensation would have been by the award under Section 24 of Act VI of 1857, and the decree therefore ought to have been for the defendant, but if the damages could not reasonably have been foreseen, the decree ought to have been for the plaintiff, since the compensation awarded for the land would in that case be no bar to the present suit. Now it is really a question of fact whether the damages could have been foreseen or not. The language of the Judge below, however, does not amount to a finding on the point; since he says—"I think I must hold that this was a contingent unforeseen damage for which no provision was secured by the Government from the Railway Company." He does not say that the damages could not have been foreseen. The finding is not to my mind sufficient. We should be justified in deciding the case if the evidence was of such a nature as that it could not have supported the finding at all; but I am not prepared to say that such is the case here.

We must, therefore, confirm that portion of the decree appealed against in suit No 74 of 1869 with costs, and reverse that portion of the decree appealed against in suit No 84 of 1869, and remand the case for retrial with reference to the above observations

Decree reversed and case remanded

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The Indian Law Reports, Vol. XXVII. (Bombay)
Series, Page 344.

PRIVY COUNCIL

PRESENT —Lord Macnaghten, Lord Iandley, Sir Arthur
Wilson, and Sir John Bonser.

THE GAEKWAR SARKAR OF BARODA

AND ANOTHER, DEFENDANTS

v.

GANDHI KACHRABHAI KASTURCHAND, PLAINTIFF

Railway Company—Negligence in construction of Railway—Suit for damage to land by causing water to flood it—Indian Railways Act (IX of 1890) Sections 7 12—Acting in excess of statutory powers in construction of Railway—Suit for damages 1902 Nov., 20 21 1903 February, 10

The defendants, by the negligent construction of a Railway made in exercise of their powers under the Indian Railways Act (IX of 1890) caused the plaintiff's land to be flooded in the rainy season and consequently damaged. That Act provides that a suit shall not lie to recover compensation for damage caused by the exercise of the powers thereby conferred, but that the amount of such compensation shall be determined in accordance with the Land Acquisition Act, 1870

Held, it being shown that the defendants had exceeded or abused their statutory powers, that the plaintiff's remedy was by suit for damages, and not for compensation under the Act

Statutory powers under such an Act are to be exercised with ordinary care and skill and with some regard to the property and rights of others: they are granted on the condition sometimes expressed and sometimes understood—expressed in the Railways Act of 1890, but if not expressed always understood—that the undertakers “shall do as little damage as possible in the exercise of their statutory powers

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Lawrence v Great Northern Railway Company (1) *Broadbent v Imperial Gas Company* (2) *Bagnall v London and North Western Railway Company* (3) *Riclet v Metropolitan Railway Company* (4) and *Geddis v Proprietors of the Bala Reservoir* (5) referred to

APPEAL from a decree (12th February, 1900) of the High Court at Bombay, which affirmed with modifications a decree (17th April, 1899) of the Subordinate Judge of Ahmedabad in favour of the respondent in a suit in which he was plaintiff. The suit was brought for damages for injury alleged to have been caused in 1894, 1895 and 1896 to the plaintiff's fields by the negligence of the defendants in the construction and working the Viramgam Mehsana Railway, which was owned by the first defendant, the Gaekwar of Baroda, and had since it was opened been under the control and management of the second defendant, the Bombay, Baroda and Central India Railway.

The plaint, filed on 17th June, 1897, alleged that the plaintiff was owner and occupier of certain fields near and in the village of Kokta under Viramgam, that the Gaekwar of Baroda in or about 1891 caused to be constructed and opened for traffic a Railway line between Viramgam and Mehsana, a portion of which line was on an embankment and lying within the village of Kokta, that the second defendant had worked and managed the said Railway line under an agreement of 17th June, 1893, made between the Government of the Gaekwar and the second defendant, that in the course of constructing the Railway the defendants made on each side of the embankment between Dabhla, some four miles north of Kokta, and Kokta, excavations or burrow pits from which to supply the earth necessary to make the embankment for the line, that the burrow pits when first made had divisions of earth between them, but from the neglect or other acts or omissions of the defendants, such divisions were removed or destroyed or washed away, so that such burrow pits formed continuous water courses or gutters on each side of the embankment, extending at least from Dabhla to Kokta, down which in the rainy season the water flowed, that prior to the construction of the said Railway, during the rainy season, the surface water from the villages of the first defendant, the Gaekwar of Baroda, in the Kadi Pargana, lying to the north of Kokta, passed west

(1) (1851) 16 Q B 643

(2) (1857) 7 D G M C G, 436

(3) (1861) 7 H L N 423 (1862) 1 H & C 514

(4) (1867) L R, 2 E & I App. 175 (202) (5) (1878) 3 A C 430 (450)

ward from Kariana to Chinotlia and thence away to the west and never reached Kokta, but after the construction of the Railway embankment which ran between Chinotlia and Kariana, and in consequence of the insufficiency of the culverts and waterways provided by the defendants, and in consequence of their negligence in permitting the formation of the said gutters, the flow of such surface water had been altered and it now was discharged and overflowed on to the plaintiff's fields at and near Kokta that in consequence of the flooding of his land the plaintiff had been compelled to relinquish some of his fields, had had to sell others at small prices, and the remainder had for the most part become incapable of cultivation and the crops raised on them had suffered material damage

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The plaintiff therefore claimed as damage, Rs 29,050, and prayed also for an injunction and decree directing the defendants to make arrangements by which the rain-water in the monsoon should pass by Kariana to the west as it formerly did and should not cause injury to the plaintiff's fields

The defendants, in their written statement, denied the plaintiff's allegations as to the damage and put him to proof of them. They also pleaded that if the plaintiff has suffered any damage he should have proceeded in accordance with the provisions of the Indian Railways Act (IX of 1890) and not otherwise, and that the suit was not maintainable, that under the provisions of Section 10 of the said Act the plaintiff was debarred from bringing his suit, that if the plaintiff had suffered any damage, such damage could have been foreseen, and should have been assessed under the provisions of Section 10 of the said Act and the Land Acquisition Act (X of 1870), that any damage was caused by the heavy rainfall and that such rainfall being due to the act of God, the defendants were not liable, that the suit was barred by the Indian Easements Act (V of 1882), and that the line of Railway having been constructed with all such accommodation works as in the opinion of the Governor-General in Council were necessary and sufficient under the provisions of the Indian Railways Act (IX of 1890), Section 11, the Court had no jurisdiction to grant an injunction or pass a decree as claimed by the plaintiff

The issues raised these defences

The Subordinate Judge of Ahmedabad found that the damage had been caused to the plaintiff's fields by the negligent and

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careless construction and management of the Viramgam-Mehsana Railway, and by the hurrow pits that had been made to supply earth for the embankment having been permitted to become channels through which the water flowed southwards, and held that the plaintiff was not debarred by any provisions of the said Acts from maintaining his suit. He gave the plaintiff a decree for Rs 17,507-6-8 and ordered that the defendants should within six months raise a construction on their line to the north of Kokta, and make the necessary arrangements to prevent the water going to the gutters, side-cuttings and trenches of the Railway, and flooding the plaintiff's land.

From that decision the defendants appealed, and the High Court (*Parsons and Ranade, J J*) varied the decree of the Subordinate Judge only as to the amount of damages, giving a decree for Rs 12,132. In other respects they confirmed the decree of the Lower Court.

As to the question that the suit was not maintainable, the High Court said

PARSONS J —The next objections taken, on behalf of the defendants, are based on Sections 10 and 11 of the Railways Act. It was argued that compensation should have been asked for under Section 10, and that the present suit will not lie. The answer to the argument depends on the answer to the question, namely, in doing what they have done in the present case have the defendants been exercising the powers conferred on them by either Section 7, Section 8 or Section 9 of the Act? Sections 8 and 9 have no application and can be disregarded. Section 7, clause (a), gives the power to make embankments, culverts, &c. No compensation, however, has been awarded in respect of the exercise of these powers. Clause (b) gives power to divert and alter the course of rivers, brooks, streams or water courses, or raise or sink the level thereof in order the more conveniently to carry them over, or under or by the side of the Railway. The defendants have not exercised these powers, because, as found by the Subordinate Judge, no water course exists, and it is the flow of surface water only that has been obstructed and diverted. Even, however, if it be assumed, that the course of flow of this surface water from Karina to Chauthia and thence westward amounted to a water course, I fail to see how the act of the defendants in allowing the water to flow for some four miles by the sides of their line and then discharging it on to the land of the plaintiff can be said to have been an exercise of the power conferred by this clause. It was evidently not the intention of the contractors of the line to so divert the flow of water. They intended that it should flow, as before, to the west, and for that purpose they made a culvert in the embankment at Dabha. This apparently answered its purpose, because for some years we find no complaint was made, and the water was not turned south. The cause of the diversion

evidently was the negligence of the defendants in allowing the excavations on the sides of the line that had been made to supply earth for the embankments to become channels for the water to flow southwards. Had it not been for this negligence it is clear, as I have before said, that all the water that had actually passed through the culvert would have pursued its original course and although there might have been an accumulation of water on the east of the line that unless very large, would not have flowed down south. Again Section 10 can only be applicable to damage which was the result of the exercise of the power and could have been foreseen. Here the power exercised was the erection of an embankment and the making of a culvert. This did no injury, it might reasonably have been supposed that the culvert had been made sufficiently large to carry off the water. The chief if not the sole, cause of the injury, namely, that the side trenches were allowed to become water courses was quite unconnected with the exercise of any power conferred by Section 7 and was the result of negligence, that could not have been foreseen the mischief probably growing worse only gradually year after year.

I am, therefore of opinion that the present is a case in which the plaintiff could not have asked for any compensation under Section 10 and that the suit is not barred by it.

It is a little difficult to understand the ground of the objection taken, that the suit would not be having regard to the terms of Section 11 of the Act. That section says that a Railway Administration shall make such accommodation works 'as will, in the opinion of the Governor General in Council, be sufficient at all times to convey water as freely from or to the lands lying near, or affected by, the Railway as before the making of the Railway, or as nearly so as may be. There may be force in the argument that the law has thus left it to the Governor General in Council to decide upon the sufficiency of the works to be erected for the purpose specified, and that the person, whose lands might be affected by insufficient works, must apply to that authority for redress and could not sue in a Civil Court either for damages for what he alleged to be the result of insufficient accommodation or for an order directing additional works to be constructed but this argument clearly cannot apply to the plaintiff. The purpose stated in the section for which the works are to be constructed is to convey water as freely as before from, or to certain lands, and the aggrieved person is the owner of those lands. The lands of the plaintiff, before the making of this Railway, had the water from Kariana conveyed neither to, nor from them. He could, therefore, have made no application in respect of them. There is no provision in the Act for recovery of compensation for damage caused by the construction or non construction of the works enumerated in this section. If, therefore, persons who own lands other than those mentioned in the section are injured their remedy must be the ordinary one by suit, and there is nothing in the Act which bars this remedy, still less can there be any bar to the present suit, in which the plaintiff alleged and has proved injury not so much by the construction or non construction of accommodation works as by the construction of the Railway here itself generally, and especially by the negligence in that the line was allowed to become a

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channel for discharging on to his land water which, before the construction, never came near it

RAVADÉ, J. —The fact of negligence being thus proved, the question of law, whether plaintiff was entitled to bring this suit for damages and in junctions, has next to be considered. It is quite plain that, if there had been no proof of negligence and the injury had been the unavoidable result of the proper exercise, by the Railway Company, of the powers vested in it by law, the defendants would have been protected from any civil suit, even if damage had resulted from the exercise of that power. Section 10 of the Act expressly provides that as little damage as possible should be done in the exercise of powers conferred by sections 7, 8 and 9 and that a suit shall not lie to recover compensation, and plaintiff's remedy would obviously be to apply to the Governor General in Council, who alone is vested with control over these matters. If special or larger accommodation works were needed, that relief also could be claimed only under section 11 or under section 12, but by means of an appeal to the same authority. The case is, however, altered when the act, which has caused the damage is not the result of a proper exercise of the powers conferred, but is due to the neglect or carelessness of the Railway Company in the execution of its powers. The distinction has been well illustrated in the case of accidental fires caused by a spark. Where the damage done by the spark was not shown to have been the result of negligence, the Company was held not to be liable, the reason assigned being that when the Legislature sanctioned and authorized the use of a particular thing, and it is used for that purpose, the sanction carries with it the consequence that, if damages result from it, the Company is not responsible. *Vauhan v Taff Vale Railway Company* (1) and *Halford v The East Indian Railway Company* (2). But where negligence is proved in the matter of a fire caused by the spark, the damage done was held to be actionable. Action lies even for authorized acts if they are done negligently. If the damage could have been prevented by the reasonable exercise of powers conferred, it was held to be a case in which an action can be maintained. The decision in *Rylands v Fletcher* (3) may also be consulted with advantage on this point. Applying this principle, the defendants in this case are obviously not protected, as the damage is proved to be the result of their Agent's carelessness and neglect. Neither Section 10 nor Section 12 of the Railways Act prevents such a suit. In the present case, the Governor General in Council has expressly permitted this suit, as one of the parties is His Highness the Gaskwar of Baroda and it is not likely that this permission would have been granted if the Government had been satisfied that other relief could be given to the plaintiff under the provision of that Act. I, therefore, agree with Mr Justice Pious on both the points raised in this appeal.

F Balfour Browne, K C, and *Mayne* for the Appellants

J Jardine, K C, and *Kenyon S. Parker* for the Respondents

(1) (1860) 5 H & N 679

(2) (1874) 14 B L R 1.

(3) (1868) L R, 3 E & I App, 330.

The contentions on behalf of the appellants are sufficiently stated in their Lordship's Judgment. The Indian Railways Act (IX of 1890), Section 10 and 11, was referred to.

Counsel for the Respondents were not heard.

The Judgment of their Lordships was, on the 10th February 1903, delivered by—

LORD MACNAGHTEN—The respondent, who was plaintiff in the suit, is the owner of lands in the village of Kokta and its neighbourhood. He complained that since the making of the Mohana Viramgam Railway his lands had been flooded in the rainy season. The Railway, which was constructed by the Gaekwar of Baroda, was finished in 1891. Ever since it has been under the control and management of the Bombay Baroda and Central India Railway Company, by whom it is still worked. The respondent brought his suit against the Gaekwar with the consent of the Governor General in Council as required by Section 433 of the Civil Procedure Code and also against the Railway Company. His case was that the mischief of which he complained was occasioned by the negligent manner in which the works of the Railway had been constructed and maintained. He claimed damages and an injunction.

The Subordinate Judge of Ahmedabad and the High Court of Judicature at Bombay both found in favour of the respondent on the question of negligence and concurred in awarding damages and an injunction, though the damages assessed by the Subordinate Judge were reduced in amount by the High Court. Both defendants appealed to His Majesty. But the Railway Company did not lodge a case or appear by counsel to support their appeal.

The concurrent finding of the two Courts was hardly disputed before this Board. The negligence proved appears to have been of a very gross character. Before the Railway was made the surface water of a district four miles distant from Kokta which was abundant in the rainy season, used to pass away to the westward without coming near the respondent's lands. The Railway, which there runs north and south, was constructed on an embankment. The embankment was designed with so little skill that no proper provision was made for the passage of the surface water. The greater part of it being obstructed by the embankment flowed down by the east side of the line and drowned the respondent's lands. The mischief was increased by the fact that

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serious excavations or burrow pits, as they are called, from which earth had been taken to form the embankment, were turned into a continuous channel by the action of the water washing away the barriers left between them. A similar thing happened on the other side of the Railway and some of the water that did pass through the embankment ran down a channel formed on the western side of the line also found its way on to the respondent's lands.

The Railway was constructed under the Indian Railways Act, 1890, and is subject to the provisions of that Act.

The Act of 1890 provides that a suit shall not lie to recover compensation for damage caused by the exercise of the powers thereby conferred, but that the amount of such compensation shall be determined in accordance with the provisions of the Land Acquisition Act, 1870. It also provides that the Governor General in Council is to determine in case of difference what accommodation works are required for the convenience of adjoining owners.

In these circumstances their Lordships were much surprised to hear the arguments addressed to them at the Bar. The leading counsel who appeared for the Gaekwar contended, first, that inasmuch as the Act of 1890 authorized the undertakers to construct all necessary embankments, this embankment as constructed was an authorized work and that the statutory authority conferred by the Act of 1890 (though in fact no statutory authority was required by the Gaekwar for the construction of an embankment on his own land) actually protected the Gaekwar from any claims connected with or arising out of negligent or defective construction. In the second place he contended that although the statutory authority of the Act of 1890 might have been abused or exceeded, no suit would lie, and that the respondent's only remedy was by proceeding for compensation under the Land Acquisition Act, 1870. And, lastly, he gravely argued that what the respondent really required in order to protect himself from the mischief caused by the negligence of the appellants was some additional accommodation works or something in the nature of accommodation works which it was the respondent's business to define and submit for the approval of the Governor General in Council.

It would be simply a waste of time to deal seriously with such contentions as these. It has been determined over and over again

that if a person or a body of persons having statutory authority for the construction of works (whether those works are for the benefit of the public or for the benefit of the undertakers, or, as in the case of a Railway partly for the benefit of the undertakers and partly for the good of the public) exceeds or abuses the powers conferred by the legislature, the remedy of a person injured in consequence is by action or suit and not by a proceeding for compensation under the statute which has been so transgressed. Powers of this sort are to be exercised with ordinary care and skill and with some regard to the property and rights of others. They are granted on the condition sometimes expressed and sometimes understood—expressed in the Act of 1890, but if not expressed always understood—that the undertakers “shall do as little damage as possible” in the exercise of their statutory powers. *Laurence v The Great Northern Railway Company*, (1) *Broadbent v The Imperial Gas Company*, (2) *Ricket v Metropolitan Railway Company*, (3) *Giddis v Proprietors of the Baun Reservoir*, (4) *Bagnall v London and North-Western Railway Company* (5)

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Their Lordships are, therefore, of opinion that the appeal must be dismissed, but they think that it will be better that the injunction should be in general terms restraining the defendants from flooding the lands of the respondent or causing or permitting them to be flooded by the works of the Melsan-Viramgam Railway. It would be inconvenient if the Court were to direct the execution of specified works which it has no power to supervise, which might not be approved by the paramount authority, and which after all might not effect the object in view.

Their Lordships will, therefore, humbly advise His Majesty that with this variation the order appealed from should be affirmed and the appeal dismissed. As regards costs, the order will be against both the appellants.

Appeal dismissed

Solicitors for the Appellant—*Messrs Dollman & Pritchard*

Solicitors for the Respondent—*Messrs Holman & Birdwood & Co*

(1) (1851) 16 Q B 613

(2) (1857) 7 D & G M & C, 436.

(3) (1867) L R., 2 E & I App 175 (204)

(4) (186) 3 A C 430 (455)

(5) (1861) 7 H & N, 423, (1862) 1 H & C, 544

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Page 632.

APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, and
Mr. Justice Moore.*

SELTAMRAJU KONDAL ROW (SECOND PLAINTIFF), APPELLANT,

v.

THE COLLECTOR OF GODAVARI ON BEHALF OF THE
SECRETARY OF STATE FOR INDIA (DEFENDANT),

RESPONDENT *

1001
December, 4

*Indian Railway Act—Act IX of 1890, Ss 7, 10, 11—Compensation for
damage caused by Railway works—Suit to enforce construction of a
channel to irrigate land—Maintainability*

Plaintiff alleged that the execution of certain works by a Railway Company, under Section 7 of the Indian Railway Act had interfered with his right to the flow of water to his land. He did not suggest that the Company had exceeded the powers conferred on them by that section but claimed that they had failed to discharge the obligation imposed by Section 11 (b) of the Act, to make the necessary accommodation works and sought a decision of the Court that such works should be executed.

Held that he had no right of action. The effect of Section 11 of the Indian Railway Act is that the opinion of the executive with reference to the sufficiency of accommodation works, is final.

SUIT for a decree directing the defendant to construct a new channel for the purpose of irrigating plaintiff's land. The plaintiff alleged that, owing to the works made by the Railway authorities, the usual flow of water from the Vntlur tank had been checked and that his land had in consequence been lying fallow. He claimed that a channel should be constructed to irrigate the land and sought to recover the amount of profits which he had lost by reason of defendant's interference. The defendant admitted

* Second Appeal No 692 of 1900 against the decree of T. H. Munro Acting District Judge of Godavari in Appeal Suit No 695 of 1899 confirming the decree of V. Lakshminarasimham District Munsif of Ellore, in Original Suit No 457 of 1893.

that some obstruction had been caused to the irrigation of plaintiff's land but pleaded that as soon as plaintiff had complained, the Railway department had done all that he had required. He also alleged that a dam had been properly constructed for plaintiff in masonry and that he had offered to give any further relief that plaintiff might reasonably require but that plaintiff had not availed himself of that offer. He contended that under Section 10 (2) of the Indian Railway Act (IX of 1890), no suit lay for the recovery of the compensation claimed. An issue having been framed on this point, the District Munsiff said —

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‘ I am of opinion that this suit must fail. The suit for that portion which relates to compensation is not maintainable under Article 2 of Section 10 of the Railway Act (IX of 1890). Plaintiff's remedy must, in case of dispute, be determined on application to the Collector. Also, the other portion of the suit relating to the accommodation work is prohibited by Section 41 of the Act. Section 11 of the Act lays down the procedure to be observed by the Railway Administration in regard to the works intended for the accommodation of the occupiers of land adjoining the Railway like plaintiff. If any owner or occupier feels dissatisfied with the works made for him, the only course open to him is to apply to the Railway Administration for such further accommodation works as he thinks necessary and are agreed to by that administration, or, in case of difference of opinion, as may be authorized by the Governor General in Council. If the work done for him was really insufficient for the commodious use of plaintiff's land, he ought to have applied for further works instead of rashly proceeding to Court, especially in this matter in which the Collector deputed a subordinate to ascertain plaintiff's wishes (a fact not denied for plaintiff), but he did not avail himself of that opportunity, and he alleges his illness as an excuse. If he was really then ill, he might since have asked for the same as the Collector seems to have been inclined to attend to plaintiff's reasonable wishes.’ He dismissed the suit. Plaintiff appealed to the District Judge, who dismissed the appeal.

Plaintiff proffered this second appeal

P Nagabhushnam for Appellant

The Government Pleader for Respondent

JUDGMENT — ‘ I he plaintiff apparently asks for a decree directing the defendants to construct a new channel for the purpose of

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irrigating his land The Railway Company, in the execution of the works authorized by Section 7 of the Indian Railway Act have, the plaintiff alleges, interfered with his right to the flow of water to his land It is not suggested that the Company acted beyond the powers conferred on them by Section 7 If, as the result of the exercise of these powers, the plaintiff has sustained damage, he can recover compensation if he adopts the special procedure prescribed by Section 10 The plaintiff, however, does not ask for compensation but says the Railway Company have failed to discharge the obligation imposed by Section 11 (b) to make the necessary accommodation works and he asks the Court to decide that such works shall be executed Under the English Railway Clauses Act 8, Vic, chap 20, differences as to the sufficiency of accommodation works are decided by two Justices (see Sections 69 and 70) But the wording of Section 11 of the Indian Act makes it clear that the Indian Legislature intended that the opinion of the executive, with reference to the sufficiency of accommodation works, should be final

We must hold the plaintiff has no right of action

The second appeal is dismissed with costs

The Bengal Law Reports, Vol. X Page 241.

ORIGINAL CIVIL

Before Mr Justice Macpherson.

RAJMOHUN BOSE AND ANOTHER,

v

THE EAST INDIAN RAILWAY COMPANY

1872
September
9 to 13 and
November 18

Jurisdiction—Letters Patent 1863 & 12—Act VIII of 1863 S 5—Suff for Land—Nuisance—Acts done under Powers conferred by the Legislature—Reg I of 1824—Act XLII of 1860—Land taken for Public Purposes—Injunction—Decree—Time to abate Nuisance—Liberty to apply

The plaintiffs the owners and occupiers of a house and premises in Howrah sued for an injunction to restrain a nuisance caused by certain workshops forges and furnaces erected by the defendants and for damages for the injury done thereby

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The defendants were a Railway Company incorporated under an Act of Parliament for the purpose of making and maintaining Railways in India, and by an agreement (entered into under their Act of Incorporation) between them and the East India Company, they were authorized and directed to make and maintain such Railway stations, offices, machinery, and other works (connected with making, maintaining and working the Railways) as the East India Company might deem necessary or expedient. The workshops complained of were erected in 1867 under the sanction of the Bengal Government on land purchased by the Government in 1854 for the purposes of the Railway under Regulation I of 1824 and Act XLII of 1860, and which had been made over to the defendants.

Held that the suit was in *personam* and not a suit "for land or other immovable property, within the meaning of cl 12 of the Letters Patent, 1865, or of s 1 of Act VIII of 1869

Held further a nuisance having been proved to exist that is to say, such annoyance as materially interfered with the ordinary comfort of human existence in the house and caused sensible injury to the property of the plaintiffs the defendants could not plead laches or acquiescence on the plaintiffs part, as, upon the plaintiffs complaining in May 1870, the defendants had admitted that there was a nuisance and had up to June 1871 made various efforts to abate it. Nor could the defendants escape liability on the ground that the nuisance had been caused by them in the reasonable exercise of powers conferred upon them by the Legislature.

An injunction was granted restraining the defendants, and liberty to apply was reserved in the decree. On a motion by the defendants, supported by an affidavit showing the alterations which they proposed to make with the view of abating the nuisance, and alleging that a period of three months was required to carry out these alterations, and that a refusal to grant this time would necessitate the closing of the Company's Workshops and would occasion great inconvenience, the Court granted the time asked for, on the conditions that the defendants paid the costs of the application and did all they possibly could in the meanwhile to prevent annoyance to the plaintiffs.

THE plaintiffs in this case, the owners and occupiers of a house and premises in Chandmaree Road, Howrah, sued for an injunction to restrain the continuance of a nuisance arising from certain furnaces, chimneys, forges, and other works erected by the defendants in 1867, opposite and close to the plaintiffs' premises, and to recover damages for the injury done thereby. The plaintiffs stated in their plaint that "by reason of smoke, blacks, and other gaseous effluvia arising from the said fire furnaces, &c," entering their house, they were annoyed, their movable property injured, and their house and premises rendered unfit for convenient and comfortable habitation, and diminished in value.

The defendants disputed the plaintiffs' title to the premises injured, the jurisdiction of the Court; the fact of the alleged

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nuisance, and the right of the plaintiffs, even if there were a nuisance, to an injunction or damages in respect of it, since it had been caused by the defendants on land taken by the Government for the purposes of the Railway, and in the careful and reasonable exercise of powers conferred by the Legislature, and they contended finally that, if the plaintiffs ever had any remedy, they had lost it by their laches and acquiescence.

The defendants had previously raised the question of jurisdiction before MACKENZIE, J., in an application to have the plaint taken off the file on the ground that the suit was for land or other immovable property, but His Lordship had dismissed the application, as he was of opinion that the suit was not a suit for land within Cl. 12 of the Letters Patent, 1865, and also that the defendants were personally liable to the jurisdiction of the High Court by reason of their carrying on business in Calcutta, where their chief office was situated.

The defendant Company was incorporated under 12 and 13 Vict., c. 93, for the purpose of making and maintaining Railways in India, and by an agreement of the 17th August 1849 entered into under that Statute between the East India Company and the Railway Company, the latter was authorized and directed to make and maintain such railways, stations, offices, machinery and other works and conveniences (connected with the making, maintaining, and working the Railways) as might be deemed necessary and expedient by the East India Company. This agreement had been subsequently confirmed by the Imperial Government.

The workshops complained of were erected by the defendants under the sanction of the Bengal Government, on land originally belonging to the plaintiffs' father, and purchased from him by Government in 1854 for the purposes of the Railway under Regulation I of 1824 and Act XLII of 1850, and which had been duly made over to the defendants.

At that time the plaintiffs' present house was a mere bungalow without an upper story, but since then the plaintiffs had repaired and largely added to it. In 1855 a portion of the upper story was built, and in 1864 several rooms were added both on the lower and upper floors. The defendants' workshops were built shortly after, but they had originally been used as carriage shops and for other purposes which caused no nuisance. Since 1868 they had, as the plaintiffs alleged, been used in the manner com-

plained of In May 1870 the plaintiffs called the defendants' attention to the annoyance arising from large volumes of smoke and soot thrown out by chimneys recently erected by the defendants opposite their premises, and which at the defendants' request, they pointed out, and they subsequently repeatedly complained to the defendants of the nuisance. In answer to their letters the defendants replied that they were taking steps to remove it, and they did in fact make extensive alterations, adding several new chimneys and raising some already built. Their endeavours to provide a remedy however proving ineffectual, the plaintiffs, on the 23rd August 1871, called upon them either to stop the works, or to allow the plaintiffs compensation, and upon their refusal the present suit was brought.

The issues raised at the trial were —Did a nuisance exist? If so, was it actionable, was the suit barred by lapse of time, and had the Court jurisdiction to entertain it?

Mr Kennedy, Mr Ingram and Mr Woodroffe for the Plaintiffs

The Advocate General Offg (Mr Paul), Mr Phillips and Mr Allen for the Defendants

Mr Kennedy —The plaintiffs' title cannot be challenged. Mere possession is sufficient to enable them to maintain the suit—*Bhulan Mohan Banerjee v Elliott* (1). The fact that the lands were acquired for a public purpose would not give the defendants any higher rights than those possessed by an ordinary purchaser. The Government did not confer on the defendants the right to use their land to the detriment of others, even supposing the works were necessary for the existence of the Railway. The Act incorporating the defendant Company embodies the Company's Clauses Act only, but not the Lands or the Railways Clauses Acts, the defendants therefore have no special powers except those given by the first mentioned Act—*The King v Pease* (2). Even that case was questioned by the Exchequer Chamber in *Brand v The Hammersmith and City Railway Co* (3). (*Mr Phillips* —That Judgment was reversed by the House of Lords (4). Then see *Tipping v The St Helen's Smelting Co* (5). The objection to jurisdiction cannot be supported. The suit is in no sense a suit for land, see *Saya Loo v Nya Pau Loo* (6). (MACPHERSON, J —In

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(1) 6 B L R 85

(2) 4 B & A 1 30

(3) L R 2 Q B, 223

(4) L R 4 H L, 171

(5) 4 B & S 608

(6) 6 W T Civ Ref 4

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Oakeley v Ramsay,⁽¹⁾ Malins, V C, granted an injunction to restrain a man from shooting over a moor in the north of Scotland. The owner of the moor leased it to A, and subsequently getting a better offer leased it to B. A applied for an injunction against B, and obtained it on the ground that it was a purely personal matter. In *Robinson v Carey*,⁽²⁾ this Court gave damages in an action for trespass to a house at Barrackpore. (MACPHERSON, J.—That case was removed for trial before the High Court in the exercise of its Extraordinary Original Civil Jurisdiction.) The plaintiffs complain not merely of the injury to their premises, but also of the personal injury to themselves.

The *Advocate General* for the defendants—No action will lie against the defendants, the land having been taken by the Government for a public purpose, and made over to the Railway Company, and these Workshops erected, under the express sanction of Government, see *The King v Pease* ⁽³⁾. There may be *damnum*, but no compensation being provided by law, it is *damnum absque injuria*—*Boulton v Crouther* ⁽⁴⁾. The defendants did not act in a wanton or arbitrary manner, but did their best to remedy the alleged nuisance—*The London and North-Western Railway Co v Bradley*,⁽⁵⁾ *Croft v The London and North-Western Railway Co*,⁽⁶⁾ *Vaughan v The Laff Vale Railway Co*,⁽⁷⁾ *The Manchester South Junction, &c, Railway Co v Fullarton*,⁽⁸⁾ and *The Hammersmith and City Railway Co v Brand* ⁽⁹⁾. The plaintiffs do not contend that the defendants have erected their works negligently, but that they had no right to erect them at all, but it was necessary to have these Workshops and Furnaces somewhere on the premises, and as the defendants were authorized to erect them, there is no actionable wrong. Having regard to the position of the premises, and the habits of the natives of this country, there was clearly no nuisance, see the remarks of Westbury, L C, in *The St Helen's Smelting Co v Tipping* ⁽¹⁰⁾. As to what constitutes a nuisance, see *Crump v Lamert* ⁽¹¹⁾. The nuisance, if there be any, is of so trifling a nature that the Court

(1) The case appears to be unreported but the granting of the injunction is mentioned in a report of further proceedings between the parties, see *The Weekly Notes for Dec 28 1872 p 235*

(2) *Crofton* 137

(3) 4 B & C 703

(4) 32 L J Q B 113 & C, 3 B & S 430

(5) 14 C B, N S 54

(6) 11 H. L, 642 at p 650

(7) 4 B & A 1 30

(8) 6 H L, Ca, 50 L

(9) 5 H & N 679

(10) L R, 4 H L, 171

(11) L R 3 Eq, 409

ought not to interfere—*Attorney General v. Goe* (1) The learned Counsel also referred to the following cases—*Hole v. Barlow*, (2) *Carey v. Ledbetter*, (3) and *Banlart v. Houghton* (4) Then as to the jurisdiction of the Court, suits for foreclosure or redemption have been held to be suits for land—*Bilee Jann v. Meer a Mahomed Hade* (5) and *Simulty Lalmyy Do see v. Juddoonauth Shaw* (6) (MAGNUS v. J.—The direct object of such suits is to obtain possession of land or to perfect the plaintiff's title) Mesne profits are in the nature of damages for trespass, yet a suit for mesne profits is within the meaning of the words "suit for land" The fact that the defendants are personally subject to the jurisdiction will not avail the plaintiffs when the venue is not transitory *Motyn v. Iatriga* (7) was a case of personal injury and there were no Courts in Minorca competent to deal with the case *Penn v. Lord Baltimore* (8) was for specific performance of a contract In cases of this nature, the Court must be in a position, enabling it fully to adjust the relative rights of the parties, which it could not do in the present case, see *Barrow v. Archer* (9)

Mr. Kennedy in reply.—It is admitted that the defendants are personally subject to the jurisdiction In the cases of *Captain Gambier* and *Admiral Palliser* the Court of King's Bench felt no difficulty in making the defendants personally liable in damages for the destruction of property in Nova Scotia and Labrador, see *per* Lord Mansfield in *Mistyn v. Fabrigan* (10) See further *Penn v. Lord Baltimore*, (8) *Angus v. Angus*, (10) *Cartwright v. Pettus* (11)—cited in the note to the leading case—*Khalut Chunder Ghose v. Minto* (12) and *Chintaman Narayan v. Mallairav Venkatesh* (13) The inconvenience to the plaintiffs is an injury as purely personal as an assault, though aggravated by the injury to their land In *Rylands v. Fletcher*, (14) it is said that the defendants having a statutory authority, are not liable for the nuisance unless negligence be proved in the present case the defendants' own evidence shows that they were guilty of negligence but apart from this the cases cited for the defendants do not support the argument They show that the defendants can do nothing more

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(1) L R 10 F. 131

(2) 4 C B. N. S. 334

(3) 13 C B. N. S. 470

(4) 7 B. 15

(5) 11 J. N. S. 10

(6) 11 J. N. S. 313

(7) 18 M. C. 1

(8) 2 T. L. C. 837

(9) 2 Hyl. 100

(10) West R. 11 Hardw. 3

(11) 1 Ch. Ca. 214

(12) 11 J. N. S. 470

(13) 6 B. v. H. C. I. A. C. 29

(14) L. F. 3 H. L. 330

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There is expressly authorized by their Act of Incorporation Acts of this kind give special powers, and the Courts have always confined Companies strictly to those powers—*Jones v The Festiniog Railway Co* (1) The defendants' act does not confer greater powers on the Company than it would give a private individual, nor does it put the East India Company in the place of the Legislature to confer such powers besides which it has not been shown that the sanction of Government was obtained for the erection of these particular forges. And even if that were the case, it would not justify the defendants in working the forges so as to cause a nuisance—*Broadbent v The Imperial Gas Co* (2) and *The Queen v The Bradford Navigation Co* (3)

Cur ad vult

MACPHERSON, J.—The plaintiffs, the owners and occupiers of a certain house and premises in Chandmarce Road, Howrah, complain of a nuisance caused by certain workshops, forges, and furnaces recently erected and now used by the defendants. They say that the smoke effluent, and blacks, or smuts, emitted cause great annoyance and greatly injure the plaintiffs' property, and diminish its value, and they pray that the defendants may be ordered to pay them damages for the injury done and may be restrained by the injunction of the Court from continuing the nuisance.

The workshops, &c, complained of are in the immediate proximity of the plaintiffs' house being in fact separated from it only by the Chandmarce Road. They were erected in 1867, and have been in use ever since the latter part of that year.

The defendants contend that the Court has no jurisdiction, as the suit is "for land or other immovable property," and therefore ought to have been instituted in the Court of the district in which Howrah lies, that no nuisance was in fact ever caused, that if a nuisance had been caused and if the plaintiffs could, under ordinary circumstances, have maintained a suit in respect of it, they are not entitled either to damages or to an injunction, because the nuisance has been caused by the defendants in the exercise with due care and caution of powers conferred upon them by the Legislature, and finally that, if the plaintiffs even had any remedy, they have lost it by their laches or acquiescence.

As regards jurisdiction, the defendant Company being undoubtedly personally subject to the jurisdiction, as already decided by Mirkby, J. in reason of their carrying on business in Calcutta, I think that this Court can properly deal with the suit. The suit is not, as it seems to me, for land or other immovable property within the meaning of Section 12 of the Letters Patent or Section 5 of Act VIII of 1859. It is a suit exclusively *in personam* where the person against whom relief is sought is within and subject to the jurisdiction, though the relief sought is in respect of acts done on land situated beyond the local limits of the original jurisdiction. See *Chintaman Narayan v. Madhavrao Venkatekh* (1) and *Penn v. Lord Baltimore* (2) and the other cases there cited, see also *Khalut Chunder Ghose v. Minto* (3).

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If the smoke does enter the plaintiffs' house so as to constitute a nuisance, the plaintiffs' right of suit does not appear to me to be affected by the fact that some portions of the house were built only a year or two before the commencement of the nuisance. The whole of this land both that on which the plaintiffs' house stands and that on which the defendants' workshops stand, originally belonged to the plaintiffs or those whom they represent. The land now held by the defendants was, in 1854, taken by Government from the plaintiffs, duly paid for, and made over to the defendants for the purposes of their Railway. The plaintiffs' old family dwelling-house stood on the portion taken for the Railway and the plaintiffs' present house (then a mere bungalow with no upper story) was repaired and added to so as to make it suitable for the purposes of a new family house, and the Government was aware of its being so added to and repaired and allowed the plaintiffs, as a matter of favour, to remain in possession of the old family house for an extra period of six months until the new one was ready for occupation.

That was in 1855, when the northern part of the upper story was built. After the Cyclone in 1864, some further additions were made, both on the ground floor and on the upper floors,—some four new rooms on each floor were built, so far as I understand it. A year or two after these last additions, the defendants erected the workshops out of which the present litigation has arisen. Other works of different sorts, but none of them causing a nuisance such as that now alleged, were, from time to time, prior

(1) C.B. & H.C.R.A.C. 29

(2) 2 Fa. L. Cas. 837

(3) I.I.J. & S. 46

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to 1867, carried on by the defendants on portions of this same ground I can see nothing in this state of facts which injures the plaintiffs' right of suit, if a nuisance has really been committed

That the smoke (and accompanying effluvia and smuts) arising from these workshops does constitute a nuisance in the legal sense of the term, is I think proved, i.e., I think it proved that the annoyance caused when the wind is in certain quarters is not slight or fanciful, but is such as materially interferes with the ordinary comfort of human existence in that house, and causes sensible injury to the value of the property of the plaintiffs. The plaintiff Rajmohun Bose appeared to me to put his case fairly and moderately in the witness box when detailing his grievances. He said, in effect, that the annoyance is excessive and intolerable when the south wind blows, the smokes sweeping right through the house, and dirtying everything in it, that when the wind is from the east, the annoyance is very great, though not so excessive, that when the wind is from the west, he is not much inconvenienced and that when the wind is from the north, the plaintiffs do not suffer at all, except from the noise of the shops (which he says is always great and annoying, although it is not put forward in the plaint as one of the grounds of suit). Smoke, even if not accompanied by noxious vapours may constitute a nuisance—*Crump v Lambert*(1), and, considering the immediate proximity of these numerous chimneys to the plaintiffs' house and the fact that the wind blows from the south, south-east, or south-west, for the greater part of the year, I do not doubt that an intolerable annoyance materially interfering with the ordinary comfort of the occupants of the house, and amounting to a nuisance, is created. That this was so before the alterations made in consequence of the representations the plaintiffs made in 1870 has been practically admitted by the defendants however much they may deny it now. On the 27th of May 1870, the plaintiffs' attorney wrote to the defendants, saying, "the chimneys recently erected on the Company's premises, opposite my client's property, throw out large volumes of smoke and soot to their great annoyance, and to that of the other inmates of the house. I have, therefore to request you to cause the nuisance to be at once stopped by some arrangement by which the chimneys might consume their own smoke." Upon this, the

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defendants very properly replied (June 11th 1870) that, if the plaintiffs would point out the chimneys "from which annoyance arises" the Company would adopt such measures as might be found practicable to remedy the nuisance. The chimneys having been pointed out and the plaintiffs' attorney having on the 28th June called attention to the fact that nothing had been done to remedy the evil Mr. D. whom the District Engineer at Howrah, replied (July 14th) for the defendant Company that steps were being taken to remedy the evil as much as possible. For a further letter of the plaintiff the defendants replied on the 10th of August enclosing a copy of a letter from the District Engineer at Howrah, adding, "from which you will observe that the Company are endeavoring to remove the nuisance complained of, and hope to execute the work shortly. The letter of the District Engineer enclosed, explained the nature of certain extensive alterations which he was making, in order to remove the smoke nuisance. As a matter of fact the defendants then did make considerable alterations and additions with a view to abate the nuisance. They built an entirely new brick chimney, 60 feet high, raised an existing brick chimney by some 15 feet raised some 10 iron forge chimneys from 38 feet to 53 feet and added some new iron chimneys for carrying off smoke collecting in the roofs of the workshops. On these and other alterations the defendants expended a large sum more than Rs 5000. On the 1st of July 1871, after these alterations had been completed, the plaintiffs again wrote and complained that the nuisance remained unabated. The defendants replied (July 22nd), forwarding a copy of a letter from the Superintendent of the Carriage and Waggon department "from which it will be seen that steps have been taken to remove the cause of complaint against the smoke nuisance referred to." The letter of which a copy was sent, contained the following passage — "I thought we had done all that was necessary but it seems not since the south east wind has blown, and Kurhmhattee coal used. No time shall be lost. I have put in hand four more chimneys to carry smoke from the fires, and two ventilating shafts to carry away smoke that may accumulate in the linterns, &c." On the 23rd of August 1871, the plaintiffs again called attention to the fact that notwithstanding the Company's efforts the nuisance had not been removed, and required the defendants, either to stop the works or allow them compensation. The defendants (September 8th) answered "the carriage shops referred to have been in existence for the past fifteen years,

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and the smith's shop complained of, about four years, and no complaint was made until May 1870, since which time steps have been, and are being, taken to abate any possible ground of complaint. Under these circumstances, the agency consider that your clients have no claim for compensation."

The correspondence and the acts of the defendants are most important, not only as bearing out the truth of the plaintiffs' allegation that those works do cause a nuisance, but as disposing entirely of the defence raised on the ground of acquiescence or laches on the part of the plaintiffs. The defendants cannot now avail themselves of any such defence when we find them for more than a year after the plaintiffs' first complaint in May 1870, admitting that a nuisance did exist, and spending large sums of money in the attempt to abate it. The evidence adduced by the defendants as to the extent to which matters were improved by the alterations which were made was very weak and unreliable, as also the evidence adduced by them to prove that the smoke does not in fact blow with the plaintiffs' house, or do it any damage. I think it clear that the defendants, admitting in 1870 that a nuisance existed, attempted to abate it, that those attempts were only partially successful, and that the nuisance still exists, though possibly in a somewhat diminished degree.

But it is said that even if the state of things amounts in law to a nuisance, the defendants are not liable in this suit, by reason of their position, *i.e.*, because the nuisance has been caused by them in the reasonable exercise of powers conferred upon them by the Legislature. The land, on which the workshops stand, was taken by Government, under Regulation I of 1824 and Act XLII of 1850, for the purposes of the defendants' Railway. All that the Government did or could do under these laws, was to pay for the land actually taken. For in Regulation I of 1824, there is no provision such as is to be found in Sections 24 and 25 of Act VI of 1857, or in the English Statutes on the subject, for allowing compensation (beyond the mere value of the land taken) for damages in respect of adjoining land. It cannot be said that the Government, simply because in the exercise of statutory powers it has taken land on paying its value can create a nuisance on it to the injury of the person from whom it was taken, and who remains in possession of adjoining land. The Government merely becomes the proprietor of the land appropriated, and acquires no higher rights in it than any other purchaser. In saying this, I am speaking of

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land taken by Government under Regulation I of 1824. The defendants' position is not improved or altered by the Statute 12 and 13 Vict., c. 93 (Local), under which the East India Railway Company is incorporated for the purpose of making and maintaining the railways in this country, nor by the agreement of the 17th August 1849, entered into (under that statute) by and between the Railway Company and the East India Company. The general effect of the East India Railway Company Act and the agreement is no more than to authorize and direct the Railway Company to make and maintain such Railway Stations, Offices, Machinery, and other works and conveniences (connected with making, maintaining, and working the Railways) as in the opinion of the East India Company may be necessary or expedient. The having such workshops, furnaces, and forges as these now complained of, may in itself be proper, and be within the powers of the defendant Company; but it does not follow that they are entitled to have their workshops, furnaces, and forges in such place, or to use them in such a manner, as to constitute a nuisance to their neighbours. The decision of the House of Lords in *The Hammersmith Railway Company v. Brand*(1) does not assist the defendants. The nuisance in that case—vibration—was one which was unavoidable, and must necessarily be caused if the Railway was to be used at all, and trains were to run on it with locomotives. So in *The King v. Pearce*,(2) the Legislature had authorised the nuisance, i.e., the use of locomotive engines in the manner in which and place where they were used. But in the present case, there is no sort of necessity for having the workshops where they are, and the nuisance might easily have been avoided. It may be necessary for the defendants to have such workshops, but it is in no degree a matter of necessity that they should have them on this particular piece of ground, or in any other place where they will cause a nuisance to anybody. The case is in fact similar in many respects to that of *The Queen v. The Company &c., of Bradford Navigation*,(3) and CROMPTON, J., in his Judgment really disposes of the matter in issue in this suit where he observes—“Suppose a Company had power given them to erect necessaries, no one could say that that power alone would extend to enable them to make a nuisance by the erection.” The defence that the defendants are not liable, because the workshops are on their

(1) L. R. 4 H. L. 171.

(2) 4 H. and Ad. 30.

(3) 34 L. J., Q. B., 191; 5 C. 6 B. & S. 631.

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own land, and are worked with all reasonable care, is, I think, disposed of by the Judgment of the Exchequer Chamber in *Bamford v. Turnley*,⁽¹⁾ which shows that when a man uses his land so as to create nuisance it is no answer in an action for damages, to say that the acts complained of were done in a convenient place, and were in themselves a reasonable use of the land.

In every respect therefore, in my opinion, the defence fails. The only remaining question is, to what decree the plaintiffs are entitled. As the nuisance is a continuing one, and further actions for damages may be brought if the nuisance is not abated, the proper course (see *Bathurst v. Reed*,⁽²⁾ for me to follow will be to give the plaintiffs a decree for Rs. 100 as nominal damages, and to order that an injunction do issue restraining the defendants, their servants, workmen, and agents from allowing smoke and soot to issue from the workshops or chimneys, so as to cause nuisance or annoyance to the plaintiffs. I may add in the words used by the Master of the Rolls in making a similar decree in *Crump v. Lambert*,⁽³⁾ "I cannot make the order more precise, it is always a question of degree, and if the defendants can continue to carry on their works in such manner as to avoid any substantial issue of smoke, they will not violate the injunction. Whether they do so or not may have to be tried in another proceeding."

The costs (on Scale 2) must follow the event up to and including the hearing, and liberty to apply will be reserved.

Judgment for plaintiffs

Subsequently to decree an application was made to suspend the injunction.

In accordance with the usual practice of the Court, the decree had been framed so that the injunction should come into force at once. The defendant Company now moved, upon notice to the plaintiffs' attorney, for an order that the injunction be suspended for a period of three months. The application was supported by an affidavit of Mr. Pearce, the Officiating Superintendent of the Carriage and Wagon department of the East Indian Railway, who, after describing the various improvements and alterations projected by the defendant Company with a view to the abating of the nuisance, went on to state that a period of three months

(1) 31 L. J., Q. B., 29.

(2) 5 L. J., C. P., 290.

(3) L. R. 3 Ex., 114.

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would be required for completing these alterations and improvements and that if the defendants were compelled to close their works while the alterations and improvements were in progress, considerable inconvenience would be caused to the public, and upwards of two hundred men would be thrown out of employment

The plaintiff, Rajmohan Bose, filed a counter-affidavit, to the effect that the defendant Company had already had upwards of two years to execute the necessary improvements, and that they had at the hearing of the suit contended that they had already done all that could possibly be done towards the abating of the nuisance

The *Advocate General* in support of the motion —The decree expressly reserves liberty to apply This reservation was clearly intended to enable the defendants to come before the Court The plaintiffs have their remedy if the defendants do not obey the order of the Court Should this application not be granted, the defendants will have to be guilty of contempt of Court without being able to help it The Court will not place parties in such a position It is true that the English Courts have refused to modify their decrees by altering the time mentioned in them But all the English cases have this peculiarity, that in them the decrees contain a provision suspending their operation till a future date, thereby giving the defendants an opportunity for carrying out the orders of the Court, whereas in this case the decree was to operate at once, and no time was allowed for the defendants to abate the existing nuisance Besides, the English Courts are not competent to alter their decrees, while in this country the Courts are differently constituted, and can review their own Judgments *Spokes v Banbury Board of Health*(1) is an authority only apparently against me, and, if closely looked into, will be found to support my view There an injunction was granted on 6th of March, but execution was postponed till the 1st of July The order not having been complied with by that date, the plaintiff moved for a writ of sequestration for breach of the injunction Wood, V C, said at page 49 —“These gentlemen were given from the month of March to the 1st of July to comply with the order The order was made in the month of March, but, as has been done in several cases, knowing that it requires time for matters

(1) L R 1 Eq, 42

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of this kind to be carried into effect, the Court said they should not be bound to comply with the order until the 1st of July * * * If these gentlemen had come before the 1st of July with a motion to ask for a longer time to comply with the order of the Court, it would have been a question, even then, whether the Court would have had power to enlarge the time mentioned in its own decree, because it is not an interlocutory order. But, at all events, that might have been discussed. Instead of which, they quietly let the 1st of July pass by." Now it will be observed that in that case the Court did not grant the defendants any further time, on the grounds, firstly, that it had no power to alter its own decree, and, secondly, that the defendants had done nothing during the time which was granted to them expressly to enable them to comply with the order of the Court—*Attorney-General v Proprietors of the Bradford Canal*,⁽¹⁾ *Attorney-General v Leeds Corporation*,⁽²⁾ *Attorney-General v Colney Hatch Lunatic Asylum*,⁽³⁾ and *Attorney-General v Council of Borough of Birmingham* ⁽⁴⁾ All these cases are only apparently against me, while in reality they support my contention. Had the defendants, when the decree was made, applied to the Court to suspend its execution, no doubt the application would have been granted at once.

Mr Kennedy, Contra—The cases relied on by the learned Advocate General are not only apparently, but really and substantially against him. The main argument of the defendants is that unless time is given they will not be able to comply with the orders of the Court. But this is totally at variance with the defence set up by them at the trial that they had already done all that could be done. How then can they ask the Court to give them time to do that which, if their defence was true, they had already done? It is contended that the reservation of liberty to apply was made with the view of enabling the defendants to come before the Court, and that the plaintiffs had their ordinary remedy. But from the language of the decree it is quite clear that the object of the reservation of liberty to apply was the benefit of the plaintiffs. The plaintiffs are the only judges in the first instance as to whether the defendants have complied with the order of the Court. If the plaintiffs felt that the order had not been complied with they would have to

(1) 1 R. 2 Eq. 71

(3) L. R. 4 Ch. App. 140

(2) L. R. 5 Cl. App. 583

(4) 19 W. R. 501

come to the Court, and it is for the purpose of enabling them to do so that liberty to apply was reserved. The decree could not be in any other form.

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The *Advocate-General* was not called upon to reply.

MACPHERSON, J. —At the time I granted the injunction, I contemplated the Company making alterations such as would make it possible for them to continue to use these workshops. and if I had been asked to do so, I should have granted them a reasonable time within which to make necessary alterations. I shall therefore now give them time on their undertaking to use coke and to do everything in their power to mitigate the nuisance, and on their paying the costs of this application. They must use coke except when the wind is from the north, and they must do all that they possibly can to prevent annoyance to the plaintiffs. On those terms they may have three months from the date of the notice they gave of this application,—that is to say, they may have until the 9th of April.

Application granted.

Attorney for the Plaintiffs *Mr. Mackertich.*

Attorneys for the Defendant Company *Messrs Chauntrell, Knowles, and Roberts.*

**The Indian Law Reports, Vol. XXIII. (Bombay) Series,
Page 358.**

ORIGINAL CIVIL.

*Before Mr. Justice Strachey; and, on appeal, before Sir
Louis Kershaw, Kt., Chief Justice, and
Mr. Justice Fulton.*

**GREAT INDIAN PENINSULA RAILWAY COMPANY
(ORIGINAL DEFENDANTS), APPELLANTS,**

v.

**THE MUNICIPAL CORPORATION OF BOMBAY AND
H. A. ACWORTH, MUNICIPAL COMMISSIONER
(ORIGINAL PLAINTIFFS), RESPONDENTS.***

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Water-works—Municipality of Bombay—Right to enter on land of Railway Company to lay pipes, &c.—Bombay Municipal Act (Bom. Act III of 1888), Secs 222 265—Railway Act IX of 1890, Section 12—Accommodation works

Under the Bombay Municipal Act (Bom. Act III of 1888) the Corporation of Bombay has the right, for the purpose of supplying the city with water, to enter upon land belonging to other owners, to make connections between the mains and to lay the pipes forming the connections through or under such lands without the owners' permission, though not without giving them reasonable notice in writing.

Held, also, that Section 12 of the Railways Act (IX of 1890) does not exclude the above right of the Corporation of Bombay to enter on land belonging to the G. I. P. Railway Company for the said purposes.

Suit by the Municipal Corporation of Bombay to obtain a declaration that certain land mentioned in the plaint was vested in them, and that, even if it was not, they were entitled to enter upon it for the purpose of executing certain works necessary to supply water to the City of Bombay, and for injunction, &c.

The plaint alleged that by virtue of Act XIII of 1863 and subsequent Acts of the Legislature the land in question with other

lands was vested in the plaintiffs for the purpose of carrying the water of the Vihar lake into the town of Bombay and then distributing the same, that in January, 1894, the plaintiffs desired to make a connection in the Vihar 32 main for the purpose of carrying Vihar water into the Arthur Road 27 main. They also proposed to make a connection between the Tansa 48 main and the Vihar 32 main. The two places at which these works respectively were to be executed were marked X and Y respectively, in a plan annexed to the plaint.

The following are the material paragraphs of the plaint:—

“4 The plaintiffs by their workmen on the 29th day of January 1894, entered on the land through which the said Vihar 32nd main runs at the spot marked with the letter X on the said plan and began to excavate the soil over the said Vihar main for the purpose of making the connection second above-mentioned but the defendants claimed to be entitled to refuse to allow the plaintiffs men to work at the said spot without the permission and the defendants claim the land through which the said Vihar main runs at the said place as their own, and refuse to allow the plaintiffs to make the connection afore said, or to enter upon the said land at the place afore said except upon conditions which the plaintiffs are not bound to agree to.

“5 The plaintiffs say that the land at the places marked X and Y on the said plan is vested in the plaintiffs and is not the property of the defendants as they allege, and in the alternative the plaintiffs say that if they are wrong in this contention and the said land is the property of the defendants, yet nevertheless the plaintiffs are entitled to enter on the said land in the way and in the manner and for the purposes therein mentioned entered on the same on the 29th day of January, 1894, and that the defendants are not entitled to prevent them so entering.

The prayers of the plaint were as follows:—

“1 That it may be declared that so much of the land as is herein deposited in the office of the Secretary to Government of Bombay mentioned in the 2nd paragraph of this plaint as occupied by the plaintiffs as corresponds with the places marked X and Y on the plan hereto annexed is vested in the plaintiffs.

“2 That it may be declared that the plaintiffs are entitled to enter upon the land at the said places marked X and Y as afore said for the purposes mentioned in the 3rd paragraph of this plaint even if the said land is the property of the defendants, without the permission of the defendants.

“3 That the defendants may be restrained by the order of this Honourable Court from preventing the plaintiffs and agents entering upon the said land at the places marked X and Y as afore said for the purposes mentioned in paragraph 3 of this plaint for any other purpose for which the plaintiffs may lawfully enter on the said land.

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The defendants by their written statement did not admit that the land in question was vested in the plaintiffs, and submitted that, even if it was, the plaintiffs, having regard to Section 12 of the Railways Act (IX of 1890), were not justified in entering upon the defendants' land and attempting to do the said work without the permission of the defendants. They further contended as follows —

" 2 The defendants say that in the months of September, 1893, and January, 1894, the plaintiffs' servants, without the permission of the defendants, entered upon the defendants' land for the purpose, as alleged by the said servants, of laying down therein 2 pipes to connect the 3rd Vohar main with the 'Lansa main', portions of both these pipes were intended to be placed upon land of the defendants. The defendants will rely upon a plan furnished by the plaintiffs (engineer to them showing the proposed connections and upon the correspondence copies whereof are hereto annexed and marked collectively No 1

' 3 The defendants say that, irrespective of the provisions of Section 12 of the Railway Act 1890 the plaintiffs were not justified by any of the provisions of the Municipal Act, 1883, in doing what they attempted to do, and that the defendants were justified in preventing the plaintiffs' said servants from making the said connections

" 4 The defendants do not admit that the land at the places marked X and Y on the plan annexed to the plaint, and marked A, is vested in the plaintiffs, but the defendants say that it is the property of the defendants, having been acquired by them in the year, 1869. The defendants submit that in no event were the plaintiffs entitled to enter on the said land in the way or in the manner or for the purpose that they entered on the same on the 29th January, 1891

The case was tried by STRACHEY, J., in December 1897.

Intercity and Loundes appeared for the Plaintiffs

Lang (Advocate-General) and *Russell* for the Defendants

The following issues were raised —

1 Whether all the lands and other immovable property necessary for the purpose of carrying the water of the Vohar Lake by pipes into Bombay is vested in the plaintiffs?

2 Whether the land, the subject matter of this suit is vested in the plaintiffs?

3 Whether the land described in the plaint is not the property of the defendants?

4 Whether the plaintiffs are entitled to enter or justified in entering upon the land in question in the way and in the manner and for the purposes alleged in the plaint?

5 Whether the defendants are not justified in preventing the plaintiffs' servants from entering upon the said land for the purposes mentioned?

6 Whether having regard to the provisions of the Railway Act IX of 1870 the defendants were not justified in preventing the plaintiffs and their servants from entering into the land?

7 General issue

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The following is the material portion of the Judgment delivered by the lower Court —

STREACHEY, J (after examining the evidence as to title) continued —The state of the title to the property in dispute is, therefore, this The Vehar man, including the parts of it shown on Exhibit I, where the plaintiffs proposed to make the connections, is vested in the plaintiffs The soil above the man is vested in the defendants The space of 22 inches between the western skin of the man and the Railway fence is vested in the defendants The land west of the Railway fence as far as 266 feet north of the Arthur Road is vested in the plaintiffs The result is that everything done in this case by the plaintiffs west of the fence was done upon their own property, but that in crossing without the permission of the defendants the space of 22 inches between the fence and the man they committed a trespass, unless they can show express statutory authority justifying their action

In considering the right of the plaintiffs to enter, for purposes connected with the water-works, upon land vested in other persons, and to make the proposed connections upon such land, it is not necessary to refer to any enactment earlier than the City of Bombay Municipal Act, III of 1888 The subject is dealt with by Chapter X of that Act The first section of Chapter X, Section 261, gives the Municipal Commissioner for the purpose of providing the city with a proper and sufficient water-supply, and when authorized by the Corporation in that behalf, power to construct and maintain water works either within or without the city, and do any other necessary acts, necessary, that is, for the purposes specified, to purchase or take on lease any water work, and to enter into an arrangement with any person for a supply of water Section 262 provides that the Commissioner shall manage all water works belonging to the Corporation, maintain them in good repair and efficient condition, "and shall cause all such alterations and extensions to be from time to time made in the said water works as shall be necessary or expedient for improving the said works" That section does not require the authority of the Corporation for necessary or expedient alterations or extensions of existing water-works, as distin-

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guished from the construction of water-works provided for by Section 261. The making of the proposed connections between the Vihar and Tansa and Arthur Road mains would be an alteration or extension of Municipal water-works, and would, it is not denied, be necessary or expedient for improving them within the meaning of the section. It has been argued with reference to the interpretation clause, Section 3 (t), including within the term water work a duct, main-pipe, and any "thing for supplying or used for supplying water," that the laying down of any new pipe, such as those required for the proposed connections, would be "constructing water-works" within the meaning of Section 261, and would require a resolution of the Corporation, which admittedly has not been passed. In my opinion, however, Section 261 refers only to any future water works which the Commissioner may construct or acquire, and not to additions to water-works, like the Vihar water-works, already existing and vested in the Corporation when the Act came into force. The distinction between extensions of an existing system of water-works by additions or improvements within the area previously supplied and previously within the jurisdiction of the Corporation, and a "construction" of new water-works, is not only plainly recognized by Sections 261 and 262, but illustrated by the most recent decisions in England upon the analogous provisions of the Public Health Act, 1875—*Cleveland Water Company v Redcar Local Board* (1), *Huddersfield Corporation v Ravensthorpe Urban District Council* (2). Section 263 deals with the right of access to municipal water-works. It provides that the "Commissioner may, for the purpose of inspecting or repairing or executing any work in, upon, or in connection with, any municipal water work, at all reasonable times, (a) enter upon and pass through any land, within or without the city, adjacent to or in the vicinity of such water work, in whomsoever such land may vest, (b) convey into and through any such land all necessary materials, tools, and implements." That would include a right to enter upon the land in dispute vested in the defendants for the purpose of making the proposed connections. It is not alleged that the times at which the plaintiffs proposed to make the connections were not reasonable. So far, although the Act clearly recognizes the right of the plaintiffs to extend and alter their mains, and gives them a right of access with all necessary implements for the purpose of making connections, it

(1) (1895) 1 Ch., 163

(2) (1897) 2 Ch., 121

says nothing about the right to lay the pipes forming the connections upon land vested in other persons. That, however, is the effect of Section 265 read with an earlier section of the Act. Section 265 provides that "the Commissioner shall have the same powers and be subject to the same restrictions for carrying, renewing, and repairing water-mains, pipes and ducts within or without the city as he has, and is subject to, under the provisions hereinbefore contained, for carrying, renewing and repairing drains within the city." The preceding provisions of the Act relating to drains are contained in Chapter IX. The only provisions relating to drains which, it has been suggested, are made applicable by Section 265 to water works are Sections 220, 221 and 222. Section 220 merely provides that all municipal drains shall be under the control of the Commissioner. Section 221 provides that "the Commissioner shall maintain and keep in repair all municipal drains, and, when authorized by the Corporation in this behalf, shall construct such new drains as shall from time to time be necessary for effectually draining the city." If, as regards repair, that Section is made applicable by Section 265 to water-works, it adds nothing to Section 264. If, as regards constructions of new works, Section 221 is made applicable by Section 265 to water-works, it adds nothing to Section 261. As Section 265 makes applicable to water works only the powers and restrictions given to and imposed on the Commissioner for carrying, renewing and repairing drains, and does not refer to the construction of new drains, it does not, in my opinion, make the latter part of Section 221 applicable to water-works. If by reason of Section 265, the latter part of Section 221 applied to the construction of new water-works, that would not, for the reasons which I have already given in reference to Section 261, affect the proposed connections, which are not the construction of new, but the alteration and extension of existing water-works. That disposes of Mr. Russell's argument based on the words common to Sections 221 and 261, "when authorized by the Corporation in this behalf." The only other Section in Chapter IX which has been referred to is Section 222. That section is clearly made applicable by Section 265 to water works. It provides that "the Commissioner may carry any municipal drain through, across or under any street and, after giving reasonable notice in writing to the owner or occupier, into, through, or under any land whatsoever within the city." Reading this as applying to water-works, it supplements Sections 262 and 263

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by adding to those provisions for alterations and extensions of water-works, and for access to them for inspection, repair, or the execution of any work, a further power to carry pipes into, through, or under any land whatsoever, which would, of course, include the land in dispute vested in the defendants, after giving reasonable notice in writing to the owner or occupier. In the present case the reasonable notice in writing was given by a letter from the Water Engineer to the Chief Engineer, dated the 26th October, 1893, (Exhibit M), and enclosing a tracing (Exhibit I) which showed the proposed connections.

Unless therefore, the defendants can point to some enactment excluding or modifying the operation of those just cited, the plaintiffs have, under the Act, the right to enter upon the land in dispute, even where vested in the defendants, to make connections between their mains, and to lay the pipes forming the connections through or under the defendants' land, and to do all this without the defendants' permission, though not without giving them reasonable notice in writing. The defendants, however, do point to an enactment which, they contend, excludes or modifies the operation of Act III of 1888 so far as the railway property is concerned. They rely on Section 12 of the Indian Railways Act, IX of 1890, which provides that "if an owner or occupier of any land affected by a railway considers the works made under the last foregoing section to be insufficient for the commodious use of the land, or if the local Government or a local authority desires to construct a public road or other work across, under or over a railway, he or it, as the case may be, may at any time require the Railway Administration to make at his or its expense such further accommodation works as he or it thinks necessary and are agreed to by the Railway Administration, or as, in case of difference of opinion, may be authorized by the Governor General in Council." Mr Russell contended that the proposed connections were 'further accommodation works' within the meaning of this section, and that the plaintiffs, who are a 'local authority' as defined by Section 3 of the General Clauses Acts, 1887 and 1897, cannot themselves make the connections, but can only require the defendants to make them at the plaintiffs' expense. The word "Railway" is defined by Section 3 of Act IX of 1890 as including "all land within the fences or other boundary marks indicating the limits of the land appurtenant to a railway" and, therefore, if, contrary to the conclusion which I have already stated, the land in dispute out-

side the railway fence is vested in the defendants Mr Russell's argument will not apply to it Mr Russell supported his contention by referring to sections 7 and 8, under the latter of which, he said, the defendants might subject to certain conditions, and for the purpose of exercising the powers conferred on them by the Act, alter the position of the Vehrman itself or of any pipe vested in the plaintiffs It appears from the evidence of Mr Campion and from the letters of the Chief Engineer and the Agent, which have been put in that the defendants contend for an extremely wide application of Section 12 Mr Campion, for instance, says that, although the defendants "would not object to anything reasonable" they claim a right under the section to prevent the plaintiffs not only from making connections but from coming within the railway fence for any purpose whatever without their permission including such purposes as patrolling the line of the Vehrman for inspection and control and entering the sluice house which is a limitedly municipal property It is difficult to see how the right of access to municipal water works for purposes of inspection and the like conferred by the express terms of Section 263 of Act III of 1888, can be overridden by a section in Act IX of 1890 relating exclusively to the making of accommodation works

It appears to me that there are two answers to Mr Russell's contention In the first place I agree with Mr Inverarity's argument that assuming the proposed connections to be "further accommodation works" within the meaning of Section 12, that section is purely enabling and permissive and not prohibitive It gives a particular right to a local authority as against a Railway Administration, but does not thereby impliedly abolish any independent right vested in the local authority by any other enactment What it does is in effect, to give the plaintiffs, as regards railway land, an additional and not a substituted right, so that they might, at their option, either themselves make the connections under Sections 262, 263, 265 and 222 of Act III of 1888, or require the defendants to make them under Section 12 of Act IX of 1890 The provisions of Section 12 would only be obligatory upon a local authority desiring further accommodation works and not having any independent power, such as the powers created by Act III of 1888, for the purpose That this view is correct, follows, I think, from the wording of Section 12, which in terms only confers a power on the local authority and does not purport to take away any other power or duty existing

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abunde There is nothing inconsistent with it in Section 8. It is reasonable enough that a local authority should be empowered, subject to certain conditions and for the purposes of its own Act, to lay pipes under railway as well as under other land, and that nevertheless the Railway Administration should be authorized, for the purpose of exercising the powers conferred upon it by Act IX of 1890, to alter the position of any such pipe subject to the local authority's superintendence.

In the second place, the proposed connections are not, in my opinion, "further accommodation works" within the meaning of Section 12 of the Indian Railway Act. They are a public work for which, under the section, a local authority might require accommodation works to be made. In the case of local authority desiring to construct a public road or other work across, under, or over a railway, the accommodation works required must obviously be works other than the public work to be constructed, there must be, first, a public work whose construction is desired by the local authority, and, secondly, works required to be made for its commodious use. A local authority desiring to make only a public road cannot require the Railway Administration to make the road as an accommodation work. What the local authority may require the Railway Administration to make, is not the road or other public work, but accommodation works for its commodious use. The public work itself must be made by the local authority under some other statutory power. In the present case, what is the public work which the local authority "desires to construct" under the railway? The connections, by means of pipes, between the Vihar and the Arthur Road and Tansa mains. What, then, are the accommodation works required for the commodious use of the public work? None. No work other than *the connections themselves is contemplated*. It follows that no accommodation work is in question here, and that Section 12 does not apply. Again, it is not "accommodation works" simply, but "further accommodation works" that the section provides for. The "further accommodation works" must mean the same thing throughout the section, must have the same meaning whether the requisition to the Railway Administration is made by the owner or occupier mentioned in the opening words of the section or by the Local Government or a local authority. The word "further" in itself, and also in connection with the opening words, obviously has reference to Section 11, to which Section 12 is a rider, and in which the term "accom-

modation works' is virtually defined. Sections 11 and 12 of the Indian Railways Act are modifications of Sections 68 and 71 of the Railways Clauses Consolidation Act, 1845 (8 and 9 Vic, c 20), though Section 71 refers only to owners and occupiers and not to local authorities desiring to construct public works. It has been held that the "further" works contemplated by Section 71 do not mean any kind of works which would at any time be convenient for the land owners, but works additional to accommodation works already made by the Railway Company under Section 68 and of the same kind as those which might be required under that section—*Rhondda and Swansea Railway Co v Talbot* (1). In the present case, no accommodation works have been previously made by the Railway Company for the plaintiffs, and Section 11 mentions no accommodation works resembling the connections which the plaintiffs propose to make. The connections are not water courses or other passages of the kind described in Section 11 (b), as Mr Russell suggested. They are not, in my opinion, "further accommodation works" or accommodation works at all. Section 12 of the Indian Railways Act, 1890, therefore, does not exclude the right of the plaintiffs to enter on the defendants' land and to make the proposed connections which is given to them by Act III of 1888.

This decides the suit substantially in favour of the plaintiffs. I find on the first and fourth issues on the affirmative, and on the fifth and sixth in the negative. On the second and third I find that the Vchar main and the land west of the railway fence are vested in the plaintiffs, and the land between the main and the railway fence to the west in the defendants. The plaintiffs will have a decree for declaration and injunction in accordance with these findings with costs.

The defendants appealed, contending that the Lower Court was wrong in holding that the Corporation were entitled to enter upon their land without their permission.

The appeal was heard by KERSHAW, C J, and FULTON, J.

Lang (Advocate General) and Macpherson for the Appellants.

Scott and Loynes for the Respondents.

KERSHAW, C J.—The Court is of opinion that Mr Justice STRACHAN's Judgment is right and should be upheld. I need only shortly allude to what are the admitted facts of the case.

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They have been clearly stated by the Advocate General in his opening speech. It appears that a main of the Bombay water works, through a portion of its course, lies along a narrow strip of land which may be accurately described as part of this railway. The plaintiffs think it necessary that there should be a connection between one portion of this water-main and another portion of their water mains in the city, and in order to carry this out, they desire to enter upon the land of the defendant Railway Company and to exercise what they consider to be the powers conferred upon them by the Municipal Act. An action in the nature of a friendly action was filed, it having been agreed to be taken for granted that the Corporation have entered upon the land and are prepared to carry out the proposed works. The action was instituted in the High Court and came before Mr Justice STRACHEY, who decided that the Bombay Corporation were right. This Court is of opinion that Mr Justice STRACHEY decided properly, and the reasons which lead us to that decision may be shortly stated.

By the combined operation of Section 265 and Section 222 of the Municipal Act, it may be said that, practically, the Corporation have the same rights with regard to carrying out their water works as they have with regard to the carrying out of their drainage system. By Section 265 it is provided "The Commissioner shall have the same powers and be subject to the same restrictions for carrying, renewing and repairing water main pipes or ducts within or without the city, as he has and is subject to under the provisions hereinbefore contained for carrying, renewing and repairing drains within the city." Turning back to Chapter IX it is seen that the Commissioner is associated with drainage and drainage works by Section 221, which says "The Commissioner shall maintain and keep in repair all Municipal drains and when authorized by the Corporation in this behalf shall construct such new drains as shall from time to time be necessary for effectually draining the city." By Section 222 it is laid down that "the Commissioner may carry any Municipal drain through, across or under any street or place laid out as or intended for a street, or under any collar or vault which may be under any street, and after giving reasonable notice in writing to the owner or occupier, into, through or under any land whatsoever within the city, or, for the purpose of outfall or distribution of sewage, without the city." Sub-section 3 of this section lays down "In the exercise of any powers under this section as little

damage as can be shall be done, and compensation shall be paid by the Commissioner to any person who sustains damage by the exercise of such power ' O I P By
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For the Railway Company it is said that the new pipe proposed to be laid through the twenty two inches or thereabouts of this land is really a new drain within the meaning of Section 221, and that, therefore the Municipal Commissioner requires the sanction or authorization of the Corporation before he can lawfully and legally enter upon the work duties. The Court does not think it is necessary to decide that question. It is surrounded by a great many difficulties, and the real question which arises in this appeal may be decided without entering upon that question at all. It seems to us that what the Commissioner did as a matter of fact is well described by Mr Justice STACKEY when he says the Commissioner's action amounts to an alteration or extension of an existing water-main, which may be effected under one of the sections without the authority of the Corporation being given to him. By Section 262 it is laid down 'The Commissioner shall manage all water works belonging to the Corporation, and maintain the same in good repair and efficient condition, and shall cause all such alterations and extensions to be from time to time made in the said water works as shall be necessary or expedient for improving the said works.' Clearly the alteration and extension proposed is with a view to improving the said works, and no doubt it will have that effect when it is completed. Therefore, if the proposed work may be described as an alteration or extension of the existing work, it is an operation which can be carried out by the Commissioner without obtaining the authority of the Corporation at all.

It has been alleged by the defendants that there is no power in the Corporation to lay the new pipe on private land. We are of opinion that under Section 265 as read with Section 222 there is power to lay such a pipe under any land whatever in the city, and, therefore, there is no trespass by the Corporation seeing that they have followed out strictly the lines of the Act which gives them the power.

Lastly, it is contended that even if the Corporation formerly had this power it is now controlled and taken away by Section 12 of the Railways Act. It seems to us that, in order to take away a power of this kind which is so eminently serviceable and useful for a large Corporation like that of Bombay, it should be

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either taken away in express terms, which would leave no doubt about the matter, or the inference should be so strong as really to amount to taking away, in express terms, the power given by the Municipal Act. If we can see that both powers may be exercised together or separately, so that there is some reason why the two powers may co-exist side by side, it will go far to show that such inference cannot be drawn. We can understand why in the one case it would be for the advantage of both the Railway Company and the Corporation that the Railway Company should have the right to do the work. We can also see that there may be circumstances in which it would be for the advantage of both that the Corporation should do it. Supposing that a street has to be carried under a Railway, it would be for the advantage of all that the Railway Company should do it, but when, on the other hand, we come to a work like water works it should be done by the Corporation, who have the whole scheme of the supply of water to the city in hand. I see nothing in Section 12 which by express words takes away the power given by the Municipal Act or in any way repeals it. I see no irresistible inference to be drawn from Section 12, which takes away such power, and we are of opinion that Mr Justice STRACHAN was right when he said the two powers might well co-exist side by side, and that there is no abrogation by Section 12 of the Railways Act of the powers previously given to the Corporation.

I do not think it necessary to enter into a discussion with regard to what are further accommodation works, because the case scarcely turns upon that point. It seems to me that the Court can decide the appeal on the broad grounds of the reasons given. The order of this Court is that Mr Justice STRACHAN'S decision be confirmed with costs.

Decree confirmed.

Attorneys for the Plaintiffs — *Messrs Crawford, Brown and Co*

Attorneys for the Defendants — *Messrs Little and Co*

The Bombay High Court Reports, Vol IX Page 217.

*Before C. J. and Westropp, J.**

THE JUSTICES OF THE PEACE FOR THE CITY OF
BOMBAY (PLAINTIFFS)

v.

THE GREAT INDIAN PENINSULA RAILWAY
COMPANY (DEFENDANTS)

*Rates—Municipal ground rates—Railway Company's liability to pay rates—
Inter-cycles of rates—Order—October 1871—Act II of 1870 (Bombay)—Act
IV of 1871 (Bombay)*

1872
May 27

The Great Indian Peninsula Railway Company which under an agreement with Government holds the land upon which their railway is constructed free of rent for 99 years are occupiers only and not owners of such land within the meaning of Section 2 of Bombay Act II of 1870 and are therefore not liable to be rated as owners of the ground used by them for the purposes of the railway within the City of Bombay.

Principles upon which Railway Companies are liable to be rated considered and laid down.

This was a special case stated, under Section 328 of Act VIII of 1860, for the opinion of the High Court. The material portions of the case stated that—

By an Indenture of agreement, bearing date the 17th day of August, A. D. 1840 and made between the East India Company of the one part and the Great Indian Peninsula Railway Company of the other part wherein, amongst other things, it was stated that the said Railway Company had contracted, to make, maintain and work a railway from Bombay to Calcutta, and to pay into the Treasury of the East India Company the sum of £500,000, to be, from time to time, drawn out for the purposes of the said railway, and that it had been agreed that the said railway, when finished, should be leased to the said Railway Company for the term of ninety-nine years, subject to any branches by the said Railway Company of certain conditions imposed on them in the said Indenture of agreement, the said East India Company covenanted, to obtain possession and to

* After the arguments of the case had been heard and before the Judgment was delivered C. J. was appointed to the Chief Justiceship of Bengal and Westropp, J. was appointed Chief Justice at Bombay.

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make over to the Railway Company free from all charges, the land required for the said railway, for the said term of ninety-nine years, subject as aforesaid

Since the making of such Indenture of agreement, the capital of the Railway Company has been increased, and by successive agreements made between the Government of India and the said Railway Company, like powers, as in the first mentioned agreement, were granted to the said Railway Company, to extend the said railway from Colhan aforesaid to other places in the Mofussil

The Railway Company have since extended their line of railway, one terminus of which is at Borce Bunder in the Island of Bombay, the other terminus being at different places in the Mofussil, to wit, Sholapur, Nagpur, and Khundwah, and the Railway Company, since such first mentioned agreement, have been, and now are, in possession, and exclusive occupation of the same as well as of sidings, stations, offices, store rooms, goods warehouses and other conveniences situated both in Bombay and various other places along the said railway between Bombay and the various termini in the Mofussil before mentioned

In the year 1855, the Assessing Officer, under and by virtue of the Statute 33, Geo III, Chapter 52, Section 158, assessed the said Railway Company at the sum of Rs 3,750 in respect of houses, buildings and ground owned and occupied by them within the City and Town of Bombay, and from that time to the year 1870 inclusive each and every year was the said Company duly assessed. The assessment for the present year (1869) was made under the provisions contained in Act II of 1865 and Act IV of 1867

The said Railway Company have always maintained that the ground occupied by their railway within the City of Bombay, has no assessable value, as they are not the owners of the same nor have they any title thereto, but, on the contrary, that the same is owned by and vested in the Government of India, as appears from the letters which passed between the Solicitors of both the Government and the Railway Company

The following questions were submitted to the Court for its opinion —

1st — Is the Great Indian Peninsula Railway Company liable to be rated as owners for the ground used by them for the purposes of the railway within the City of Bombay?

2nd—If so, upon what principle is the assessment to be made?

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3rd—The Railway Company admitting that they are liable to be rated as occupiers of land, upon what principle are they to be rated as such?

The case came on for argument before COUCH, C J, and WESTOFF, J

Allinson, Sergeant, McCulloch, and Green, for the Plaintiffs.

Marriott and Latham, for the Defendants Cur Adv Vult.

27th May—WESTOFF, C J (after reading the special case as stated above, proceeded) —

This special case, as I have stated it, is the amended case which was filed in March 1870, and not the case originally presented, and which was of a much more extended nature

This case, it will be observed, has no reference to stations, houses, buildings, &c. Upon these the Railway Company have, for several years past, paid rates. It relates to ground only. As to the first question, I have come to the conclusion that the Railway Company are not liable to be rated as "owners" in respect of the ground used by them for the purposes of the railway.

The Indenture of agreement of the 17th August 1840 appears to me to vest in them a right to occupy the land for ninety nine years, determinable under the circumstances set forth in that Indenture. The occupation is only for certain purposes, the absolute dominion over the land not being given to the Railway Company.

Such was the nature of transaction that there has not been any rent reserved to Government, but if rent had been reserved, Government, in whom the reversion is vested, would alone have been entitled to receive it.

It was not, I think, intended that the definition of "owner," contained in Section 2 of the Act, should have been applied to one who himself is a lessee, or who holds, as the Railway Company does here, under an agreement to grant him a right of pancy for specific purposes for a term of years, and who to another. The remark is made by me with words in the definition, "or who would receive land or premises were let to a tenant."

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There would be some difficulty in contending that the Railway Company has any right to sublet, but, even if it had, I do not think that a party who sublets was intended to be included in the definition of "owner"

In fact, we find that Section 48 draws clearly a distinction between owners and tenants who sublet, applying to the party alone who makes the first letting the term "owner," and to his lessee who sublets, the term "tenant," and albeit that Section 48 deals with houses and buildings only, the argument as to the proper use of the term "owner" is not thereby weakened. The true mode of construction of enactments is, if it be reasonably possible, to give to a word the same construction throughout the enactment, unless there be something in the context repugnant to that construction. I see nothing in the context to render it imperative upon the Court to hold that the term "owner" in Section 2 of the Act necessarily includes a lessee.

The definition of "owner" in that section is perhaps not a very happy one, but the Legislature itself by Sections 47(1) and 48 has greatly aided that definition, and showed that the rent spoken of in Section 2 means rent receivable, or which might be receivable, under an original letting, and not a subletting, otherwise, indeed, every temporary occupier who sublets would become an "owner" and liable to be rated in that capacity—a result which it would not be reasonable to hold as within the intention of the Legislature without some more clear declaration of it than can be discovered in the Act.

Government appears to me to be the owner of the land, but I am not in anywise called upon, on the present occasion, to determine what its liability may be, and I do not intend to offer any opinion upon that point. I hold that the Railway Company are not owners within the scope of the Act.

2 The Railway Company admits its liability as "occupiers"

The principle, upon which the Railway Company is liable to be rated as occupiers, is to take the gross earnings of the portion of the line which is within the City (Island) of Bombay, and to make therefrom the following deductions—

1 The expenses of working that portion of the line

(1) Section 47 has been repealed and a somewhat similar enactment substituted for it.—Bombay Act IV of 1867 Section 1—which does not alter the argument.

- 2 The repairs of rolling stock, etc, used on that portion of the line
- 3 An allowance for renewal of it
- 4 An allowance for a compensation fund
- 5 Interest upon the capital necessary for working that portion of the line
- 6 Tenant's profit on that capital

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A deduction in respect of income tax has also been claimed on behalf of the Railway Company, and in support of that claim *Reg v The Great Western Railway Company*(1) has been cited. But that case has been, in that respect, overruled by *Reg v The Southampton Dock Company*,(2) upon satisfactory grounds. I must hold that income tax is not a proper deduction.

If an allowance be made for depreciation of rolling stock, the fact of such an allowance having been made should be taken into consideration in fixing the rate of tenant's profits.

The letter of the 23rd March 1870, appended to the amended special case and marked A, appears to have erroneously adopted the now exploded mileage principle. The principle to be adopted here is that which, in England, is known as the parochial principle.

The figures in this case will, according to the terms arranged between the parties, be worked out by their mutual referee, Mr Ormiston, upon the principles laid down in this decision.

The parties will, up to this stage, bear their own costs respectively.

(1) 6 Q B 179, 205

(2) 14 Q B, 587, 611

The Indian Law Reports, Vol. XIII (Madras) Series
Page 78.

APPELLATE CIVIL.

Before Mr. Justice Muthusami Ayyar.
MUNICIPAL COUNCIL OF TUTICORIN
(DEFENDANTS), PETITIONERS,

v.

SOUTH INDIAN RAILWAY COMPANY
(PLAINTIFFS), RESPONDENTS *

1897
August, 7,
Rpt, 7

Municipalities — District Municipalities Act—Act II of 1884 (Madras) S. 19, 20, 53, 101—Wrongful assessment of profession tax—Jurisdiction of Small Cause Court—Provincial Small Cause Courts Act—Act IX of 1887, Sch II, paragraph 1—Order of a Local Government

The Municipality at Tuticorin demanded Rs 50 as profession tax from the South Indian Railway Company which had already paid profession tax to the Municipality at Negipattam. The Company complied with the demand under protest and sued the Municipality for a refund of the amount paid on the Small Cause Side of the District Munsif's Court.

Held (1) the Court had jurisdiction to hear and determine the suit.

(2) the Municipality at Tuticorin had no right to levy the tax on the Railway Company and the decree directing the amount levied to be refunded was correct.

Petition under Act IX of 1887, S 25, praying the High Court to revise the decree of S. Krishnasami Ayyar, District Munsif of Tuticorin, in Small Cause Suit No. 1041 of 1887.

Subramania Ayyar for Petitioners

Burton for Respondents

The facts of this case and the arguments adduced on this petition appear sufficiently for the purpose of this report from the following—

JUDGMENT.—The petitioners in this case are the Municipal Council at Tuticorin and the counter-petitioners are the South Indian Railway Company. The question for decision is whether

the Railway Company who exercise their profession or carry on their business as such Company as well within the limits of the Municipality at Tuticorin as within the limits of the Municipality at Negapatam are liable under Act IV of 1884 (Madras), to pay the profession tax to both Municipalities. The facts upon which the question arises are shortly these. In 1884, when Act IV of 1884 was passed Negapatam was the head-quarters in India of the South Indian Railway Company. The Company's profession tax was paid for that and the subsequent year to the Negapatam Municipality. In April 1885, the Company's head quarters were transferred from Negapatam to Trichinopoly, but the Negapatam Municipality continued to demand and the Railway Company continued to pay them the profession tax due for 1886-87 and for the first half of 1887-88. On 6th August 1887, the Municipality at Tuticorin gave notice to the Railway Company that Rs 50 was payable to that body as the Company's profession tax for the first half of the year 1887-88. This demand was made after the Company had paid Rs 50 as their profession tax to the Municipality of Negapatam for the same half-year. On the 31st August 1887, the Railway Company paid Rs 50 to the Municipality at Tuticorin under protest and preferred an appeal against the assessment on the ground that the profession tax had been previously paid to the Negapatam Municipality. Their appeal was rejected and they then sued for a refund on the Small Cause Side of the District Munsif's Court at Tuticorin. The Tuticorin Municipality resisted the claim on three grounds, viz., (1) that the suit was barred by Act IV of 1884 (Madras), (2) that the District Munsif had no jurisdiction to entertain it on the Small Cause Side, and (3) that the tax, of which a refund was claimed, had been lawfully levied. The District Munsif disallowed their objections and decreed the claim with costs and the contention before me is that the decision is contrary to law as regards each of those objections.

As to the first objection, viz., that the suit cannot be maintained in a Civil Court, I am unable to support it. It is taken with reference to Section 101 which provides that the adjudication of an appeal by the Municipal Council shall be final. Section 97 allows an appeal from the decision of the Chairman to the Municipal Council in regard to (i) any classification or revision under Section 54, (ii) any valuation or assessment under Section 65 and any revision thereof under Section 71, and (iii) any tax on any vehicle or animal demanded on behalf of the Municipal Council.

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Act IV of 1884 came into force on the 2nd July 1884, and according to the previous decisions of this Court in *Kamayya v Leman*(1) and in *Leman v Damodaraya*,(2) a distinction was made between a suit contesting the incidence of a tax lawfully imposed and a suit to recover back money wrongfully levied on the ground that the so called tax had no legal existence. Section 83 of Act III of 1871 to which those decisions referred provided that "no person shall contest any assessment in any other manner than by an appeal as heretofore provided." Section 85 of the Act III of 1871 and Section 101 of the present Act appear to me to be substantially the same, and the jurisdiction which the Civil Courts had under Section 85 of the former Act was not taken away by Section 101 of the Act now in force. Again, Section 87 of Act III of 1871 provided a rule of decision impliedly for the guidance of Civil Courts and enacted that no tax shall be impeached by reason of an mistake in the name of any person liable to pay the tax, or in the description of any property liable to the tax, or in the amount of assessment, provided that the directions of the Act be in substance and effect complied with. Section 202 of the present Act re-enacts in substance Section 87 and provides further by clause 2 that "No action shall be maintained in any Court to recover money paid in respect of any tax, etc.," levied under this Act, "Provided that the provisions of this Act relating to the assessment and levy of such tax and to the collection of payments have been in substance and effect complied with." There can therefore be no doubt that a suit will lie when the provisions of the Act have not been complied with in substance and effect in regard to the assessment and levy of such tax, and the tax cannot be considered to have legal sanction.

The second objection argued before me is that a Court of Small Causes has no jurisdiction to entertain this suit. It is conceded that under Section 15 of Act IX of 1887 it would have jurisdiction if the suit were not specially exempted by the second schedule attached to that Act, but it is argued that it is so exempted and reliance is placed on paragraph 1 of the schedule which is in these terms — "A suit concerning an Act or Order purporting to be done or made by the Governor General in Council or a Local Government, or by the Governor-General or a Governor or by a Member of the Council of the Governor General or of the Governor of Madras or Bombay, in his official capacity,

(1) 1 L R, 2 Mad., 37

(2) 1 L R, 1 Mad., 155

"or concerning an act purporting to be done by any person by order of the Governor General in Council or a Local Government"

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It is urged that the sanction and approval of the Governor in Council are necessary under Sections 49 and 50 of Act IV of 1884 and that the levy of the tax with such sanction is an act done by the order of the Local Government within the meaning of the above cited paragraph. The act contemplated by paragraph 1 is an act done or ordered to be done by the Local Government in its executive or administrative capacity and the sanction or approval contemplated by Section 49 or 50 of Act IV of 1884 is not in my judgment within the purview of paragraph 1 of the second schedule.

The third objection is that the tax of which the refund was claimed was lawfully levied under Section 53. After directing the Municipal Council to notify that a profession tax shall be levied, it provides that every person, who, within the Municipality, exercises any one or more of the arts, professions, or trades or callings specified in Schedule A, shall, subject to the provisions, of Section 59, pay in respect thereof the sum specified in the said schedule, as payable by the persons of the class in which such person is placed. Section 60 provides that no person shall be liable to the payment of the tax under Section 53, who shall prove that he has paid the tax for the same half-year in any other Municipality. It is not disputed in this case that the South Indian Railway Company had paid their profession tax to the Municipality at Negapatam when the Municipality at Tuticorin called upon them to pay their profession tax. The intention which the two sections suggest when they are read together, is that the person liable to pay a profession tax has to pay it but once, and that when he lawfully pays it in any one Municipality he is not liable to pay another profession tax for the same period in any other Municipality. Any other construction would lead to this result, —that the South Indian Railway Company would have to pay as many profession taxes as there are Municipal towns through which their railway passes, though they exercise but one profession. The tax seems to be regarded as being in the nature of a license or a registration fee, and when it is paid and the exercise of the profession is once licensed, no second license or registration fee is intended by the Legislature to be required for the same half-year. In this connection I may refer to the proviso of Section

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58 of the old Act It was in these terms "No person, who shall prove that he has paid the tax prescribed in this section in any one Municipality, shall be required to pay the same for the same half-year in any other Municipality, *unless it shall appear that he has exercised in both Municipalities within the same half year the art, profession, trade or calling in respect of which he has been taxed*" The omission in the present Act of the last clause is significant, and appears to confirm the view which I take

The decision of the District Munsif is right, and I dismiss this petition with costs

Hyde's Reports, Vol. II, Page 228.

Before Mr. Justice Lvinge.

HAM

v

THE EASTERN BENGAL RAILWAY COMPANY

1861

December 14
15 16 & 17
—

Wrongful dismissal—Master and servant—Misconduct

The plaintiff was appointed as Head Accountant and Assistant to the Agent in India by the E B Ry Co and he entered into an agreement to serve the Company for three years Before the expiration of this period he was dismissed from the service for alleged misconduct without the six months notice provided in the agreement He, therefore sued the Company for damages for wrongful dismissal *Held* that the misconduct alleged by the defendants was not so gross as to justify his summary dismissal and that he should recover six months salary and passage to England

Eglinton with Lowe for the Plaintiff

Marshall with Wilkinson for the Defendants

THIS was a suit to recover damages for wrongful dismissal In the month of March 1863, Mr. Ham, who had previously been in the service of the Eastern Bengal Railway in the Engineer's Department, was appointed Head Accountant and Assistant to the Agent in India at a salary of six hundred rupees a month, and entered into an agreement to serve in that capacity for three years That agreement was as follows —

Articles of agreement entered into this 9th day of March, 1863, between George Ham of Lower Circular Road in the Town of Calcutta of the one part and the Eastern Bengal Railway Company and hereinafter called the Company of the other part

The said George Ham engages himself in the service of the Eastern Bengal Railway Company for three years from the 1st day of March, 1863, on the following conditions —

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1 He shall reside at such place, and remove from time to time to such place or places, and occupy and employ himself as may be required by the said Company through the Secretary of the Company for the time being in England, or by the Agent for the time being, appointed by the said Company, to manage the affairs of the Company in India

2 He shall faithfully and diligently employ himself in the service of the Company as Chief Accountant and Assistant to the Agent at such place and places as the said Company through such Secretary or Agent as aforesaid shall require

3 He shall devote his whole time and attention on the service of the Company, and shall use his utmost exertions to promote the interest of the Company

4 He shall in all things be subservient to and obey the orders and directions of the said Company, and of the Agent of the Company in India for the time being, so long as they are consistent with the time of this agreement, and shall neither directly nor indirectly be engaged in any other service, business or speculation whatever

And in consideration of the agreements hereinbefore contained on the part of the said George Ham to be done and performed, and of the due and faithful and exclusive services to be rendered by him to the said Company for three years as aforesaid, the said Company doth promise and agree with him in manner following

That the said Company shall pay to the said George Ham for the period of the first two years of his services commencing from the said first day of March 1863 the sum of Rs 600 per month, and for the third or last year of the said period of his services the sum of Rs 700 per month

That if he shall at any time neglect or refuse, or from any cause become or be unable to perform or comply with all or any of the Articles of this agreement, or any of the duties required by him or all or any of the orders of the said Company or their Agent aforesaid, or shall in any manner misconduct himself, or shall correspond verbally or otherwise directly or indirectly on the affairs of the Company with parties unconnected with the executive of the Company, or shall publish directly or indirectly

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any information, paper, document, book, or matter of any kind whatsoever affecting the Company, it shall be competent to the Directors or their Agent in India to declare the employment of the said George Ham under this agreement at an end

That at the expiration of the said three years (provided the said George Ham shall have satisfactorily complied with and performed the Articles of this agreement) the said Agent shall provide the said George Ham a first class passage to England and Egypt at the expense of the Company

That in the event of the Company or their Agent in India becoming desirous to terminate the engagement of the said George Ham at an earlier period than three years from the commencement thereof, they shall be at liberty to do so on giving him six months' notice (signed by the Secretary or Agent or otherwise determinable) at any period of the year on paying him salary for that period, and shall moreover in such case, provided the engagement of the said George Ham shall have been terminated without fault or incapacity on his part, provide the said George Ham a first class passage to England at the expense of the Company, and the Company shall also provide the said George Ham a like passage to England at the expense of the Company in the event of his being under the necessity from illness of proceeding to England, the said Company shall provide the said George Ham a passage to England via Egypt, or the Cape, at the expense of the Company, provided that it shall be satisfactorily established that such necessity exists, and it is not occasioned by any impropriety of conduct on the part of the said George Ham, and that he shall be provided with a certificate of good conduct from the proper officer of the Company in that behalf.

That the said George Ham hereby binds himself under a penalty of Rs 6,000 to the said Company, diligently and faithfully, to perform the various matters and things contained in the agreement. In witness whereof the said George Ham and the Agent of the said Company, for and on behalf of the said Company, have respectively herunto set their hands and seals the day and year first above written *

GEORGE HAM (L S)

FRANKLIN PRESAGE (L S)

Acting Agent,

L B RAILWAY

On the 3rd of December, 1866 the plaintiff was dismissed without the six months' notice provided in the agreement. The defendants admitted the dismissal but justified it on the ground of the plaintiff's misconduct.

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LEVINGE J.—This case has been very fully gone into, witnesses have been examined on either side, and all the circumstances relating to that which forms the subject of the suit have been laid before the Court. And it is impossible that I should not have made up my mind as to what the Judgment of the Court should be. If juries were established in civil cases in this Court, this is a case which would have been tried before a special jury, and it is in a peculiar degree a case in which the question would have been one entirely for their consideration. Perhaps the position of the plaintiff would have been better if his case had been submitted to a jury, as there is always a disposition in juries to sympathise with a person in the position of the plaintiff. I cannot say that I do not share that sympathy. But at the same time, though I am of opinion that the defendants have not made out a case justifying the summary dismissal of the plaintiff from their service, I think that the evidence has disclosed a state of affairs that rendered it extremely difficult, if not altogether impossible for Mr Prestage, the Acting Agent for the Company to carry on the business of the Company in its connection with the duties to be discharged by Mr Ham. But what he ought to have done was to have given six months' notice to Mr Ham to determine his engagement. This was not done. In order to justify the dismissal of a servant on the ground of misconduct, I am of opinion that mere venial faults are not sufficient, but that there must be something gross in the acts or duties committed, or omitted, to warrant a summary dismissal. Looking at the acts relied upon here in justification of the dismissal I do not think they are of that nature or gravity to warrant a dismissal without notice. There is no charge of want of capacity on the part of Mr Ham to fulfil the duties of the office to which he was appointed. That is stated, and very properly stated as one of the grounds of dismissal. But it was not attempted to show that there is the slightest ground for any such imputation. Indeed it was admitted by the learned Counsel for the defendants that he was perfectly qualified for the office, and there cannot be a doubt that Mr Ham is a gentleman of very considerable attainments and ability, and possessed of every capacity and qualification for such an office. Then what are the grounds upon which his summary ejection from the employment

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of the Company is attempted to be justified. The first reason assigned in Mr Prestage's letter is "for persistently disobeying my orders and instructions by corresponding with me, instead of personally attending at my office, to dispose of the business of your office." The evidence in support of this is that in the month of August Mr Prestage had remonstrated with the plaintiff for communicating by letter instead of waiting upon him personally and receiving his instructions verbally, and that subsequently Mr Ham had written a letter to Mr Prestage, enclosing three letters about some business in the office and that he had sent him a memorandum of a great many matters, to which it appears he might properly have called the attention of the Agent, but which Mr Prestage says he ought to have communicated by waiting upon him, and not by writing. It appears to me that a peremptory order never, under any circumstances to communicate by writing would not be a reasonable order, if such order were given, and that the two instances given in evidence of a disobedience of a direction of a less peremptory character did not constitute such disobedience as would form any ground for dismissal, and certainly falls very far short of that gross misconduct which in my opinion must be established in order to make out the justification upon which the defendants rely. The next reason assigned is for communicating the affairs of the Company with persons not connected with the executive of the Company. There is no doubt by the Regulations and in the agreement into which the plaintiff entered with the Company a prohibition against corresponding "verbally or otherwise directly or indirectly on the affairs of the Company with parties unconnected with the executive of the Company." But the circumstances under which the communication relied upon took place, taken in connection with the person to whom it was made do not appear to me to make out the case of infraction of this regulation. It appears that Mr Ham had addressed a letter to Mr Prestage with reference to a Meeting connected with the Audit Department, complaining that such Meeting had been held without his being present, and that he had allowed Mr Cooke, the Assistant Consulting Engineer to the Government, to take away a copy of that letter for the purpose of showing it to Captain Taylor, the Consulting Engineer to Government. Mr Cooke and Captain Taylor had a right to inspect all the papers and documents of the Company and in the interests of Government under the terms of an agreement between the East India Com

pany and the Railway Company to investigate the affairs of the Company, and I do not think that the allowing Mr Cooke, at his own request, as he himself said, to take away a copy of that letter was a communication of the Company's affairs to a person not an executive officer of the Company within the meaning of the prohibition. The third reason I have already partly dealt with, namely, "for incapacity or neglect of duty." For the former there is not the slightest foundation, and with respect to the latter the only evidence is that on one occasion Mr Ham sent to the Agent a statement of the finances of the Company, which it is the habit to transmit by each mail to the Board in England, prepared by a Bahoo in his office without having looked over it himself and which he admitted contained some sentences that were unintelligible. But I cannot regard this oversight on one occasion to revise and correct a document before sending it into the Agent, as gross misconduct justifying a dismissal. The fourth reason is "for disobeying my orders and directions by submitting to Government a Pay Bill for sanction which I had refused to sign and send forward." The facts with respect to this matter are these.—It appears that the chowkee dabee tax was assessed upon the Company's station at Ranaghat, and that the Pay Bill after it had been signed in due course by Mr Ham for the allowance of the payment was sent in by him to the Acting Manager, whose signature also was required. Mr Prestage did not sign the bill, but caused his clerk to write across it the words "the Acting Agent declines to sign this bill as he is not satisfied that the Company are liable." After the bill was returned to Mr Ham, he wrote upon it the following memorandum—"The chowkeedabee tax must, I think, be paid without further delay, otherwise the authorities will seize the station furniture. I should not have signed this bill unless I had thought it was a fair claim against the Company." It appears that the tax was afterwards paid under protest. I cannot regard this as such an act of disobedience or misconduct as the defendants are bound to establish in order to make out their justification. The fifth reason is "for making notes on Pay Bills after they had left my hand." The chowkeedabee tax bill is one of the alleged instances. The other has reference to what has been called the Contingent Pay Bill. This was a Pay Bill for some small expenses incurred at an office of the Company, Mr Payne's office, and with respect to this the proceeding was altogether irregular, and I cannot see that Mr Prestage was not

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himself in fault, for it appears that contrary to the regular practice in the office he affixed his signature to the bill before it had been signed by Mr Ham. It went before Mr Ham with Mr Prestage's signature upon it, and Mr Ham did not sign it, but wrote upon its face in red ink a memorandum to the following effect — "Mr Payne broke up his office establishment in August and took up his new duties in the Chief Engineer's Office on the 30th August. Pankawallahs Chairmen could not therefore, have been employed by him in Koomar district during the month of September. I cannot pass this bill without special instructions." (Signed) "GEORGE HAM, Chief Accountant." I think Mr Prestage was himself in the first instance to blame for departing from the established usage in signing the bill before it had passed through the Accountant's Office, and it is altogether too frivolous to form any justification. The sixth is however, a charge of the most serious character, one that should never be made lightly nor without the strongest and most convincing grounds. It imputes that Mr Ham told untruths to screen two of his acts. Of one of the alleged untruths we have heard nothing—no evidence has been offered, as to the other some evidence has been given of a conversation upon the 1st of December between Mr Prestage and Mr Ham at which Mr Payne was present, and at which, according to the evidence of Mr Prestage and Mr Payne, Mr Ham asserted that at the time when he wrote the red ink memorandum upon the Contingent Pay Bill, it had not been signed by Mr Prestage. Mr Ham, on the other hand asserts strongly that he never made any such statement. Persons may very easily be mistaken as to what is said at a conversation, particularly where they are under any exciting influence, such as anger. No doubt some conversation and controversy took place about the memorandum previous to the letter of suspension on the 1st of December, and I have not the slightest doubt that each gives that which he believes to be a true account of what was said. But I could not on such evidence arrive at the conclusion that Mr Ham was guilty of an untruth and indeed I think, the probabilities are very strongly against it, as Mr Ham, from his whole course of conduct and character is evidently not a person likely to shrink from the responsibility of what he has done. There was a ground of justification given in evidence in addition to those specified in Mr Prestage's letter namely, that Mr Ham, notwithstanding, by the regulations of the Company, Officers in India are prohibited from communicating

with the Board of Directors in England, otherwise than through the Agent, had done so in the month of September. That was, no doubt, improper, but does not constitute, in my opinion, gross misconduct justifying dismissal. Although I think it extremely probable that Mr Ham was in some respects over-officious, I think I must acquit him of any misconduct. I therefore think that the defendants have failed to make out their justification, and that the plaintiff is entitled to judgment.

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With reference to the damages, I think the plaintiff is entitled to six months' salary, having been entitled to six months' notice, which was not given, and he is further entitled to the cost of a first class passage to England, since by the contract the Directors undertake to forward him to England free, in case they should determine the service before the expiration of the three years.

Judgment for the plaintiff, damages Rs 4,710

Bourke's Reports, Part VII. Page 56.

ORIGINAL CIVIL

Before Peacock, C J., and Macpherson, J.

CAMPBELL, (APPELLANT)

v.

EAST INDIAN RAILWAY COMPANY, (RESPONDENTS) *

Dismissal of Servant—Acquiescence—Contract of Service—Laches

On the 4th of July, 1860, C engaged to come to India as engine driver, for the E I R Co, on a progressive salary of Rs 152 11 7 per month for the first year commencing July 1st, 1860 Rs 174 8 8 for the second, Rs 196 5 9 for the third Rs 218 2 10 for the fourth with a free passage home and the Company might, at any time determine the engagement by a six months' notice. The Company gave this notice in September 1861. When the six months' notice expired the plaintiff was driving ballast trains receiving (under his agreement) Rs 174 8 8 per month. He continued to be so employed and to receive pay at the same rate without interruption or objection until the beginning of 1864 when he was employed to drive passenger trains for the defendants who, thereupon increased

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* Cases heard and determined in the High Court of Judicature at Fort William in Bengal

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his salary. The plaintiff did not assent to the increase but claimed the balance of salary due to him as on the footing of his whole service having been service under the original agreement. His demand not being acceded to he sued the Company to enforce it and also for his passage money home. He also sued for his salary for May 1861, during which month he had been suspended and his pay had been withheld but he had not previously claimed the pay so withheld. In 1862 he had applied to be restored to his position under his original agreement and was refused. The Court below gave C a decree for the amount claimed minus the passage money. Decision reversed on appeal.

Held—That a legal notice of dismissal having been given continuance in the service on a reduced salary is evidence of acquiescence by the servant in his dismissal.

That in such a case the servant serves under a fresh contract, not at the rate of wages previously received by him but at the rate he is actually receiving.

That a servant whose wages have for one month been stopped during suspension for alleged misconduct and who continuing in the service has not claimed them for several years has acquiesced in the stoppage.

This was an appeal from a decision of Mr. Justice PHEAR, giving a decree in favor of the plaintiff for Rs. 887-9 7 (1).

This suit was brought by plaintiff, who had formerly been an engine driver in the service of the defendants, to recover arrears of salary and wages alleged by him to be due in respect of three years, during which he had received a smaller sum than he claimed to be entitled to.

He entered into an engagement in England, on the 4th of July, 1860, to come out to India to serve the Company as an engine driver, for the period of four years. By the terms of the contract, the plaintiff was to receive a monthly salary after a yearly rate, which was to increase in amount during each of the four years. During the first year he was to receive Rs. 152-11-7 per month; during the second, commencing 1st July, 1861, his salary was to be Rs. 171-8-8, in the third year it was to be increased to Rs. 196-5-9 and in the last year he was to receive Rs. 218-2-10. The plaintiff was also to be entitled to a free passage home to England. A power was reserved to the Company to determine the engagement at any time during the four years, by giving to

(1) In this case the alternative point of *laches* by the plaintiff is not raised. It is perhaps rather a sleeping over alleged rights than an absolute defence with regard to claims subsequently asserted which being the ground of defence here overrules the consideration of *laches*. Had the Court not considered the plaintiff's conduct to amount to acquiescence a second string to the bow might have held good—E.I.

the plaintiff six months' notice, in writing, of their desire to do so. And in that event, the plaintiff if the notice were not given in consequence of misconduct was to be entitled to be sent home at the expense of the Company. The plaintiff came out to India under the contract, and was employed as an engine driver. In the month of September 1860, the Company in consequence of dissatisfaction with plaintiff in certain matters, and complaints of alleged misconduct on his part gave him six months' notice to determine the engagement. This notice expired in February 1861. The plaintiff, some six weeks after the giving of the notice, was taken from the employment of being a driver of passenger trains, and was engaged in the driving of ballast trains. Upon the expiration of the notice he did not leave the service of the Company, but still continued in the same employment down to the early part of 1861 and during the whole of that period he received monthly an unvarying salary of Rs. 174 8 8. In the early part of 1861, he was for a short period employed in driving passenger trains, and his salary was, thereupon, increased to Rs. 190. The plaintiff shortly afterwards claimed to be entitled to the salary to which he would have been entitled if the agreement had remained in force, and he afterwards left the service of the Company, and brought the present action against them, for the difference between the salary he received and that to which he would have been entitled under the agreement, if the same had continued in force, and also the amount of a free passage to England. The plaintiff claimed salary for the month of May 1860, during which he had been suspended from his employment and his wages stopped. It appeared that the plaintiff had not previously complained that he was entitled to more than the salary paid to him or asserted any right to be paid the salary reserved by the agreement. But, in 1862 he addressed a letter to Mr. Palmer, the Acting Director of the Company in India in which he begged to be replaced in the position of the covenanted servant of the Company, a request with which Mr. Palmer refused to comply (1)

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Marshall and Woodroffe for the Appellant —The Court below drew an inference not justified by the facts. The Company having exercised the right they possessed of determining the engagement, and the contract having been put an end to by the notice, it cannot be inferred to have been within the intention of the parties that the agreement with respect to salary, under the contract, should regulate the new service, because the defendants, by paying the unvarying smaller salary, and the plaintiff, by receiving it without objection, showed that each understood that the contract did not regulate the salary. Further, the plaintiff not only showed by his conduct that he was in the position of an uncovenanted servant, but he admitted that he was, by applying to be placed on the footing of a covenanted servant. There is no room to infer an agreement where the parties, by their conduct have shown a mutual understanding of what the contract is. Part of the consideration for the increased salary of future years, was the advantage to the Company of having the services of the plaintiff for the full term, but, after the contract was put an end to, this benefit no longer remained, for the plaintiff might have left at any time.

Eglinton, S C, for the Respondents —The plaintiff was entitled to the arrears of the difference of salary. When he remained after the expiration of the six months mentioned in the notice, he did so upon the terms of receiving that salary which the Company had, by their contract, undertaken to pay him, while

to rest on implication from circumstances. Had both the service been actually performed and the payment made to the plaintiff continued the same after the termination of the written contract, as before, I must no doubt in the absence of any express stipulation between the parties have taken the new service to be a monthly service upon the terms of the old agreement as far as they were applicable. But although all the other circumstances remained the same the payment which was in fact made was not the same as before nor such as would have been correct under the old agreement had it remained in force. How far does this effect the inference which the Court would otherwise draw from the circumstances? If the agreement of service was altered as regards payment, what was the alteration agreed upon in that respect? The Company did nothing on their part to specify the alteration. They made no break in service or stipulation as to alteration in payment. The expiration of the notice found plaintiff alone two hundred miles up the country no one was there to replace him not a word was said on the matter at all and no alteration whatever in the state of things between the parties did occur except that the Company did afterwards alter the rate of payment which they made to him. I find that plaintiff did not acquiesce in this alteration of payment. The Company have not offered a particle of evidence to show what the altered terms were. They have only shown the original agreement as ended. They leave the case practically undefended and

employed by them as an engine driver. Having that right, the mere circumstance of his not objecting to the salary at the time does not preclude him from afterwards recovering the amount. The plaintiff is, at all events, entitled to the salary for the month during which he was suspended from his employment. The Company have no power to stop the wages of a person in their employment.

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PEACOCK, C. J.—This is an action brought by *Joseph Archibald Campbell* against the *East Indian Railway Company*, and he claims the sum of Rs 1,110-2-11, besides passage money to England. His claim is made up as follows.—

| | RS | A. | P. |
|---|-------|----|----|
| Salary for the month of May 1861 at 152-11-7 | 152 | 11 | 7 |
| Difference of overtime in the year 1863 between 174 8-8 and 196-5-9 ... | 92 | 15 | 10 |
| Difference in pay from January 1862 to July 1863, between 174-8-8 and 196-5-9 | 261 | 13 | 0 |
| Difference in salary from 4th July 1863 to 4th April 1864, between 175 and 218-2-10 | 518 | 2 | 0 |
| Difference in pay from 4th April 1864 to 4th April 1865, between 190 and 218-2-10 . . . | 84 | 8 | 6 |
| Total | 1,110 | 2 | 11 |

I ought, perhaps, to treat it as undefended, but as defenceant's Counsel wishes me to consider that plaintiff tacitly agreed to work as an un-avenanted driver, on the wages of such uncovenanted drivers as were doing like work with himself I will observe that the Company have given me absolutely no means of ascertaining what those wages were. I only learn incidentally, that they vary from Rs 90 to Rs 200 a month, and I have no guide to determine which amount between those extremes I should select as the wages which relate to the plaintiff's specific work. On the whole, then, I cannot overlook the fact that there was a previous agreement which I have before me, while there is nothing beyond mere hypothesis suggested to show me that the original terms of that agreement are not to be taken as those adopted for the new service. I therefore find that the new service was an ordinary monthly service, under such terms of the original agreement as are applicable to it. It is not for me to say or enquire why the parties agreed to the particular terms of payment, originally. I can only take them as the rates agreed on and find them applicable to the new service. As to the stipulation for the passage money, I do not think that is applicable. The stipulation in

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The learned Judge who tried the case, has given a decree for the plaintiff for Rs 887 9-7, the amount claimed by him, deducting the passage money and certain other sums, into the details of which I need not now enter. The question is, whether the learned Judge came to a right conclusion in giving a decree at all for the plaintiff. It appears that the plaintiff was originally engaged on the 4th July 1860, in England, to come out to this country under a written engagement that he should faithfully and diligently serve the Company as an engine driver or fitter, in such place or places as the Locomotive Superintendent should require. There is no stipulation made in the Articles of Agreement as to whether he was to be a passenger engine driver or a ballist engine driver. In consideration of those services, the Directors agreed to pay him at the rate of Rs 152 11-7 per month for the first year, Rs 174 8-8 per month for the second year, Rs 190 5 9 per month for the third year, and Rs 218-2 10 per month for the fourth year. There was a stipulation in Article 5, that the Directors should have power to dismiss him for misconduct, and there was also a stipulation in Article 6, that in the event of the Directors being desirous to terminate the engagement with the plaintiff before four years, they should be at liberty to do so, on giving six months' notice, signed by their Secretary, or otherwise. But in case the Board of Directors wished to terminate the engagement with the plaintiff without any fault on his part, they were to provide him with a passage to England at the expense of the Company, either by the Cape or by Egypt, at their option, and the Board further engaged to provide such passage to the plaintiff on the expiry of the term of his contract if his conduct were satisfactory.

Now it appears that, in consequence of some misunderstanding between the plaintiff and the foreman of the locomotive department, and another officer of the Company, the Railway

question was that the plaintiff should be furnished with a passage home on the happening of any one of three contingencies, namely first the contingency that he served the complete term of four years under the agreement second that he was taken ill during those four years and third that the service was terminated by six months' notice and that he desired to go home forthwith. As he did not require to go home at the end of the six months notice none of these contingencies could happen under the new service. I told that the plaintiff is not entitled to the benefit of the stipulation for a passage home. There will therefore be a verdict for the plaintiff for Rs 887 9-7 the amount of the plaintiff's claim deducting the passage money. He shall have no costs and I shall certify that the suit was properly brought in this Court.

Company availed themselves of the 6th Article of the Agreement. The defendant's Agent in his written statement says — "On the 15th August, 1861 the defendant, being dissatisfied with the conduct of the plaintiff in many respects, and, in particular, with his conduct towards the foreman of the locomotive department, and towards Dr Williams, the medical officer of the Company, the following notice was, under the 6th clause of the agreement, served upon him. They do not profess to dismiss him for such misconduct as would have justified them in dismissing him at once but, being dissatisfied with him, they were desirous of terminating the engagement and therefore, under clause 6, they gave him the following notice —

"Mr J A CAMPBELL Engineman, Burdwan

Sir,—On behalf of the East Indian Railway Company, I hereby give you notice, in pursuance of clause 6 of the agreement entered into between yourself and the said Company, and dated 4th day of July, 1860, that the Board of Directors terminate your engagement with the said Company, at the expiration of six months from this date

I am, Sir,

Your Obedient Servant,

EDWARD PALMER, *Agent*"

The plaintiff says that his agreement was not terminated by this notice. The learned Judge who tried this case, however, was of a different opinion. He says in the first part of his judgment —

"In this case, I think it is clear that service, under the original agreement, ended at the expiration of the six months' notice. There was no waiver of the notice, and the plaintiff, by his visit to Mr Palmer, and his letter twelve months afterwards shows that he never considered there was any waiver, although the service, under the agreement, came to an end. There was a continuation of service, or rather a new service, and it is a question of fact what the terms of that service were." I think, to that extent the learned Judge was perfectly correct in his judgment. I think it scarcely necessary to do more than refer to the plaintiff's own evidence to show that that was his idea of the matter. It appears from his conduct throughout, that his written agreement was terminated. He says — "Before I received notice of 15th August, I went to Mr Palmer, because

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"Mr Stokes had issued an order that I was not to drive an engine, that was five months before I received the notice, I was no wise discharged. When I went to Mr Palmer, after receiving the notice, I went to see Mr Palmer, but had to come away without seeing him. I did not ask Mr Palmer to allow me to continue on my former footing. I had a personal interview with Mr Palmer before I wrote the letter of January 1863, No 5. It refers to a personal interview. That is the only letter I wrote to Mr Palmer, that was the only interview with Mr Palmer. I required a letter, with a man to relieve me, and a pass to bring me from Peerpointee to Howrah. I considered myself, in consequence of not receiving it, a covenanted servant of the Company. I considered myself, as a covenanted servant, entitled to receive the same pay and the same rights. There was no one else at Peerpointee to take charge of the engine. I wrote No 5, that I should receive the same rate of pay as those who, like me, had joined in England. I wrote as regards my salary when I found they did not pay me. I wrote No 5. I believed, when I wrote it, I had the same rights under the agreement as when I left England, that letter was written in regard to my salary, with the exception of the personal interview referred to in No 3. I went to see Mr Palmer in only Fairweather's case, but he would not see me. I never but once went to Mr Palmer, when he refused to see me, neither he nor Mr Stokes ever said I should not be continued as a covenanted servant. They never gave me notice that, from 15th February, I should be continued as an uncovenanted servant. I am glad Stokes never said on what terms I should continue. Mr Palmer wrote that he could not interfere with reference to the rate of pay. Now, let us see what he did write to Mr Palmer. This letter does not seem to be the letter of one who considered that he was a covenanted servant, and that his agreement had not been terminated. It rather appears to be a letter from a person throwing himself on the consideration of Mr Palmer. The letter is as follows — "Having had the honour of a personal interview with you in Calcutta, on the 26th ultimo, relative to my permanency as a covenanted driver on the East India Railway, I beg most humbly and respectfully to detail my wishes. On the 15th August, 1861, I received the usual notice of six months to leave the Company, originated through a little grievance between me and the

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"Locomotive Foreman, coupled with other trouble, and the
 "inattention of a Medical Doctor to my wife, who, to my regret
 "is now suffering from insanity in England, through sickness
 "which was apparently neglected in this country. Under the
 "painful circumstances my only request is, that I may be
 "favoured with the same right to be on and in the covenanted
 "position as I had when I joined in England. In asking this
 "request I beg most humbly to refer you as regards character,
 "&c, to the head of the locomotive department, as also to every
 "employer, Engineer and others I have since served with. All
 "I most respectfully and humbly ask is, that waiting your kind
 "consideration after viewing the tenor of this letter I may be
 "placed on a footing of right to claim, and be allowed the pro-
 "motion for service on the East India Railway, as any other
 "driver employed under equal agreement to mine made in
 "England. In soliciting the above, I most humbly assure you
 "that were it not for the expense in supporting those who are
 "at home, I would not ask any favour under present circum-
 "stances and orders." In this letter the plaintiff merely asks
 that he may be placed in the same footing as he was in
 originally, and as every covenanted engine driver was on. Mr
 Palmer in his reply says—"I beg to acknowledge the receipt
 of your letter of the 4th instant, and in reply to inform you
 that, after having communicated with Mr Nichol on the subject,
 I regret to say, I am unable to accede to your request to be
 reinstated in your former position, as a covenanted servant of
 the Company."

It appears to me that nothing can be clearer than that the
 contract, entered into in England, had terminated, and was
 considered by the plaintiff himself to have terminated. The
 question then arises, under what terms did the plaintiff continue
 in the service? Did he continue in the service as an engine
 driver on the terms of the contract which he entered into in
 England, namely that he should have for the first year Rupees
 152 11-7 per annum, for the second year 174 8 8, for the third
 year 196 5 9, and for the fourth year 218 2 10? The learned
 Judge considers that he was retained upon the terms of that
 agreement. He says—"There was a continuation of service,
 "or rather a new service, and it is a question of fact what the
 "terms of that service were, unfortunately, the defendants have
 "allowed this to rest on implication from circumstance. Had
 "both the service actually performed, and the payment made to

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"the plaintiff continued the same after the termination of the
"written contract as before, I must, no doubt, in the absence of
"any express stipulation between the parties, have taken the
"new service to be a monthly service upon the terms of the
"old agreement, so far as they were applicable. But, although
"all other circumstances remained the same, the payment,
"which was, in fact, made, was not the same as before, nor
"such as would have been correct under the old agreement had
"it remained in force." Now, that is clearly the case, because,
although the plaintiff from July 1861 to July 1862 would have
been entitled to Rs 174 8 8 per month, and from July 1862 to
July 1863 to Rs 196 5 9, and from July 1863 to Rs 218 2-10, he
continued to receive Rs 174 8 8 without any objection, for long
after the higher rate would (under his original agreement) have
been due. He has said that he wrote one letter claiming the
higher rate but received no answer. That letter, however, is
not in evidence, and therefore I cannot say what it was. But
it is remarkable that, after writing that letter (if he did write it)
he should continue to receive the old rate of pay, 174 8 8,
without making any further objection until a much later period,
viz, in April 1864. But says the learned Judge—"How far
"does this affect the inference which the Court would otherwise
"draw from the circumstances of the agreement of service being
"altered as regards payment? What was the alteration agreed
"upon in that respect? The Company did nothing, on their
"part, to specify the alteration, they made no break in service,
"or stipulation as to alteration in payment. The expiration of
"the notice found the plaintiff, alone, two hundred miles up the
"country, no one was there to replace him, not a word was
"said in the matter at all, and no alteration whatever in the
"state of things between the parties did occur, except that the
"Company did afterwards alter the rate of payment which they
"made to him, and, I find, that plaintiff did not acquiesce in this
"alteration of payment."

The question really is, is there any evidence upon which we can
say that the plaintiff did not acquiesce, or is there not rather
strong evidence that he did acquiesce, in that alteration? He
continued to receive payment at Rs 174 8 8, notwithstanding
that (as he says) he wrote a letter claiming to be entitled to
Rs 196 5 9. But when we turn to the letter of November which
is before us, and which he wrote some months after he would have
(under his old agreement) been entitled to pay at the higher rate

We find that he never wrote to Mr Palmer to say that he was entitled to the rise in wages which commenced with the third year, or claimed any such rise as a thing to which he was entitled under the agreement. He merely writes to request that he may be restored to the position which he had had under the agreement, and be put on the same footing as a covenanted engine driver. It appears to me that, by receiving salary at Rs 174-8-8, as he did, he acquiesced in the change which the defendants had made in his position.

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The learned Judge goes on to say — "The Company have not offered a particle of evidence to show what the altered terms were." I think they have shown this, that instead of increasing his salary to Rs 218-2-10, they continued to pay him only Rs 174-8-8, which he accepted. That shows what the altered terms were. The learned Judge proceeds — "They have only shown the original agreement was ended. This leaves the case practically undefended, and I ought, perhaps, to treat it as undefended, but as defendants' Counsel wishes me to consider that plaintiff tacitly agreed to work as an uncovenanted driver on the wages of such uncovenanted drivers as were doing like work with himself, I will observe that the Company have given me absolutely no means for ascertaining what those wages were. I only learn, incidentally, that they vary from 90 to 200 rupees a month, and I have no guide to determine which amount between those extremes I should select as the wages which relate to the plaintiff's specific work."

The plaintiff himself gave his own evidence on this subject. It appears that the plaintiff, even before the six months of the notice expired, was not allowed to drive a passenger engine, but was driving only a ballast engine, he continued to do this until expiry of the notice, and, after the expiry of the notice, he continued to be a ballast engine driver for very nearly the whole period up to January 1864, a period of two years. He may on one or two occasions have driven a passenger engine. But up to January 1864, his was not the service of a passenger engine driver, but of a ballast engine driver. Now what does the plaintiff say? He says — "The pay of a ballast engine driver was 90, 100, or 110 Rs, and latterly raised to 120 Rs." Now is it likely, when the plaintiff was not continued as a passenger engine driver, that the Company would allow him to receive a higher rate of wages than Rs 174-8-8, which was a much higher

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rate of "wages" than the Company usually paid ballast engine drivers?

In another part of his statement, plaintiff says — "The pay per month of a passenger engine driver, not brought out, is from 140 to 200, 210 is the highest I have known some of them to run for 130 and 140" The plaintiff, then, was not in the position of a passenger engine driver, but in the position of a person who had for some reason or other been removed from that position to that of a ballast engine driver, at the rate of 174-8-8, when he knew that others were receiving as passenger engine drivers from 130 to 140 Rs a month. Mr. Palmor has also given his evidence on the subject as follows — "A covenanted man comes out at Rs 140, and gets £2 a month more. They come from England on same terms as the plaintiff, we do not bring out ballast drivers here, we give an uncovenanted man £2 less than a covenanted man, we would give a good very nearly the same, Rs 120 to Rs 200. They increase £2 per month. The highest we pay is Rs 200. The covenanted man gets the benefit of the exchange, Rs 218, a ballast engine driver gets about Rs 20 less. During the construction of the line, they were paid by the trucks, a ballast driver gets 120, 130, 140, or 150 rupees, 150 would be the highest, except he was an old servant." Therefore, the plaintiff, during the time he was acting as a ballast engine driver, was getting more than the highest rate of wages at which ballast engine drivers were employed. Whether this was in consideration of the circumstances under which he came out from England, I cannot say, but there is nothing in the evidence to show that he was entitled to more, and the evidence both of himself and Mr. Palmor shows that he was already receiving considerably more than he was entitled to, relation being had merely to the service he was performing. Then the learned Judge goes on — "I only learn, incidentally, that they (the wages) vary from Rs 90 to 200 a month, and I have no guide to determine which amount between those extremes I should select as the wages which relate to the plaintiff's specific work. In the whole, I cannot overlook the fact that there was a previous agreement, which I have before me, while there is nothing beyond mere hypothesis suggested to show me that the original terms of that agreement are not to be taken as those adopted for the new service. I therefore find that the new service was an ordinary monthly service, under such terms of

"the original agreement as are applicable to it" But, independently of the evidence which the plaintiff gives of the rate of wages that engine drivers were receiving, and independently of Mr Palmer's evidence on the same subject, there is this circumstance which weighs strongly with me that he was paid and received his pay at the rate of Rs 174 8 8 during the time for which he now claims a higher rate of wages. It is clear that the letter which he says, he wrote claiming more, was not acquiesced in by the Company, for he continued to receive at the rate of only Rs 174 8 8 and received it without objection. So things went on without any claim on the part of plaintiff (with the exception of that single letter which he says he wrote, but which he did not put in evidence) that he was entitled to higher rate of wages, until April 1864 when the Company voluntarily proposed to raise his wages from Rs 174 to 190. At that time, the nature of the plaintiff's duties had been changed. He was sent to Buxir, where he was employed as passenger engine driver, from January to April 1864. Very likely, the Company considered that he was conducting himself properly, and discharging his duties satisfactorily, and therefore, voluntarily offered to raise his wages from Rs 174 to 190. Whether that voluntary offer on the part of the Company induced the plaintiff to think that they felt themselves bound to pay him the increased rate of wages I cannot say. But certainly, from that time he began to insist that he was entitled to more than Rs 190 and he says he refused to receive at that rate. He had not refused to receive at Rs 174 before the offer to raise his wages to Rs 190, but had gone on receiving at the rate of Rs 174, and it was only when the offer of Rs 190 was made to him that he not only refused it but also claimed at Rs 196 for the whole period, as though he had remained in the service on the terms of his written agreement. I think that the letter which the plaintiff wrote to Mr Palmer, and his conduct in receiving Rs 174-8-8 per month in the manner which I have described, show that both parties intended that the plaintiff should continue in the service of the Company, not at the rate of wages stipulated for in the original agreement, but at the rate of wages which the plaintiff was actually receiving. It appears to me, therefore, so far as concerns the plaintiff's right to the increased rate of wages which he claims, he has not made out his claim.

The only remaining question is, whether he has made out his claim to receive Rs 152-11-7 for May 1861. This appears to

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have been first claimed after the expiration of the four years. There is no evidence to show that in 1861, or at any time between May 1861 and July 1864, the plaintiff ever made any claim whatever for this one month's wages. There is no doubt that the plaintiff did not receive this month's wages, for the plaintiff says — "I have not received my salary for May, 1861." But then, I wonder how it was that he neglected to claim it for four years while he was receiving salary month by month. He says in another place — "I claim salary for May, 1861, as I was suspended during that month for having a little disturbance with Mr. Panwerthor." It appears, then, that he had been suspended, and it is for the period of suspension that he now claims salary. If plaintiff had been wrongfully suspended, he might have had a cause of action against the Company for any damages he sustained. But there is no evidence to show that he even believed that he was wrongfully suspended, had he so believed, he would have made a claim at some time or other long before he was out of the Company's service. During the whole period of his service, however, he made no claim whatever for the month's wages, neither does he allude in the written statement which he has put in this suit to the circumstances under which he now claims it. But there is further evidence to show that the plaintiff did not consider himself entitled to that month's wages for in July 1864 he wrote as follows to the Locomotive Superintendent —

"I served from the 4th July 1860 to the 4th July 1861, on a monthly salary of Rs 152-11-7. On the 4th of July 1861 my salary was raised to Rs 174 8 8. On the 15th of August of the same year (1861), I was served with a notice to the effect that my services were terminated at the expiration of six months." He does not here refer to the fact that, during the period he served from July 1860 to July 1861 he was wrongfully suspended in May 1861, and that he claimed wages for that month. It is clear, therefore, that the plaintiff acquiesced in the justice of that suspension, and that he may not now claim for that month's wages. Under the whole of the circumstances it appears to me that instead of having given a decree in favour of the plaintiff, the learned Judge ought to have found that the old agreement had been set aside that a fresh contract of service had been entered into with the plaintiff, under which the Company had been paying him Rs 174 8 8 a month, a higher rate of wages than other persons were receiving for the same

duties and the learned Judge ought also to have disallowed the sum of Rs 152-11-7 for May 1861. Under these circumstances I think that the decree of the learned Judge should be reversed, and instead thereof, a decree entered for the defendants with costs No 2. The costs of appeal to be borne by each party. I agree with the learned Judge in disallowing the passage money. I am very sorry that the plaintiff should have rushed hastily into litigation. The consequence of the present decision will, probably, be serious to him, but it is impossible that the Court can act otherwise than on established principles.

MACHESON, J.—I entirely concur with the learned Chief Justice.

Decree accordingly

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The Indian Law Reports, Vol. XIII. (Madras) Series,
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APPELLATE CIVIL

*Before Sir Arthur J H Collins, Kt, Chief Justice,
and Mr Justice Wilkinson*

SOUTH INDIAN RAILWAY COMPANY

(DEFENDANTS), APPELLANTS

v.

RAMAKRISHNA (PLAINTIFF), RESPONDENT *

Defamation—Exposition of suspicion—Slander by a railway guard—Suit against Railway Company—De minimis non curat lex

Suit for damages for defamation. A railway guard having reason to suppose that a passenger travelling by a certain train from Madras to Chingleput had purchased his ticket at an intermediate station called upon the plaintiff and others of the passengers to produce their tickets. As a reason for demanding the production of the plaintiff's ticket he said to him in the presence of the other passengers, "I suspect you are travelling with a wrong (or false) ticket which was the defamation complained of." The guard was held to have spoken the above words *bona fide*.

Held the plaintiff was not entitled to a decree for damages.

SECOND APPEAL against the decree of S T MCCARTHY, District Judge of Chingleput, in appeal suit No 295 of 1888 modifying

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the decree of C SUREY AYYAR, District Munsif of Chingleput, in original suit No 217 of 1887

Action for Rs 250, damages for insulting and defamatory words spoken by a railway guard, in the employ of the defendant Company, of the plaintiff in the presence of various other persons whereby the plaintiff was injured in reputation, &c No special damage was alleged

The facts of the case appear sufficiently for the purpose of this report from the Judgment of the High Court

The District Munsif passed a decree in favour of the plaintiff for Rs 100 On appeal the District Judge modified the decree of the District Munsif reducing the damages awarded to plaintiff to Rs 10

The defendant preferred this second appeal

Mr Johnstone for Appellant

The words complained of are not actionable *per se*. they only express suspicions, which appear to have had a certain justification, or at the worst they were mere vulgar abuse *Parialli v Mannar*,⁽¹⁾ *Dauan Singh v Mahip Singh*,⁽²⁾ *Torer v Mashford* ⁽³⁾

It would be absurd to hold the Company liable for vulgar abuse by its servants which it did not authorize In fact, the guard was acting on his own authority—*Bank of New South Wales v Owston*,⁽⁴⁾ *Odgor on Label*, 2nd edition, pp 411, 416

Ramachandra Rau Saheb for Respondent

The words are actionable *per se* even judged by the English rule, because they imputed conduct punishable both under the Railway Act, Act IV of 1879, Section 32, but also under the Penal Code, but in India the test is hurt to the plaintiff's feelings

As to the liability of the defendant Company, see *Torer v Mashford*,⁽³⁾ *Hamon v Falle* ⁽⁵⁾ Calling for tickets was within the scope of the guard's authority the test of the liability of the employer is—was the servant acting independently on his own behalf, or consulting the interest of the employer at the time? When the discretion vested in him by the employer is abused, the employer is liable There is no question of ex

(1) 1 L R, 8 Mal 175

(2) 1 L R, 10 All 12

(3) 6 Fitch 537

(4) 1 App Cas 270

(5) 4 All Cas 247

authority. If there were express authority the defendant would have been directly liable and not merely liable as an employer. *Bayley v Manchester, Sheffield, and Lincolnshire Railway Company*,⁽¹⁾ *Moore v Metropolitan Railway Company*,⁽²⁾ *Limpus v London General Omnibus Company*,⁽³⁾ *Goff v Great Northern Railway Company* (4) In *Symour v Greenwood* (5) as here, the wrong was done by the servant who, in exercising the authority derived from the employer, exceeded its bounds. See Underhill on Torts, p. 51. Thus a Statute was necessary to protect the proprietors of newspapers from even criminal liability, *Dewan Singh v Mahij Singh* (6) is in my favour and I only seek to establish civil liability. I rely also on *Pariathi v Mannar* (7).

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Mr Johnstone in reply cited *Allen v The London and South-Western Railway Company* (8).

COLLINS, C J.—This is an action brought by the plaintiff against the South Indian Railway Company for defamatory words alleged to have been used by a servant of the Railway Company. The plaintiff complains that he has suffered both in mind and body by reason of the words spoken by the servant of the Company, and that although the plaintiff sent a letter through his Vakil to the Railway Company, demanding Rs. 250 as compensation for loss of his reputation and for pain of mind and body, no answer was received from the Railway Company. Hence this action.

The District Munsif came to the conclusion that defamatory words had been uttered by the servant of the Company and awarded the plaintiff Rs. 100. On appeal to the District Judge he reduced the damages to Rs. 10. The Railway Company appeal. The material facts of this case are as follows.—The plaintiff was travelling by the railway from Madras to Chingleput. According to the plaintiff's evidence, a friend of his, Subramania Sastri, and a Christian College student, Raghava Rao, were in the third class carriage with him. The District Judge finds as a fact that a ticket for Chingleput was purchased at Vanduloro by some one then a passenger in the train and who had already come by it, and it is also found as a fact that the ticket so purchased was delivered up at Singaperumalkoil by some one in the same compartment as the plaintiff, and it appears clear that this arrangement was made with intent to

(1) 1 R. 7 C P. 415-417

(2) 8 Q. B. 36

(3) 1 H. & C. 56

(4) 3 F. & F. 672

(5) 6 H. & N. 307

(6) 1 L. L. 10 All. 473

(7) 1 L. R. 8 M. d. 170

(8) L. R. 6 Q. B. 65.

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defraud the Railway Company At Singaperumalkoil the guard of the train came to the carriage wherein the plaintiff was travelling and asked plaintiff to produce his ticket, stating that he, the guard, suspected the plaintiff of travelling with a wrong (or false) ticket, the exact words are not proved The plaintiff produced a ticket, which was in order These are the defamatory words complained of, and it may be taken as law in this country that if defamatory expressions are used under such circumstances as to induce in the plaintiff reasonable apprehension that his reputation has been injured and to inflict on him pain consequent on such belief, the plaintiff is entitled to recover damages without actual proof of loss sustained The District Judge is of opinion that the guard said the words complained of without malice, but with what he calls simple carelessness

The Counsel for the appellant contends 1st, that the words are not actionable, 2ndly, that the guard was justified in uttering the same under the circumstances of the case, and 3rdly, that in any event the Railway Company are not liable

It appears to me that this action cannot be maintained The words used by the guard of the train were not in my opinion under the circumstances of the case defamatory in the sense that an action would lie either against the guard or the Railway Company It is clear that these were spoken *bona fide* The guard was justified in requesting each passenger to produce his ticket and he gave as a reason that he suspected passengers were travelling with wrong tickets The words he is said to have used to the plaintiff, "I suspect you are travelling with a wrong ticket" given as a reason for demanding the production of the ticket would not induce the plaintiff reasonably to apprehend that his reputation had been injured and could not and did not inflict upon him any damage If, as it is suggested, the guard's manner was insolent, a complaint should have been made to the Railway Company

Upon the evidence there is no reason to believe that the plaintiff was in league with others to defraud the Railway Company, or that he knew any of the passengers were travelling with wrong tickets I allow the appeal and set aside the decrees of both the Lower Courts and dismiss the suit, and I direct that each party pay their own costs throughout

WILKINSON, J.—The facts of the case are as follow — The plaintiff was a passenger from Madras on the South Indian

Railway on the 12th March 1897 At Vindalore a ticket for Chingleput was purchased by a person who had travelled in the train from Madras to that station As the train was starting the guard observed the said ticket being handed to some one in the same compartment as that in which plaintiff was travelling At the next station the guard whose suspicions had been aroused, went to the door of the carriage and demanded to see the tickets Tickets were shown and the ticket taken at Vindalore was, the Judge finds, shown by some one in the compartment in which plaintiff was seated An altercation ensued between plaintiff and the guard who told plaintiff he suspected him of travelling with a wrong ticket The Lower Courts have held the Railway Company liable for the words used by the guard being of opinion that such words were defamatory In my judgment the words used do not amount to defamation, and, even if they did the Railway Company could not be held responsible It appears from the evidence of the plaintiff himself that the guard at first "politely" asked plaintiff where he was going, and that when plaintiff objected to give the information sought the guard said that he suspected that there was something wrong with his ticket, or words to that effect What the exact words used were, has not been found, and plaintiff himself is not prepared to swear what words the guard did use There appears to have been an altercation, because the plaintiff refused to give the information he was bound to give, and, in the heat of the moment, the guard having grounds for suspecting that a ticket had been surreptitiously obtained at Vindalore did state that he suspected plaintiff was in possession of that ticket It seems to me very doubtful whether under any circumstances the expression of a mere suspicion is actionable, and, under the circumstances of the present case, I am of opinion that no action would lie against the guard, much less can an action against the Railway Company be maintained Undoubtedly the Railway Company is responsible for the manner in which their servants do any act which is within the scope of their authority and is answerable for any tortious act of their servants, provided such act is not done from any caprice of the servant, but in the course of the employment But it would be straining this principle of law to an unprecedented extent to hold that, because the guard of a train in the execution of his duty expressed a suspicion not altogether unfounded that a passenger was travelling with a wrong ticket,

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the Company was liable in damages to that passenger for slander *De minimis non curat lex*, or, as the authors of the Penal Code have expressed it, "nothing is an offence by reason that it causes or that it is intended to cause or that it is known to be likely to cause any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm" The harm, if any, caused to plaintiff's reputation by the imputation that he was travelling with wrong ticket was so slight that he might well have contented himself with reporting the guard for incivility

I would reverse the decrees of the Courts below and dismiss the plaintiff's suit Each party must bear his own costs throughout

The Oudh Cases, Vol. IV, Page 133.

BENCH

Before Mr. Scott and Mr. Spankie.

TRAFFIC SUPERINTENDENTS, E B, E I AND O & R
RAILWAYS, DEFENDANTS

v

HAFIZ ABDUL RAHMAN AND ANOTHER, PLAINTIFFS

MISCELLANEOUS APPEAL No 14 of 1900

1901
April 8

Suit against Government—Civil Procedure Code Section 410—Secretary of State to be sued as defendant in suit against State Railway—Palray Administration meaning of—Railways Act of 1890—Section 4 cl (6)—Notice to Secretary of State—Civil Procedure Code Section 421—Amendment of plaint

In a suit against a State Railway for compensation it was held that the Traffic Superintendent is not the proper party to be sued It should be against the Secretary of State

Held also that the plaint cannot be amended until notice required under Section 174 of Civil Procedure Code was given to the Secretary of State.

For Appellants — B Nagendra Nath Ghoshal

For Respondents :—M. Mohammad Nasim

SIANKIE A J C—This is an appeal from an order under Section 502, Civil Procedure Code, remanding a case.

The plaintiffs sued for compensation for the loss of Goods delivered at Budge Budge to the Eastern Bengal State Railway to be carried to Fyzabad over that Railway, and the East Indian Railway and the Oudh and Rohilkhand Railway. The Eastern Bengal and the Oudh and Rohilkhand are both State Railways. The persons sued were (1), the Traffic Superintendent, Eastern Bengal Railway (2), the General Traffic Manager, East Indian Railway, and (3), the Traffic Superintendent Oudh and Rohilkhand Railway. The suit was defended on behalf of the State Railways by the Collector and on behalf of the East Indian Railway by the Agent. On behalf of the State Railways it was pleaded that the proper person to be sued was the Secretary of State for India in Council, and that it was necessary to give him notice under Section 424, Civil Procedure Code. On behalf of the East Indian Railway it was pleaded that the Agent was the proper person to be sued.

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Superintendent
East Indian
Railway
Hafiz Abdul
Rahman

The Court of first instance decided that the Traffic Superintendents of the State Railways were not the proper persons to be sued, that it was not necessary to sue the Secretary of State, and the Managers of those Railways might have been sued, but that it was necessary to give them notices under Section 424, Civil Procedure Code. It also decided that the General Traffic Manager of the East Indian Railway was not the proper person to be sued but the Agent. It dismissed the suit. On appeal by the plaintiffs the District Judge agreed with the Court of first instance, as regards the State Railways, except on the point that it was necessary to give the Managers notices under Section 424. He was of opinion that the plaintiffs should be allowed to amend the plaint by substituting the Managers for the Traffic Superintendents, that it was not proved that the suit should have been brought against the Agent, and not against the General Traffic Manager of the East Indian Railway, and that even if there was a mistake in this respect, the plaintiffs might be permitted to amend the plaint by substituting the Agent of that Railway for the General Traffic Manager. He set aside the decree of the Court of first instance and remanded the case to that Court under Section 562, Civil Procedure Code, for disposal on the merits after the amendments indicated by him had been made. Hence this appeal.

The District Judge was of opinion that a suit against a State Railway is not a suit within the purview of Section 416, Civil Procedure Code. He says — 'The suits contemplated by that

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section are suits where the Government is concerned as a Government, and not as a *business or Company*. The Railways Act of 1890 distinctly contemplates suits being brought against the Managers of State Railways, and it does not require notice to be given of such suits. The framers of the Act clearly never contemplated that a suit against a State Railway would be regarded by anybody as a suit against the Government. The District Judge does not refer to any particular provision of the Act, but we have been referred to the definition of "Railway Administration," in Section 3 (6) and to Section 80 of the Act. Section 3 (6) declares that "Railway Administration" or "Administration" in the case of a railway administered by Government or a Native State, means the Manager of the Railway and includes the Government or the Native State, and in the case of a Railway administered by a Railway Company, means the Railway Company. Section 80 is in Chapter VII of the Act entitled "Responsibility of Railway Administration and carriers."

The District Judge seems to think that when the Government administers a railway, it does so not as a Government, but thus is an erroneous notion. The Government administers the railway as a Government and in no other capacity. The inference to be drawn from the Indian Railways Act, 1890, is not that its framers contemplated that a suit against a State Railway should not be regarded as a suit against the Government, but is that they contemplated that it should be so regarded. One of the Acts repealed by the Indian Railways Act, 1890, was the Indian Railways Act, 1879. In that Act, "Railway Administration" was defined as meaning, in the case of a railway worked by Government, the Manager of such railway and the expression did not include Government. The same expression in such a case, although it still means the Manager, now includes the Government, so that, where the expression is used in the Act of 1890 it must, unless there is something repugnant in the subject or context also mean the Government. In the case of a Railway administered by the Government, if a Railway Administration is liable to make compensation for the loss of Goods or other injury, it is the Government which has to make compensation. It was probably for this reason that the expression "Railway Administration" was defined in the Act of 1890 so as to include the Government. The definition suggests that the framers of the Act contemplated that a suit, in which compensation was

claimed under Chapter VII of the Act should, when the Railway is administered by the Government be brought against the Government. There is nothing in Section 80 of the Act which suggests that in such a case the suit should be brought against the Manager. That section merely enacts that a suit for compensation for loss of Goods or other injury, in the case of through booked traffic, may be brought equally against the booking administration and against the administration on whose railway the loss occurred. Where therefore in the case of a Railway administered by the Government a person wishes to sue the administration for loss of Goods or other injury, he should bring the suit against the Government, that is to say, against the Secretary of State for India in Council. The District Judge was therefore wrong in holding that the suit, so far as the Eastern Bengal and Oudh and Rohilkhand Railways were concerned, could be brought against the Managers of those Railways. It should have been brought against the Secretary of State as provided in Section 416 Civil Procedure Code.

It was contended for the plaintiffs that, if the Court was of opinion that the suit should have been instituted against the Secretary of State, it should direct the substitution of the Secretary of State for the Managers of the State Railways and it was not necessary to give the Secretary of State notice of the suit, inasmuch as the suit was one *ex contractu*, and Section 424, Civil Procedure Code, was not applicable to such a suit. It was also contended that the section was not applicable, as the suit would not be one against the Secretary of State "in respect of an act purporting to be done by him in his official capacity." The case of *Rajmal Manik Chand v Hanwant Anyaba*(1) was cited.

The question whether Section 424 is only applicable to suits founded on tort and claiming damages was considered in the *Secretary of State for India in Council v Rayluchi Debi*(2) and it was held in that case that no suit whatever is maintainable against the Secretary of State, unless the notice prescribed by Section 424 has been given. I think that in that case the proper interpretation was placed upon the section. There is no indication in that section that it is intended to apply to any particular class of suits. In the same case the question as to whether the word in the section "in respect of an act purporting to be done by him in his official capacity" relate to the Secretary of State was

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(1) I I R 20 Bom 697

(2) I L R, 25 Cal 239

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considered, although it was not decided. MACLEAN, C. J. observed — "Looking, if one may look, at the punctuation of the section, and at the section grammatically, I incline to take the view so submitted as the correct construction," i.e., the view that the words do not apply to the Secretary of State. This view seems to be correct view of the section. The suit therefore would not be as against the Secretary of State, unless the notice required by Section 424 has been given.

In two cases decided by the Bombay High Court, I L R 6 Bom, 670, I L R 6 Bom, 672, in which Magistrates were sued instead of the Secretary of State for India in Council, the Court was of opinion that the plaintiff might properly have been permitted to amend his suit by substituting the Secretary of State for the Magistrates. The *suo* procedure may be adopted in this case, but inasmuch as no notice has been given to the Secretary of State, no such substitution can be made until the notice required by Section 424, Civil Procedure Code, has been given.

I would allow this appeal and modify the order of the District Judge by directing that fourteen days' time be given to the plaintiffs to give to the Secretary of State for India in Council the notice required by Section 424, and that when two months after such notice have expired the plaintiffs be permitted, within a time to be fixed by the Court of first instance, to amend the plaint by substituting the name of the Secretary of State for the Public Superintendents of the Eastern Bengal and Orissa and Rohilkhand Railways, and by stating that such notice has been given. I would direct that the respondents do pay the costs of the appellants in this appeal.

SCOTT, J. C. — For the reasons stated in the Judgment of my learned colleague, I would make the same order.

The Punjab Law Reporter, (1911) Case No. 116.

CIVIL REVISION SIDE

*Before The Hon'ble Sir Arthur Reid, Kt, Chief Judge and
The Hon'ble Mr Justice Kensington.*

THE EAST INDIA RAILWAY COMPANY (DEFENDANT),

PETITIONER

v

LALA MOTI SAGAR (PLAINTIFF, RESPONDENT

CASE No 3213 OF 1910

Railways Act (IX of 1890) Sections 3 (4) (11), 42, 66, 68, 122—Rules for guidance of Public and Railway Officials, 1906, Rule 29—Government of India Resolution, published at pp 18, 19 of the Supplement to Gazette of India 1881 scope and effect of—Right of Railway Administration to exclude persons from platforms—Railway meaning of—Traffic—“Business”—Platform is neither private property—Unlawful demand—Suit, is it maintainable for recovery of payment

1911
March 17

The term “Railway” includes all Stations offices, warehouses, etc., constructed for the purpose of or in connection with a Railway. Railway Companies have the right to exclude from Railway premises or platforms all persons excepting those using or desirous of using the Railway, and may impose on the rest of the public any terms they think proper as the conditions of admittance.

H L R 479, 66 L J P C 81 77 L T 226, 22 Bom 525, 26 Bom 609, relied upon.

The word “Traffic” in Section 42 of the Railways Act does not include a person going to the Railway Station to see a friend off.

The Resolution of the Government of India published at pages 18, 19 of the Supplement to the Gazette of India 1881 does not constitute a rule under the Railways Act IV of 1879 and, consequently, its publication under the new Railways Act is not necessary to give it validity. The resolution merely provides the conditions under which Railway authorities may exclude all but ticket holders from Railway platforms. The right of exclusion by the Railway Companies exists independently of this resolution.

Under rule 29 of the Rules for the guidance of public and Railway Officials, a Railway Administration has the right to exclude from station platforms any person not having business on the Railway premises.

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The desire of a person to see his friend off does not constitute business within the terms of this rule, especially where his presence is unnecessary so far as his friend's departure is concerned and his friend does not require any assistance from him.

The existence of rule 29 justifies the exclusion from a platform of persons without platform tickets even if it be held that the Station platform is not private property.

The right of excluding such persons is not repugnant to Rule 29 or Section 55 or 63 of the Railways Act.

Quere—Whether a suit for the recovery of the amount paid has even if it were held that the demand of payment for a platform ticket is unlawful.

13 Q B 674 referred to.

PETITION under Section 25 of Act IX of 1887, for revision of the order of the Registrar, Small Cause Court, Delhi, dated the 8th August 1910, decreeing the claim for six pies.

Messrs *Portel*, Advocate, and *Herbert*, Pleader for Petitioner.

Messrs *Shadi Lal*, *Pestonji Dadabhai*, Advocates, and *Lala Dunga Das*, Pleader for Respondent.

JUDGMENT—SIR ARTHUR REID, C J and KRAMINGTON, J—

This is an application under Section 25 of the Small Cause Court Act and the question for consideration is whether the respondent is entitled to recover from the East Indian Railway Company six pies paid by him for a ticket admitting him to the platform of the Delhi Railway Station. The Registrar of the Small Cause Court gave the plaintiff respondent a decree.

The respondent's case is that he went to the Station to see a friend off by the Bombay Mail, that on attempting to go on to the platform he was stopped by a Ticket Collector who demanded his ticket, that he told the Ticket Collector that the platform ticket was unnecessary and asked him to refer to the Station Master, that the Ticket Collector refused to do so that an Inspector informed him that he could not have access to the platform without a platform ticket, that he again remonstrated unsuccessfully and that he eventually purchased a platform ticket under protest.

Counsel for the Railway Company contended that the Station was the property of the Company and that the respondent had to establish his right to enter it. Rule 29 of the Rules for the guidance of the public and Railway Officials published on page

1971 of the Supplement to the *Gazette of India*, 1906 runs as follows —

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"A Railway Administration may exclude from the Station platform or any part of the Railway premises any person not being a *bona fide* passenger nor having business on the Railway premises"

This rule was admittedly made applicable to the East Indian Railway by a Resolution No 35—R 1 pages 319 and 320 of the *Gazette of India*, 1907. The respondent was admittedly not a passenger and we have no hesitation in holding that his desire, to see his friend off did not constitute business within the terms of the rule. It was admitted that his presence was unnecessary so far as his friend's departure was concerned and that his friend did not require any assistance from him. The point is, in our opinion, so obvious that it does not require any further consideration or authority.

Counsel for the respondent contended that the demand of payment for a platform ticket was illegal because the Resolution of the Government of India published at pages 18 and 19 of the Supplement to the *Gazette of India*, 1884 constituted a rule passed under the Railway Act IV of 1879 and no such rule was published under the Act now in force, and must therefore be held to have been repealed or to have lost its force. The Resolution runs as follows —

"The overcrowding of the platform of important Railway Stations at train times by persons who are non travellers has frequently been found to interfere with the proper working of such Stations and in view to lessening the inconvenience both to the public and to the Station Staff, the railway authorities have in some cases introduced a system of issuing platform tickets, on payment of a nominal fee, by means of which persons desiring to see their friends off, or to meet them on arrival can obtain admission to the railway platform

"2 The experiment has been tried with success at the Lahore Station of the Siod, Poonj and Delbi Railway and it is believed that the system is being adopted at certain large Stations on other railways, but, as doubts have been raised at to the legal right of the Railway authorities to issue such passes, His Excellency the Governor General in Council is pleased to rule that, in future, when the railway authorities desire to exclude all but ticket-holders from railway platforms,

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"the intention shall be duly notified in the Railway Time Tables and a printed notice to that effect, specifying the place where such tickets are obtainable and their cost, shall be drawn up with reference to Sections 3 (c) and 41 of the Indian Railway Act No IV of 1879 and posted up in a conspicuous place outside the Station

"3 Such a notice, His Excellency the Governor General in Council is advised would be a sufficient warning off to justify the officers of a railway in preventing any person from entering a railway platform without a ticket and in proceeding against him, if necessary, under Section 41 of the Act above quoted

"1 It will be distinctly understood that the Government of India considers a restriction of the nature herein referred to as undesignable excepting where there is well established and absolute necessity for it and that every facility should be given for obtaining tickets of admission, not only before the departure but also before the arrival of a train "

This Resolution merely provides the conditions under which the railway authorities may exclude all but ticket holders from railway platforms, those conditions being due notice of the intention to exclude and facilities for the purchase of ticket of admission. It has not been contended that the condition has not been complied with. Counsel for the respondent also relied on Section 42 of the Railway Act as prohibiting exclusion of some persons and the admission of others. The section is inapplicable to the present case. It prescribes the duty of Railway Administrations to arrange for receiving and forwarding traffic without any reasonable delay and without partiality and forms the part of Chapter V of the Act which is headed "Traffic facilities". Section 3 (u) of the Act defines traffic as including rolling stock of every description as well as passengers, animals and goods. This definition does not include the respondent. Sections 66 and 68 cited for the respondent do not affect the case. The fact that the possession of a proper pass or ticket or the permission of a railway servant is a condition precedent to entering a railway carriage for the purpose of travelling therein as a passenger does not qualify Rule 29 cited above, and the existence of that rule justifies exclusion even if it were held that the Station platform is not private property. The right to exclude obviously entails the right to admit on certain conditions including

the condition of payment for admission. In *Perth General Station Committee v Ross*,⁽¹⁾ the House of Lords held that apart from any facilities granted by the Railway Commissioners Railway Companies have the right of excluding from their Stations all persons excepting those using or desirous of using the railway, and may impose upon the rest of the public any terms they think proper as the conditions of admittance. *Imperatrix v Vannali*⁽²⁾ and *Cunha v Merican; Stroff v Great Indian Peninsula Railway Company*⁽³⁾ indicate that Railway Companies have a right to exclude the public from railway premises. Section 3 (4) defines the word "railway" as including all stations, offices, warehouses etc., constructed for the purposes or in connection with a railway and Section 122 prescribes penalties for unlawfully entering upon a Railway and for refusing to leave after unlawful entry. In our view of the merits of the case it is unnecessary to consider the further contention for the Railway Company that the suit for the recovery of the amount paid would not lie even if it were held that demand of payment was unlawful but we may note that the authority cited for the contention *Manchester Sheffield and Lincolnshire Railway Company v Derby Main Colliery Company*⁽⁴⁾ dealt with a specific provision of the Railway and Canal Traffic Act of 1854 precluding a suit.

We allow the application, set aside the decree and dismiss the suit with costs here and below.

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(1) L. R. 1837 House of Lords 479

(3) I. L. R., 26 Bom. 609

(2) I. L. R. 22 Bom., 525

(4) L. R. 13 A. B. D. 64.

In the High Court of Judicature at Bombay.

EXTRAORDINARY JURISDICTION.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

BYRAMJI RATANJI LENTIN (APPLICANT AND ORIGINAL PLAINTIFF)

v.

B B AND C I. RY. CO.

(OPONENTS AND ORIGINAL DEFENDANTS) *

1903
September
9 and 10

Season ticket, loss of—demand for issue of duplicate of lost season ticket—
demand for refund of deposit made on issue of season ticket

The plaintiff purchased a season ticket entitling him to travel on the defendant Company's line of railway between two specified stations from the 1st May to the 31st July 1902 on or about the 18th May 1902 he lost the season ticket and requested the defendant Company to issue to him a duplicate season ticket which the defendant Company declined to do on the ground that the Rules contained in their Quarterly Time Table and Railway Guide did not admit of duplicate season tickets being issued and they also declined to make any refund or to return the deposit made on the issue of the season ticket. The plaintiff accordingly filed a suit against the defendant Company to recover the sum of Rs 15 being the amount paid for the season ticket, including the deposit, and in the alternative the plaintiff sought to recover that sum as damages, the 5th Judge who tried the case in the Court of Small Causes dismissed the suit and his decision was upheld by the Full Court of the Court of Small Causes, the plaintiff having obtained a Rule *Nisi* in the High Court compelling upon the defendant Company to show cause why the decisions of the 5th Judge and the Full Court of the Court of Small Causes should not be reversed, the High Court declined to interfere and discharged the Rule *Nisi* with costs.

APPLICATION in the Extraordinary Jurisdiction of the High Court under Section 622 of the Code of Civil Procedure, 1882, for the reversal of the decision of the 5th Judge, as well as of the Full Court, of the Court of Small Causes at Bombay.

The facts of the case were as follows.—The plaintiff (a Plead-er) purchased a 2nd class season ticket from the defendant

* Civil Application No 161 of 1903 under Extraordinary Jurisdiction against the decision of the 5th Judge and the Full Court of the Court of Small Causes Bombay in Suit No. 1551 of 1903.

Company entitling him to travel between the Church Gate and Dadar Stations on the defendant Company's line of railway from 1st May to the 31st July 1902 the season ticket bore on it a note to the effect that the same was issued subject to the Regulations of the defendant Company as notified in the Quarterly Guide and Coaching Tariff. On the 18th May 1902 the plaintiff lost the season ticket in question and wrote to the defendant Company asking them to issue a duplicate season ticket which the defendant Company declined to do on the ground that the defendant Company's Rules did not admit of duplicate season tickets being issued they also declined to make any refund on account of the amount paid on the issue of the season ticket or on account of the deposit paid on the issue of the same. The Rule above referred to, which was published in the defendant Company's Quarterly Time Table and Railway Guide, had never been sanctioned by the Governor-General in Council or published in the *Gazette of India* under Section 47(1) (g) and (3) of the Indian Railways Act, 1890, and was as follows —

"Should the ticket not be given up within 3 days of the date of its expiry, the amount so deposited will be forfeited to the Company. Under no circumstances will duplicate tickets be issued, and in the case of tickets being lost or mislaid, fresh tickets will be issued on payment of full charges and fresh deposits."

The plaintiff accordingly filed a suit in the Court of Small Causes at Bombay to recover from the defendant Company the sum of Rs 15 being the amount including expenses and deposit paid in advance for travelling 2nd class in the defendant Company's trains between Church Gate and Dadar Stations from the 1st May to the 31st July 1902, the said sum, the plaintiff alleged, having become payable to him owing to the defendant Company having wrongfully and illegally prevented him from travelling between the said Stations from the 22nd May to the 31st July 1902, in the alternative the plaintiff sought to recover the said sum as damages by reason of the defendant Company's alleged breach of contract to allow him to travel in their trains from the 1st May to the 31st July 1902, for which period the defendant Company have been paid in advance, the defendant Company having wrongfully prevented him from travelling in their trains from the 22nd May to the 31st July 1902, the said damages being estimated on the basis of the expenses incurred by the plaintiff in purchasing a fresh season ticket for June and July

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1902 and paying to the defendant Company a fresh deposit and expenses incurred for purchasing ordinary tickets from the 22nd May to the 31st May 1902

The suit came on for hearing before the 5th Judge of the Court of Small Causes who dismissed the same, the plaintiff accordingly applied to the Full Court of that Court and on the Rule obtained by the plaintiff being argued the same was dismissed.

The plaintiff thereupon applied to the High Court under Section 622 of the Code of Civil Procedure, 1882, and obtained a Rule *Nisi* calling upon the defendant Company to show cause why the decision of the 5th Judge as well as that of the Full Court of the Court of Small Causes should not be reversed on the following grounds —

(a) The Full Court erred in holding that Clause 10 of Rule 49 published in the Quarterly Time Table and Railway Guide was not *ultra vires* for want of sanction of the Governor General in Council under Section 17 of Act IX of 1890

(b) The season ticket referred to in the proceedings being merely a receipt for the money paid and there being a contract between the parties by which the defendant Company engaged to carry the plaintiff free of any further charge for a specified period between specified Stations, the Full Court ought to have decreed the plaintiff's claim

(c) The Full Court should have held that the Company having refused to issue a duplicate of the season ticket it thereby wrongfully and illegally prevented the plaintiff from travelling in their trains

(d) The Full Court should have considered the circumstance that according to the provisions of the Indian Railways Act IX of 1890 the plaintiff could not possibly have travelled without a ticket

(e) The Full Court erred in assuming that the Company was not bound either to issue a duplicate or to give a refund of the money received

(f) The Full Court erred in not considering the point that the Petitioner had no knowledge of Rule 49 Clause 10 and that the Company had not done anything which would be reasonably sufficient to give him notice of the same

(g) The Full Court should have decreed the plaintiff's claim at least in respect of the deposit

(h) The decision of the Full Court is opposed to justice, equity and good conscience

Lalobhai Shah for the Applicant

Branson (with *Crawford, Brown & Co*), for the Opponents

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Order.—The Court discharges with costs the *Rulo Nisi* granted by it on the 31st day of July 1903, whereby the Opponent was required to show cause why the Orders passed by the Full Court of the Court of Small Causes at Bombay on the 21st day of April 1903 should not be set aside

In the High Court of Judicature at Fort William
in Bengal.

ORDINARY ORIGINAL CIVIL JURISDICTION

Before The Hon'ble Mr Justice Fletcher

ABINASH CHUNDER ROY, PLAINTIFF

v

THE EAST INDIAN RAILWAY COMPANY, DEFENDANTS
SUIT No 723 OF 1907

*Railway Company—Provident Fund—Contributions Suit for recovery of—
Provident Fund Committee*

1903
May 1

In a suit by a dismissed or retired servant of a Railway Company for the recovery of certain monies contributed by the defendant Company to the East Indian Railway Provident Fund during the time the plaintiff was in the service it was held that the suit was not maintainable against the Company but it should be brought against the committee and the Trustees of the Fund

JUDGMENT.—This is a suit by a dismissed or retired servant of the East Indian Railway Company to recover certain contributions which have been contributed by the Company to the East Indian Railway Provident Fund during the time that the plaintiff was in the service of the Company

The Provident Institution of the East Indian Railway is governed by certain Rules made by the Secretary of State and revised in March 1899. Under those Rules there is established

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a Committee and two Trustees. The funds are held by the Trustees to be administered under the direction of the Committee. The rules provide that in the event of dismissal of a servant of the Company the monies contributed by the Company do not go back to the Company but are to be held by the Trustees for the benefit of the other members of the Institution.

In these circumstances, I think, the East Indian Railway Company have no interest in the Fund. They are not the Trustees nor have they the administration of the Fund. The only power that the East Indian Railway Company have under the rules is a power to the Board of Directors of the Company to generally supervise and control the Committee and the Trustees.

It is admitted that the Company have paid to the plaintiff the aggregate amount from time to time subscribed by him to the Fund. In these circumstances this action, if it is maintainable at all, ought to have been brought against the Committee and the Trustees of the Fund and not against the Company.

The suit therefore fails and must be dismissed with costs on Serlo No 2.

The Indian Law Reports, Vol. X (Bombay) Series,
Page 390.

APPELLATE CIVIL

Before Sir Charles Sargent, Kt, Chief Justice, and
Mr. Justice Nanabhai Haridas

G I P RAILWAY COMPANY (DEFENDANTS), APPELLANTS

v

NOWROJI PESTANJI (PLAINTIFF), RESPONDENT *

*Injunction—Right of way—Obstruction to right of way—Special damage—
Injunction and not compensation granted*

The defendants closed a gateway lead n^o across a level crossing of their railway over which there was a public right of way. The plaintiff alleged that by the closing of this gateway access to his bungalow during the monsoon was completely stopped and he sued to have the gateway reopened. The Lower Appellate Court found that there was a public right

of way over the level crossing that it had been obstructed by the defendants, and that the plaintiff had suffered special damage by the obstruction. On special appeal to the High Court it was contended by the defendants that the plaintiff was only entitled to compensation, and not to an injunction.

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v
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Held that the inconvenience caused to the plaintiff was real and substantial, that the plaintiff was entitled to the user of the right of way in question, and under the circumstances to an injunction against its obstruction.

This was a second appeal from the decision of F M H FURTON, Acting District Judge of Poona.

The plaintiff owned a bungalow situated to the north of the defendants' railway at Lonavla, egress from and access to which was afforded over the lines through a gateway at a level crossing. The defendants having closed this gateway, and opened a new one further down the line the plaintiff brought the present suit to have the old gateway re-opened, alleging that for more than twenty years he had been enjoying uninterruptedly the use of the gateway, and that the defendants having wrongfully closed it, the access to the bungalow had been altogether blocked.

In their written statement the defendants admitted the existence and removal of the gateway, but contended (*inter alia*) that the plaintiff had not uninterrupted use of the gateway for twenty years, nor had he acquired an easement over it: that the gateway was not erected for the use of the occupants of the plaintiff's bungalow, that the new gateway was erected at the suggestion and request of the people of the village of Bhangarvadi, communicated to the Company through the Collector of Poona, and that this change of the gateway not having in any way affected the right of the plaintiff, he had no cause of action against the Company.

The Subordinate Judge of Poona, who tried the suit, held the plaintiff entitled to the free use of the gateway, and directed it to be re-opened within one month from the date of the decree.

The defendants appealed to the District Judge, who modified the Lower Court's decree. The following is a portion of his judgment —

" * * * I find that plaintiff has no easement or private right of way across the railway

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"I have next to consider whether, under these circumstances, he can maintain this action. I think he has undoubtedly suffered serious damage, special to himself, as owner of the bungalow. I have visited the land, and have little doubt as to the truth of the evidence of the witnesses, who say that during the monsoon the bungalow is, by the removal of the level crossing, practically cut off from the outer world. Whether, during the fair season, there is serious inconvenience may be doubted, as the occupants of the bungalow can apparently get to Lonavla across the 'bund' to the west of the house whilst the river is low. * * * I think, if the house were sold, the removal of this crossing would certainly reduce its price. Altogether, it seems to me impossible to argue that to cut the plaintiff off from all access to his house during the greater part of the rains, and to compel him to take a detour of a mile to get to the municipal water-taps during the fair season, is not a special damage of a substantial kind which he suffers in excess of any inconvenience that the removal of the gate might cause to any member of the public who might happen to want to go that way—(see the case of *Raj Koomar Singh v Sahebzada Roy* (1) * * * Lastly, I have to consider whether, under the circumstances, an injunction should be granted. * * * Apart from the special powers conferred on Railway Companies by Acts of the Legislature, such Companies appear to be in the same position as private owners of land and as no statutory authority has been pointed out under which this gate could be closed, I must hold that, in doing it, defendants acted without authority. Under these circumstances, it seems to me to be a case for an injunction, because the damage done to the plaintiff is not one which can adequately be paid for in money. It renders his house useless for several months in the year. * * * I modify the decree of the Subordinate Judge and direct that defendants construct and maintain a level crossing in the place where existed the old level crossing opposite the plaintiff's bungalow, with gates suitable for the passage of foot passengers and *bhatis'* bullocks, and do permit the free use of such level crossing to all persons having occasion to go to or from the plaintiff's bungalow for themselves and for animals in their charge, subject to such restrictions as may be in accordance with any Act or Rules having the force of law that may from time to time be in force

for the regulation of level crossing at places where railways are crossed by public roads. And I direct that this order be carried out within three months from this date, and that within the said period the defendants do pay all the plaintiff's costs in both Courts."

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The defendants preferred a second appeal to the High Court.

Russell for the Appellants.—The plaintiff's bungalow was not in existence till after 1863 and the plaintiff, therefore, could not have acquired a prescriptive right to the use of the gateway by twenty years' uninterrupted user, the gate having been closed in 1883. The plaintiff's predecessor in title had no right of crossing the line, nor can plaintiff have it without the Company's permission. There was a public way through the gate, and no private easement can be acquired over a public path see *Godard on Easements*, p. 102 (3rd ed.), *Queen v. Chorley* (1) the removal of the gate was made at the desire and request of the villagers of Bhungaradi, communicated to the Company through the Collector of Poona and not for the convenience or benefit of the Company. The plaintiff has not established any special damage which alone would entitle him to an injunction. This is not a case for injunction, but, at the most, for damages. The injunction would cause great hardship and inconvenience to the Company and the Court, in the exercise of its discretion should award damages only.

Paudurang Balibhadr (with *Ganpat Sadashiv Rai*) for the Respondent.—The gateway was not removed at the request of all the villagers, but, on the contrary, many protested against its removal. In this case an injunction alone would give the respondent adequate relief. This is a way of necessity, and that it was a public way would not affect the respondent's right to its use—*Bayley v. Cole* (2). This case shows that a way of necessity must be allowed, even if prescriptive right to it is not made out. The District Judge's finding should be upheld as the respondent has suffered special damage, inasmuch as access to the bungalow is altogether stopped.

SALIENT, C.J.—The Judge below found that the plaintiff had no easement over this level crossing. But he found also that there was a public right of way there that it had been obstructed, and that the plaintiff had suffered special damage

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"I have next to consider whether, under these circumstances he can maintain this action. I think he has undoubtedly suffered serious damage, special to himself, as owner of the bungalow. I have visited the land, and have little doubt as to the truth of the evidence of the witnesses, who say that during the monsoon the bungalow is, by the removal of the level crossing, practically cut off from the outer world. Whether, during the fair season, there is serious inconvenience may be doubted, as the occupants of the bungalow can apparently get to Loraia across the 'bund' to the west of the house whilst the river is low. * * * I think, if the house were sold, the removal of this crossing would certainly reduce its price. Altogether, it seems to me impossible to argue that to cut the plaintiff off from all access to his house during the greater part of the rains, and to compel him to take a detour of a mile to get to the municipal water taps during the fair season, is not a special damage of a substantial kind which he suffers in excess of any inconvenience that the removal of the gate might cause to any member of the public who might happen to want to go that way—(see the case of *Raj Koomar Singh v. Salehzada Roy* (1)). * * * Lastly, I have to consider whether under the circumstances, an injunction should be granted. * * * Apart from the special powers conferred on Railway Companies by Acts of the Legislature such Companies appear to be in the same position as private owners of land and as no statutory authority has been pointed out under which this gate could be closed, I must hold that in doing it, defendants acted without authority. Under these circumstances it seems to me to be a case for an injunction, because the damage done to the plaintiff is not one which can adequately be paid for in money. It renders his house useless for several months in the year. * * * I modify the decree of the Subordinate Judge and direct that defendants construct and maintain a level crossing in the place where existed the old level crossing opposite the plaintiff's bungalow, with gates suitable for the passage of foot passengers and *bhatis'* bullocks and do permit the free use of such level crossing to all persons having occasion to go to or from the plaintiff's bungalow for themselves and for animals in their charge, subject to such restrictions as may be in accordance with any Act or Rules having the force of law that may from time to time be in force

for the regulation of level crossing at places where railways are crossed by public roads. And I direct that this order be carried out within three months from this date, and that within the said period the defendants do pay all the plaintiff's costs in both Courts."

The defendants preferred a second appeal to the High Court.

Rusell for the Appellants.—The plaintiff's bungalow was not in existence till after 1863, and the plaintiff, therefore, could not have acquired a prescriptive right to the use of the gateway by twenty years' uninterrupted user, the gate having been closed in 1883. The plaintiff's predecessor in title had no right of crossing the line, nor can plaintiff have it without the Company's permission. There was a public way through the gate, and no private easement can be acquired over a public path: see *Godard on Easements*, p. 102 (3rd ed.), *Queen v Chorley* (1). The removal of the gate was made at the desire and request of the villagers of Bhangiradi, communicated to the Company through the Collector of Poona, and not for the convenience or benefit of the Company. The plaintiff has not established any special damage, which alone would entitle him to an injunction. This is not a case for injunction, but, at the most, for damages. The injunction would cause great hardship and inconvenience to the Company, and the Court, in the exercise of its discretion, should award damages only.

Pandurang Balibhadra (with *Ganpat Sadashiv Ray*) for the Respondent.—The gateway was not removed at the request of all the villagers, but, on the contrary, many protested against its removal. In this case an injunction alone would give the respondent adequate relief. This is a way of necessity, and that it was a public way would not affect the respondent's right to its use—*Basley v Coles* (2). This case shows that a way of necessity must be allowed, even if prescriptive right to it is not made out. The District Judge's finding should be upheld, as the respondent has suffered special damage, inasmuch as access to the bungalow is altogether stopped.

SALIENT, C.J.—The Judge below found that the plaintiff had no easement over this level crossing. But he found also that there was a public right of way there, that it had been obstructed, and that the plaintiff had suffered special damage.

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by such obstruction This being a special appeal, these findings are conclusive

The plaintiff, then, has a right of action, but it is contended that he should not be granted an injunction, but compensation merely This is urged on the ground of the great and insurmountable inconvenience which an injunction would occasion to the Railway Company But it is to be remarked that this way had existed apparently without inconvenience to the Railway Company for many years before it was closed, and, moreover, that, when it was closed, it was closed, not by the Railway Company on their own motion, or for their own convenience, but at the instigation of the Collector, moved by the inhabitants of certain neighbouring villages, the Collector apparently thinking, as Collectors sometimes do, that he had full power to do any thing, that seemed desirable in the way of extinguishing one public way and opening another It may be that if the Court saw that the damage caused to the plaintiff by the act complained of was unsubstantial and trifling, it might hesitate before imposing any obstacle in the way of the defendants who are a Railway Company, and, as such, serving the interests of the general public But we see no reason to doubt that the inconvenience caused to the plaintiff in this case is real and substantial The plaintiff is entitled to the user of the way, and, therefore, the injunction must go against its obstruction

Solicitors for the Appellants — *Messrs Little, Smith, Frere and Nicholson*

Sutherland's Weekly Reporter, Vol. III. Page 27.

CIVIL RULINGS.

*Before the Hon'ble W. Morgan and Sambhoonath
Pundit, Judges.*

COLLECTOR OF THE 24-PERGANNAHS AND ANOTHER,
(DEPENDANTS), APPELLANTS

v

NOBIN CHUNDER GHOSE (PLAINTIFF), RESPONDENT *

Land taken for Railway—Right of way

A right of way cannot, by the provisions of Act VI of 1857, continue to exist over land acquired by a Railway Company under that Act with the aid of Government. If, however, the Railway Company, by their representations and conduct, lay themselves under legal obligation to provide a way, such obligation may be enforced.

Baboo Kissen Kishore Ghose for Appellants.

Baboo Kali Prosunno Dutt and Romesh Chunder Mitter
for Respondent

THE line of the South-Eastern Railway, passing through the plaintiff's mouza, has severed about 1,200 beegahs of land from the remaining portion of the mouza, which lies on the south side of the line. The ryots of the land so severed live on the southern side on the railroad, and, before the making of the line, they had access by a road from their dwelling-houses to the land cultivated by them. This suit is brought against the Railway Company (the Government being also made defendant) to procure the removal of obstructions caused by them, and to establish the right of the plaintiff and his ryots to a road across the railway. Both the lower Courts have decreed in substance the plaintiff's suit, principally because the Courts find that the plaintiff's ryots have no mode of access to their lands except by crossing the line, and that their right to pass over the land now

1863
May, 18

* Case No. 418 of 1863. Special Appeal from a decision passed by Mr F L BEAUFORT, Judge of the 24 Pergannahs, dated the 2nd December 1864, affirming a decision passed by the Munsiff of that District, dated the 26th July 1864.

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by such obstruction This being a special appeal, those findings are conclusive

The plaintiff, then, has a right of action, but it is contended that he should not be granted an injunction, but compensation merely This is urged on the ground of the great and insurmountable inconvenience which an injunction would occasion to the Railway Company But it is to be remarked that this way had existed apparently without inconvenience to the Railway Company for many years before it was closed, and, moreover, that, when it was closed, it was closed, not by the Railway Company on their own motion, or for their own convenience, but at the instigation of the Collector, moved by the inhabitants of certain neighbouring villages, the Collector apparently thinking, as Collectors sometimes do, that he had full power to do any thing, that seemed desirable in the way of extinguishing one public way and opening another It may be that if the Court saw that the damage caused to the plaintiff by the act complained of was unsubstantial and trifling, it might hesitate before imposing any obstacle in the way of the defendants, who are a Railway Company, and, as such, serving the interests of the general public But we see no reason to doubt that the inconvenience caused to the plaintiff in this case is real and substantial The plaintiff is entitled to the user of the way, and, therefore, the injunction must go against its obstruction

Solicitors for the Appellants — *Messrs Little, Smith, Frere and Nicholson*

Siberland's Weekly Reporter, Vol. III. Page 27.

CIVIL RULINGS

*Before the Hon'ble H. Morj in and Sunnhoonath
Pundit, Judges*

COLLECTOR & THE 24 PERGAANAH AND ANOTHER,
(DEFENDANTS), ATTORNEYS

ROBIN CHUNDER GHOSH (PLAINTIFF), RESPONDENT *

Land taken for Railway—Right of way

A right of way cannot be the provisions of Act VI of 1877 continue to exist over land acquired by a Railway Company under that Act with the aid of Government. If however the Railway Company by their representatives and conduct by themselves under legal obligation to provide a way such obligation may be enforced.

Baloo Kishore Kishore Ghose for Appellants

*Baloo Kali Prasanna Dutt and Bamesh Chunder Mitter
for Respondent*

The line of the South-Eastern Railway, passing through the plaintiff's mouza, has severed about 1,200 beegahs of land from the remaining portion of the mouza which lies on the south side of the line. The ryots of the land so severed live on the southern side on the railroad, and, before the making of the line, they had access by a road from their dwelling houses to the land cultivated by them. This suit is brought against the Railway Company (the Government being also made defendant) to procure the removal of obstructions caused by them, and to establish the right of the plaintiff and his ryots to a road across the railway. Both the lower Courts have decreed in substance the plaintiff's suit, principally because the Courts find that the plaintiff's ryots have no mode of access to their lands except by crossing the line, and that their right to pass over the land now

* Case No. 418 of 1866. Special Appeal from a decision passed by Mr. J. L. BRAYNOR, Judge of the 24 Perganahs dated the 23d December 1864 affirming a decision passed by the Munsiff of that District dated the 26th July 1864.

1865
May 10

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of the 24
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Ghose

occupied by the railway remains as it was before the railway was made, notwithstanding that the land itself has been acquired by the Railway Company

We think the decision cannot be supported on these grounds. The Railway Company, with the aid of Government, acquired the land under the provisions of Act VI of 1857 and by the 8th Section of that Act, the land taken became vested in the Government, and afterwards in the Railway Company, absolutely, and free from every right or interest therein, of whatever description, possessed by the former proprietors, or by other persons. All rights before existing, whether of passage or of any other kind, absolutely ceased upon the acquisition of the land for the railway, and no right of way afterwards arose, or was continued, merely because there remained no mode of access to the land on the north, otherwise than by crossing the line. The express provisions of the law are not consistent with the existence of such a right.

In the Judgment of the Lower Appellate Court there is reference to a promise stated to have been made by the Railway Company to provide a level crossing at the place in question and the Railway Map, which is in evidence, shows the trace of a road there. If the Railway Company have, by their representations and conduct, laid themselves under legal obligation to provide a road or crossing, the plaintiff is entitled to enforce that obligation, and, although the present suit is based on a misconception of his strict rights (which in our view arise, not as he supposes from the continued existence of the old rights, but from the acts of the Railway Company in conferring a new right of way), we think the suit may nevertheless proceed for the purpose of obtaining the relief to which he is really entitled. We must remand the case in order that it may be ascertained whether the railway Company have, by their conduct or representations, contracted to provide and maintain any and what description of way for the plaintiff and his ryots over the line. If the Court is satisfied by the evidence that the defendants have so engaged, a decree may be awarded in plaintiff's favour.

The Bengal Law Reports, Vol. II. Page 108.

APPELLATE CIVIL.

*Before Sir Barnes Peacock, Kt., Chief Justice,
and Mr. Justice Mitter.*

IN THE MATTER OF J HOLLICK AND OTHERS *

Attachment of Salaries of Railway Servants—Jurisdiction of Mofussil Small Cause Courts—Procedure—Act VIII of 1859, Sections 236, 239 and 240

1868
Dec, 12

Salaries or other debts due from the Railway Company to any of its servants can be attached in satisfaction of a Small Cause Court decree under Act VIII of 1859, Section 236

The attaching Court must make a written order to be fixed up in some conspicuous part of the Court house, and a copy is to be delivered or sent registered by post to the debtor. The registered letter should be addressed to the Agent of the Railway Company at the Head Office of the Company. It need not be sent through the High Court, although the Head Office is within the jurisdiction of the High Court.

CERTAIN money decrees having been obtained in the Small Cause Court at Monghyr, against some of the East Indian Railway Company's servants, in execution of one of the decrees, the Judge wrote to the Chief Paymaster, E. I. Ry Co., at Calcutta, requesting him to attach and remit to his Court the amount of the decree from pay or any money due to the judgment-debtor. The Railway Company replied that they could only recognize an attachment issuing from the High Court.

Thereupon the Judge of the Small Cause Court submitted the following questions for the opinion of the High Court:

1st.—Whether the salaries of the railway servants can be attached and deducted in satisfaction of Civil Court decrees?

2nd.—Is there any necessity for this Court to make the High Court, or any other Court, a medium in exercising the powers of attachment and deduction of salaries of judgment-debtors belonging to the railway or any other department?

* Reference to the High Court by the Judge of the Small Cause Court at Monghyr.

In the matter
of
Hollick
—

3rd.—Can this Court lawfully send an order of attachment and deduction of the salary of a railway servant residing within its jurisdiction to the Chief Paymaster, E. I. R. Co., Calcutta, as well as to the Paymaster, Jamalpore, or to the Head Pay Audit Department, Jamalpore

The Judgment of the High Court was delivered by

PEACOCK, C. J.—With reference to the first question, salaries or other debts actually due from the Railway Company to any of its servants can be attached in satisfaction of Civil Court decrees, Section 236 of Act VIII of 1859

As to the second question, there is no necessity for a Small Cause Court, to make the High Court, or any other Court, the medium of attachment. By Section 236 of Act VIII of 1859, extended to Small Cause Courts by Section 47, Act XI of 1865, attachments of debts are to be made by written order prohibiting the creditor from receiving the debts and the debtor from making payment thereof to any person whatever until the further order of the Court. In order to attach a debt, the attaching Court must make a written order according to that section. By Section 240, after any attachment shall have been made by written order, any payment of the debt to the judgment debtor, during the continuance of the attachment, is null and void, if it be made after the written order has been only intimated and made known in the manner directed by the Act. By Section 239, in the case of debts, the written order is to be fixed up in some conspicuous part of the Court-house, and a copy of the written order is to be delivered or sent registered by post to the debtor. In the case of the Railway Company, the registered letter should be addressed, directed, and sent to the Agent of the Railway Company at the Head Office of the Company. It is not necessary, in our opinion, that the registered letter should be sent or delivered by the High Court, notwithstanding the Head Office is within the jurisdiction of the High Court and out of the jurisdiction of the Small Cause Court. If it were necessary for the High Court to attach the debt because the office of the Company is within the jurisdiction of the High Court, the interference of two Courts would be required for one execution, for the order prohibiting the creditor from receiving the debt must be made by the Small Cause Court within whose jurisdiction the creditor is residing. The execution of a debt is to be made by attachment, and the attachment is to be made by written order. There

is no law which requires the Court which passed the decree to make one half of the execution and then to send a certified copy of the judgment to another Court to make another part of the execution. Two orders cannot be necessary for the attachment of one debt. A copy of the written order should also be delivered to the creditor and to the Paymaster at Jamalpur.

In the matter
of
Holluck
—

The third question is substantially answered in our answer to the second question.

I observe that the Judge of the Small Cause Court has directed the Paymaster to attach and hold in attachment the pay due to the judgment debtor. That is a mistake. The order attaching the debt must be made by the Court, and a copy served upon the debtor.

**The Indian Law Reports, Vol VI (Madras) Series,
Page 179.**

APPELLATE CIVIL

Before Mr Justice Innes and Mr Justice Kimdersley

HELEN BEARD (PLAINTIFF)

v

SAMUEL FERGERTON (DEFENDANT) *

Civil Procedure Code Section 26 (1)—Attachment of one half of salary of officer on half pay 1883
January 17

Under Clause (1) of Section 26 of the Code of Civil Procedure 1882 a moiety of the salary of public officer drawing half pay (exceeding Rs 50 per mensem) on sick leave is liable to attachment.

This was a case stated under Section 617 of the Civil Procedure Code, 1882, by the Judges of the Court of Small Causes at Madras.

The reference to the High Court was in the following terms —

"This was a suit for money lent and a decree was passed against the defendant on 4th September 1882 for Rs 565 and costs.

* Special Case 78 of 1882 stated by the Judges of the Court of Small Causes at Madras.

Helen Beard
v
Samuel
Ferguson.

"Defendant is a Government servant, the full pay of whose appointment is Rs 300 a month. At present he is on sick leave and is only drawing half pay subject also to other deductions.

"In execution of the above decree one half of his half pay has been attached by prohibitory order under Section 268 of the *Civil Procedure Code*.

"Mr R Branson on his behalf objects to this attachment on the ground that by clause (h) of the proviso to Section 266 of the *Civil Procedure Code* one moiety of his salary is exempt from attachment, and that, therefore, as he is now drawing only half pay or less there is nothing to be attached.

"We have previously ruled in such cases that what is exempted from attachment by the above provision of the Code is half the pay actually drawn by the defendant at the time of such attachment, but, as the question is a very important one and not altogether free from doubt, and moreover is one which is likely constantly to occur both in this Court and other Courts, we think it is expedient to obtain the decision of the High Court upon it.

"The question which we would refer for the decision of the High Court is—

"Does the word 'salary' in clause (h) of the proviso to Section 266 of the *Code of Civil Procedure* mean the full pay of the judgment debtor's appointment, or the pay which he is actually drawing at the time of attachment?"

Counsel were not instructed.

The Court (Innes and Kindersley, JJ) delivered the following

JUDGMENT.—We consider that the practice of the Small Cause Court hitherto is right in regarding as exempted from attachment, by clause (h), Section 266 of the *Civil Procedure Code*, half the pay actually drawn by the Judgment debtor at the time of the attachment or from time to time. What the defendant is now drawing is, we understand, his pay on sick leave, which is half his ordinary salary. Half of the amount so received by him as his salary while on sick leave, is by the clause quoted exempted from attachment.

The other half is attachable.

The Indian Law Reports, Vol. XXX. (Calcutta) Series,
Page 713.

CIVIL REFERENCE.

Before Mr. Justice Banerjee and Mr. Justice Pargiter.

ABDUL GAFUR

v.

W J ALBYN *

Execution of decree—Attachment of salary—Prohibitory order—Railway servants, salaries of—Civil Procedure Code (Act XIV of 1882), Sections 268, 617—Small Cause Court, jurisdiction of—Disbursing office outside the jurisdiction of the Court—Transfer of decree for execution

1903
May, 1.

A Small Cause Court has no authority to attach the salary of a Railway servant that has not yet fallen due by a prohibitory order issued under Section 268 of the Code of Civil Procedure to the officer whose duty it is to disburse the salary, when the disbursing office is situate outside the jurisdiction of the Court. The decree must be sent for execution to the Court within the local limits of which the disbursing office is situate.

A disbursing officer who has so far submitted to such a prohibitory order as to recover and keep in deposit with him the portion of the salary attached, is not bound to pay the money into the Court which attached it without jurisdiction.

Hossein Ally v Asholosh Gangooly(1) and *Parbati Charan v Panchanand*(2) followed. In the matter of *J Hollick*(3) explained.

This was a reference made by the Munsif of Gobindapur, exercising the powers of a Small Cause Court Judge, under Section 617 of the Code of Civil Procedure.

The case is stated by the learned Munsif for the decision of the High Court, in which the facts and his opinions are fully set out, was as follows:—

One Abdul Gafur obtained a Small Cause Court decree for Rs 37 11 0 from this Court against one Mr W J Albyn, who is a gunner guard employed at Dhubad, a railway station of E I Railway within the local limits of the jurisdiction of this Court, on the 23rd June last. On the

* Civil Reference No 1 A of 1903 by Jnanendra Chandra Banerjee, Munsif of Gobindapur dated 26th January, 1903.

(1) (1878) 3 C L R, 30

(2) (1884) 1 L R, 6 All, 241

(3) (1868) 2 B L R, (A C) 108, 10 W R 447

Abdul Gafar v. Albyn
 31st July 1902, he took out execution and prayed for the attachment of the judgment debtor's salary for the month of July 1902. An attachment order was first served on the Agent of the said Company, who resides in the town of Calcutta, under Section 268, Civil Procedure Code. In reply, the Chief Auditor informed me that the Judgment debtor's salary for July had been passed for that month prior to the receipt of this Court's order, and at the same time he raised objection to the jurisdiction of this Court to pass an order for attachment. As the Chief Auditor, instead of the Agent, addressed the letter to me named above, I requested him to name the officer of the said Railway Company whose duty it is to disburse the salary of the said judgment debtor, and to let me know where the salary of the judgment debtor is actually paid. He by his replies informed me that the disbursing officer is he himself, and that the salary of the judgment debtor has for the past few months been paid on the station at Dhanbad, which is within the jurisdiction of this Court. The execution case was dismissed as infructuous on the 23rd August 1902.

"The decree holder on the 23rd September 1902 again applied for execution of his decree. In the said application he prayed for the attachment of a moiety of the judgment debtor's salary for the month of September 1902 and of subsequent months until the entire amount of the decree was realised. Accordingly an order for attachment under Section 268, Civil Procedure Code, was passed and a prohibitory order was served on the judgment debtor, and another copy of the same was also served upon the Chief Auditor, whose office is in the town of Calcutta, through the Small Cause Court, Calcutta. That order was duly served on the said officer, as would appear from the affidavit of the bailiff of the Small Cause Court, Calcutta. The Chief Auditor by his letter dated the 12th December informed me that the amount of the decree was recovered from the debtor and held in deposit pending orders from the Court.

"I accordingly made an order and served a copy of the same through the Small Cause Court, Calcutta, upon the Chief Auditor, requiring him to remit the attached money to this Court by postal money order. He in reply by his letter dated the 5th January 1903 stated that no payment could be made until an order from the Court of Small Causes, Calcutta, was received directing payment of the attached amount into that Court. I then addressed a letter to the Agent of the said Company, pointing out that the Calcutta Small Cause Court served my order on the Chief Auditor in a ministerial capacity, and as such is not competent to pass any order in connection with the execution case under reference, and that only this Court is competent to pass an order for payment of the moiety held under attachment, and asking him to direct the Chief Auditor to carry out the order of this Court without further delay. The Agent by his letter dated the 23rd January disputes this Court's authority to require payment into Court of the money attached, and has thereby declined to give effect to the order of this Court.

"Under the circumstances stated above, and inasmuch as the decree under execution is a Small Cause Court decree, I am (under Section 617,

Civil Procedure Code) compelled to refer to the Hon ble Court for its consideration and orders the following questions —

Abdul Gafur
v
Albana

"1 Whether the salaries of Railway servants residing and working for gain and actually getting their pay within the local jurisdiction of a Court can be attached in execution of Small Cause Court decree passed by such Court?

"In my opinion such salaries could be attached when the judgment debtors reside and work for gain within the jurisdiction of such Court and the clause (1) of para 2 Section 223 Civil Procedure Code, does not stand in the way of executing decrees by such Court against such judgment debtors

"2 Whether in such cases such Court is competent to serve through the Small Cause Court, Calcutta the attachment named in paras 4 and 5 of Section 208, Civil Procedure Code, on the disbursing officer having his office in the town of Calcutta and the said disbursing officer on receipt of such order is bound to give effect to the orders of the Court?

'In my
Court to s
the salaries

their pay at stations within the jurisdiction of such Court *In the matter of J Hollick* (1) supports my opinion

"3 When the salary of a Railway servant working within the local jurisdiction of a Court has been ordered to be attached in execution of a Small Cause Court decree passed by such Court and when the disbursing officer has given effect to such attachment by recovering the decreed money from a Railway servant and holding in deposit the said amount, whether such Court is competent to order the disbursing officer to pay the attached amount into Court (to remit the amount by postal money order) and if any such order is made and duly served upon such disbursing officer whether the latter is bound to carry it out?

'In my opinion the last and the last but two paras of Section 208 Civil Procedure Code, authorise such Court to pass any order it thinks proper in connection with the attached amount and the disbursing officer is bound by such order and is also bound to pay the attached amount to such Court and there is no valid ground for the Railway officers to dispute the power of such Court to ask the Chief Auditor to send money to the Court. A decree holder would certainly derive no benefit by attaching the salary of a Railway servant if the disbursing officer simply holds the attached money in deposit without making any payment of the same. The decree holder's object for attaching such salary is ultimately to get the amount in satisfaction of his decree. In my humble opinion it is absurd and unreasonable to suppose that a Court which has power to attach the salary of a Railway servant has no power to give the judgment creditor the relief of actually obtaining the attached money. The last para of Section 208 Civil Procedure Code, enjoining that a disbursing officer is to pay into Court the attached money from time to time and I think is bound to do so whenever so ordered by the attaching Court

Abdul Gafur
v
Albyn

Mr. O'Kinealy and Dr Ashutosh Mookerjee for the Railway Company.

BANERJEE AND PARGITER, JJ.—This is a reference from the Munsif of Gobindapur exercising the powers of a Small Cause Court Judge, under Section 617 of the Code of Civil Procedure, which has been transmitted to this Court through the Judicial Commissioner of Chota Nagpur, and the first question referred to us is, whether the salaries of Railway servants residing and working for gain and actually getting their pay within the local jurisdiction of a Court can be attached in execution of a Small Cause Court decree passed by such Court.

The learned Munsif is of opinion that the question should be answered in the affirmative, and so it ought from one point of view, no doubt. If the attachment is made by the Small Cause Court at or about the time when the agent of the disbursing officer is going to hand the money to the Railway servants within the jurisdiction of that Court, the attachment would be valid, for it would then be an attachment of a debt due to the judgment debtor made within the jurisdiction of the attaching court. But if the attachment is of salary that has not actually fallen due, and is made in the manner indicated in Section 268 of the Code of Civil Procedure by a prohibitory order requiring the officer whose duty it is to disburse the salary, to withhold every month such portion as the Court may direct until the further orders of the Court, the attachment in such a case is attachment of a debt not of course actually due to the judgment debtor, but anticipated to fall due to him, month by month, at the place where the disbursing officer has his office, and such an attachment can be made only by the Court having jurisdiction at the place where the disbursing officer has his office. It would seem from the statement of facts in this reference that the attachment here was of this latter description, and if that was so, the attachment was made in Calcutta, where the Munsif of Gobindapur has no jurisdiction. The view we take is in accordance with that taken by this Court in the case of *Hossein Ally v Ashutosh Gangooly*⁽¹⁾ and by the Allahabad High Court in the case of *Paribati Choran v Panchanand*⁽²⁾, and it is not really in conflict with that taken by this Court in the case of *J Hollich*⁽³⁾ because there the order was made by the Monghyr Court,

(1) (1878) 3 C L R 30

(2) (1894) 1 L R GAH 243

(3) (1868) 2 B L R (A C) 103 10 W R, 14.

Abdul Gafur
v
Albyn

within whose jurisdiction the disbursing officer's office was held, that office being held at Jamalpur. We may here observe that although the previous attaching order was made without jurisdiction, we understand from the learned counsel for the Railway Company that the money attached has not been paid to the judgment debtor, but it is still held in deposit, and would be available for the decree holder if only the attachment is made in due form by the decree being sent down for execution to the Calcutta Small Cause Court.

The second question in the reference has in effect been already answered, that question being whether in such cases such Court is competent to serve through the Small Cause Court, Calcutta, the attachment order named in paragraphs 4 and 5 of Section 268 of the Code of Civil Procedure, on the disbursing officer, having his office in the town of Calcutta, and the said disbursing officer on receipt of such order is bound to give effect to the orders of the Court. If the attachment is of salary to fall due and is to be made in the manner indicated in Section 268 which we have already referred to, the attachment itself could not be made by the Gobindapur Small Cause Court without the decree being transferred for execution to the Court of Small Causes at Calcutta.

The third question is whether "when the salary of a Railway servant working within the local jurisdiction of a Court has been ordered to be attached in execution of a Small Cause Court decree passed by such Court and when the disbursing officer has given effect to such attachment by recovering the decree money from a Railway servant and holding in deposit the same amount, such Court is competent to order the disbursing officer to pay the attached amount into the Court (to remit the amount by postal money order) and if any such order is made and duly served upon such disbursing officer, whether the latter is bound to carry it out."

To the third question stated in the reference our answer is this that the disbursing officer when he submitted to the order for attachment did so under a mistake of fact namely that the order has really emanated from the Calcutta Small Cause Court, which has jurisdiction in the matter. But when he was informed that the order did not really emanate from that Court but proceeded from the Gobindapur Court which has no jurisdiction over him, he was justified in not remitting the money to the Gobindapur

Abdul Gafur v Albyn Court But as we are informed by the learned counsel for the Railway Company, and as we have already observed above, the money is still in deposit with the disbursing officer, and will be available for the decree holder if only the attachment is made in due form by the decree being transferred to the Small Cause Court at Calcutta for execution.

**The Indian Law Reports, Vol. XXVIII (Bombay) Series,
Page 198.**

APPELLATE CIVIL

Before Mr Justice Chandavarkar and Mr. Justice Aston

SAYADKHAN PYARKHAN (Plaintiff)

v.

B S DAVIES (Defendant) *

1903
Sept 17

*Civil Procedure Code (Act XIV of 1882 Section 268—Decree—Execution—
Salary of Railway servant—Disbursing officer outside the jurisdiction of
the Court—Prohibitory order—Jurisdiction*

The judgment debtor a railway servant resided within the local limits of the jurisdiction of the Small Cause Court at Bhusaval which passed the decree. The disbursing officer of the Railway Company resided at Bombay outside its jurisdiction, but the salary was every month paid to the judgment debtor at Bhusaval by the disbursing officer through his subordinate. The Court at Bhusaval issued to the disbursing officer a prohibitory order under Section 268 of the Civil Procedure Code (Act XIV of 1882) against the salary of the judgment debtor.

Held that the Court at Bhusaval had no jurisdiction to attach the salary of the judgment debtor by a prohibitory order issued to the disbursing officer under Section 268 of the Civil Procedure Code (Act XIV of 1882).

Abdul Gafur v W J Albyn (1) followed.

This was a reference made by V N Rahurkar, Subordinate Judge of Bhusaval, exercising the powers of a Small Cause Court Judge, under section 617 of the Code of Civil Procedure (Act XIV of 1882).

* Civil Reference No 10 of 1903

(1) (1903), 30 Cal., 713

The facts giving rise to the reference, and the opinion of the Subordinate Judge on the question referred, appear from his statement which was as follows —

Sayadkhan
Pyarkhan
v
Davies

(1) One Sayadkhan obtained a decree in Small Causes Suit No 117 of 1903 for Rs 131 and costs against one Mr B S Davies, a guard employed at Bhusaval, a Railway station on the G I P Railway, within the jurisdiction of the Court. On the 9th of July, 1903, he applied for the execution of the decree and prayed for the attachment of the moiety of the judgment-debtor's salary for the month of June, 1903, and of subsequent months until the satisfaction of the entire decretal debt. The judgment debtor resided and worked for gain principally at Bhusaval which is his head quarters. He draws Rs 100 per month. The disbursing officer of the G I P Railway Company resided in Bombay. Every month the salary is paid to the judgment debtor at Bhusaval by the disbursing officer through his subordinate. A prohibitory order under Section 268, Civil Procedure Code against the salary of the judgment-debtor was sent to the disbursing officer in Bombay. It was received by him on the 3rd August, 1903, after the salary for the month of June was paid to the judgment debtor. The salary for the month of July was then due on the 1st of August, but was not paid to the judgment debtor. The prohibitory order was returned by the disbursing officer on the ground that the Court had no jurisdiction to pass the order and that the machinery of Section 223, Civil Procedure Code, should have been adopted.

(2) The point on which doubt is entertained,

"A Railway servant resides works for gain and receives his salary within the local jurisdiction of the Court that passed the decree. The disbursing officer holds his office beyond the local jurisdiction of that Court. Can the Court attach the salary that fell due and that was to fall due by a prohibitory order, under Section 268, issued to the disbursing officer?"

(3) My opinion on the said point is in the affirmative.

(4) Reasons for the opinion.

The Court passing the decree can attach the salary by a prohibitory order under Section 268 Civil Procedure Code if the salary is within the jurisdiction of the Court. A salary is within the jurisdiction of the Court when it is payable within its jurisdiction.

Sayadiban
Pyarkhan
v
Davies

In the absence of any evidence to the contrary, the salary of a Railway servant is payable at the head quarters, where he principally resides and works for gain, and not at the place of the office of the disbursing officer. There is no ruling of the Bombay High Court on the point under consideration. The facts in *Rango Javram v. Balkrishna Vitthal* (1) and in *Parbati Charan v. Panchanand* (2) were different. In these cases the judgment debtor and disbursing officer resided beyond the local jurisdiction of the Court. The Calcutta case of *Abdul Gafur v. W J Albyn* (3) is almost on all fours with the case under consideration. I say almost because the prohibitory order in that case was served through the Small Cause Court, Calcutta, within whose jurisdiction the disbursing officer resided. The ruling in this case is against the opinion expressed by me. The principle of the ruling is that the salary becomes due to the servant, month by month, at the place where the disbursing officer has his office (*vide* Page 716 *idem*). With all due deference to their Lordships I am humbly of opinion that the salary becomes payable at the place where the servant resides and works for gain. The disbursing officer may hold his office at any place according to the convenience of the Railway Administration. The servant is not required to go to the office of the disbursing officer to receive his pay, but the disbursing officer through his deputy goes to the place where the salary is payable. Having regard to this recent Calcutta decision I entertain doubt as regards the correctness of my opinion. The question is of general importance and of frequent occurrence in this Court. The decree under execution is a decree passed by me as a Small Cause Court Judge and is final. I therefore think it necessary to refer, under Section 617, Civil Procedure Code, the abovementioned point to the Honourable High Court for its decision.

T R Gharapur (*amicus curiæ*) for the Plaintiff

B N Bhajekar (*amicus curiæ*) for the Defendant.

CHANDAVARKAR J. —Following the decision in *Abdul Gafur v. W J Albyn* (3) the question referred must, we think, be answered in the negative.

Answer accordingly

**The Indian Law Reports, Vol. VI. (Allahabad) Series,
Page 634.**

Before Mr. Justice Brodhurst and Mr. Justice Duthoit.

JANKI DAS (PLAINTIFF)

v.

THE EAST INDIAN RAILWAY COMPANY (DEFENDANT) *

*Civil Procedure Code, S 206—Gratuity—Liability to attachment—Gift—
Delivery—Act IV of 1882 (Transfer of Property Act), S 123—Act IX
of 1872 (Contract Act) S 90*

1884
July, 16.

K, a servant in the employment of the East Indian Railway Company, was recommended by the Traffic Manager a bonus in consideration of long and good services. This recommendation was sanctioned, and the amount of the bonus was received by the District Paymaster. Before payment to K, the money was attached in execution of a decree obtained against him by J.

Held, that inasmuch as the bestowal of the money was a gift of movable property of date subsequent to the 1st July, 1882 and was not evidenced by a registered instrument, it could only be effected by actual delivery, that as there had been no such delivery as completed the transfer (S 123 of the Transfer of Property Act, and S 90 of the Contract Act), the money was not at K's disposal and he could not have enforced payment, and that the money was therefore not liable to attachment in execution of a decree against him.

On the 20th March, 1882, one Kelly, in the employment of the East Indian Railway Company as a yard foreman at the Allahabad Railway Station, was recommended by the Traffic Manager of the Company a bonus of six months' pay in consideration of his long and good services. This recommendation was approved of and the bonus sanctioned by the Board of Directors and ultimately by the Government of India. On the 15th August, 1882, the amount of the bonus, Rs 1,080, was received by the District Paymaster of the Company, for payment to Kelly. On that same day, before payment to Kelly, the money was attached in execution of a decree against Kelly, which had been obtained by the plaintiff, one Janki Das. The Paymaster of the East Indian Railway Company refused to pay the money so attached, on the

* Second Appeal No 1492 of 1883 from a decree of F S Bullock Esq, Offg District Judge of Allahabad, dated the 31st August 1883, affirming a decree of Babu Prag Das, Offg Munsiff of Allahabad, dated the 18th June 1883.

Janki Das
v
E I Ry

ground that nothing was due to the judgment debtor. The plaintiff therefore instituted the present suit against the Company for recovery of the above mentioned sum of Rs 1,080.

The Court of first instance (Munsiff of Allahabad) dismissed the claim, holding that the money in question was not liable to attachment in execution of a decree against Kelly, inasmuch as the gift to him had never been legally completed, so as to entitle him to enforce payment. On appeal, the District Judge upheld the decree.

The plaintiff appealed to the High Court, and it was contended on his behalf that as soon as the payment of the gratuity to Kelly had been sanctioned, and the amount remitted to the District Paymaster at Allahabad, it became in effect the property of Kelly, and liable to attachment in execution of a decree passed against him.

Mr T Conlan and Lala Lalta Prasad, for the Appellant

Mr G T Spankie, for the Respondent

The Court (BROTHURTON and DUTHOIT, JJ) delivered the following Judgment —

DUTHOIT, J — The Rs 1,080 was in no sense a debt due by the Company to Kelly, but was a gift bestowed from motives of compassion. It has, however, been contended by the learned Counsel for the appellant that from the moment when sanction to pay the money reached Allahabad, the money was at his client's disposal that his client could have compelled the Paymaster to pay the money to him and that the issue of the order to pay was equivalent to payment of the money.

There is, we think, no force in these contentions. The bestowal of the gratuity was a gift of moveable property. Its date is subsequent to the 1st July, 1882, and it was not evidenced by a registered instrument. It could therefore only be effected by actual delivery. The receipt of the order to pay is not equivalent to delivery to Kelly, for Kelly was not personally put into possession of the money, nor had the Paymaster authority from Kelly to hold the money on his behalf. As, therefore, there had been no such delivery (S 123 of the Transfer of Property Act, and S 90 of the Contract Act) as completed the transfer—vested the property—the money was not at Kelly's disposal and he could not have enforced payment of it. The appeal fails and is dismissed with costs.

Appeal dismissed

The Indian Law Reports, Vol. XXVI. (Madras) Series,
Page 440.

APPELLATE CIVIL

*Before Sir Arnold White, Chief Justice, and
Mr. Justice Moore.*

OFFICIAL ASSIGNEE OF MADRAS, (APPELLANT)

v.

MARY DALGAIRNS, (PETITIONER) RESPONDENT *

*Provident Funds Act—IX of 1897, S. 4—Insolvent Debtors' Act 11 and 12
Vict chap 21 S 7—Vesting order—Sum due to an insolvent from a
Provident Institution—Right of Official Assignee to claim—Construction
of Statutes—Distinction between enactments affecting vested rights and
those regulating procedure*

1902
September,
11, 1902

A member of a Railway Provident Institution who had made compulsory deposits therein became insolvent and the usual vesting order was made under Section 7 of the Act for the Relief of Insolvent Debtors. By the rules of that Institution a member is to be paid, on his retirement from service, the sum of money standing to his credit. At the date of the vesting order, the Insolvent had not yet retired from service. Subsequently to the date of the vesting order, but before the retirement of the Insolvent, The Provident Funds Act, 1897 came into force. Section 4 of which provides that after the commencement of that Act the Official Assignee shall not be entitled to or claim any such compulsory deposits in any Railway Provident Fund. On a claim being made by the Official Assignee to the amount on the ground that when the Act came into force the interest of the Insolvent in the Fund had become vested in the Official Assignee.

Held, that by Section 4 of the Provident Funds Act all the right and title of the Official Assignee was determined as from the coming into operation of the Act and that its operation was not limited to cases where the vesting order had been made after its commencement.

The distinction between the construction of enactments affecting vested rights and those which merely affect procedure recognised.

* Original Side Appeal No 10 of 1902 presented against the order of the Honorable Mr Justice Boddam one of the Commissioners of the Court for the Relief of Insolvent Debtors at Madras dated 3rd February 1902 made in the matter of the petition and schedule of James E Dalgaurns an Insolvent Debtor No. 152 of 1896.

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Jaranmal Jitmal v Muktabar (1) referred to

Under Section 7 of the Insolvent Debtor's Act the right of the Insolvent to be paid the sum standing to his credit in the Fund, on his retirement from service, vested in the Official Assignee

Petition in insolvency Petitioner was the widow of one James Dalgairns, who had been an Engineering Assistant in the employment of the Madras Railway Company, and her petition set forth that the deceased had subscribed in the usual way in the Provident Institution of the Madras Railway Company till November 1897, when he resigned from the service of the Company. On the 30th July, 1886, the deceased presented a petition in the Madras Court for the Relief of Insolvent Debtors and was granted his personal discharge on the 26th April 1897, he being also ordered to make a monthly payment towards his debts—which he did. On the 14th November 1900, the insolvent died, leaving the petitioner, his widow, behind him surviving. Petitioner applied to the Provident Institution for payment of the amount standing to her late husband's credit, but was referred to the Insolvent Court. On the 16th October 1901, the net amount standing to the credit of the insolvent was remitted to the Official Assignee. Petitioner now prayed that this sum might be paid out to her. The rules of the Provident Institution which are material to the question are set out in the Judgment.

The Court made the order

The Official Assignee preferred this appeal

Mr *Allan Daly* for Appellant

Mr *J H M Ryan* for Respondent

JUDGMENT —This is an appeal from an order of BODDAM, J., directing the Official Assignee to pay to the widow of an insolvent a sum of Rs 1,131

The insolvent filed this petition on July 30th, 1896, and the usual vesting order under Section 7 of the Act (11 and 12 Victoria, Chapter 21) was made. The insolvent had been in the employ of the Madras Railway Company and had contributed in the usual way to the Madras Railway Provident Institution from January 1891 till November 1897 when he retired from the

service of the Company. The amount in question was paid over by the Railway Company to the Official Assignee in October 1901

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Rule 4 of the Rules of the Institution is as follows — The payment by members to the Institution shall be as follows —

“(1) Obligatory — Every married member, or widower with a child or children dependent on him, not being purely of Asiatic descent, shall subscribe a sum at the rate of $6\frac{1}{2}$ per cent of the amount of his salary. Every other member shall subscribe a sum at the rate of $3\frac{1}{2}$ per cent of the amount of his salary

“(2) Voluntary — Any member may, on giving not less than one month's notice to the committee of his intention so to do, make deposits in the Provident Institution from the amount of his salary, as he may think proper, and any member who having availed himself of this provision may at any time desire to vary or discontinue the amount of such deposits, may do so on giving not less than one month's notice to the Committee of such intention. All such deposits will be held at the disposal of the depositor, subject to such regulations as to notice of withdrawal and repayment as may be made by the Committee, provided that such notice shall not be fixed in excess of one month”

Rule 7 says — “The Company shall from time to time deduct from any sum payable by them to any member in respect of salary such sum as may be required to pay any subscription, due from him to the Institution, and shall from time to time pay over to the Committee in India all sums so deducted by them”

Apparently the sum which stood to the credit of the Insolvent at the date of the vesting order consisted entirely of obligatory subscriptions, and for the purposes of this Judgment, we assume this to have been the case

Rule 15 says — “The accounts of the Institution and of the members shall be made up half yearly to the 30th June and the 31st December but the said accounts shall be rendered for each calendar year, and as soon as may be after the 31st of December in each year, and the Committee shall thereupon render a statement of his account to each member of the Institution. For the purposes of this rule the investments of the institution shall be valued at the market rates ruling at the close of each half year”

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Rule 16 says — "All amounts standing to the credit of members shall be credited with interest. The rate of interest shall be that from time to time fixed upon by the Committee according to the results of the investment of the moneys of the Institution, due allowance being made for the expenses of management of the Institution in fixing this rate of interest."

Rules 19 and 20 provide as follows —

"19 Except as is by these Rules expressly provided, no member or any person or persons on his behalf, or in respect of his interest in the Institution or the funds thereof, shall be entitled to claim any payment of money to him or them"

"20 On the retirement of any member of the Institution from the service of the Company the Committee shall pay to him or his assigns the sum of money standing to his credit in the books of the Institution on the 30th day of June or 31st day of December preceding his retirement, together with interest thereon up to the end of the month last preceding his retirement at the rate applicable to the last preceding half year. They shall also return to him in full the amount of his paid up subscriptions for the then current half year, together with interest thereon calculated as heretofore stated"

Under Section 7 of the Insolvency Act, upon the making of the vesting order all the real and personal estate and effects of the petitioner (with certain specified exceptions) and all debts due to him and all his future estate right, title and interest in or to any real or personal estate or effects which may revert, descend or come to him, vest in the Official Assignee. At the time of the making of the vesting order the Insolvent was still in the service of the Company and the event upon which the contributions made by him to the institution became repayable, viz., his retirement from the service of the Company, had not then taken place. It is not necessary to consider whether when the vesting order was made the amount standing to the credit of the insolvent was a debt due to him from the institution. At the time the vesting order was made the Insolvent, at any rate, had the right to be paid the amount standing to his credit as and when he retired from the service of the Company, and we do not feel the least doubt that the effect of Section 7 of the Insolvency Act was to vest this right in the Official Assignee as from the date of the filing of the petition. If authority were

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needed the case of the *Shreusbury* in re *The Petition of E J S Shreusbury* (1) is directly in point

The question we have to decide really turns upon the construction to be placed upon Section 4 of the Provident Funds Act, 1897, (Act IX of 1897) This enactment came into force on March 11th, 1897, i.e., after the making of the vesting order but before the retirement of the Insolvent from the service of the Railway Company Section 4 of the Act is as follows —

“After the commencement of this Act, the compulsory deposits in any Government or Railway Provident Fund shall not be liable to attachment under any decree or order of a court of Justice in respect of any debt or liability incurred by a subscriber to, or depositor in, such Fund, and neither the Official Assignee nor a Receiver appointed under Chapter XX of the Code of Civil Procedure, shall be entitled to, or have any claim on any such compulsory deposit”

It was argued by Mr Daly, on behalf of the Official Assignee, that inasmuch as when the Act came into operation, the interest of the Insolvent in the fund in question had passed to the Official Assignee by virtue of the vesting order, the section ought not to be read retrospectively so as to divest a right or title which had already accrued Mr Daly relied on the well known canon of construction which draws a distinction between new enactments which affect vested rights and enactments which merely affect procedure (see, for instance, *Jai Ramal Jitmal v. Multabai* (2) and the authorities there referred to) We entirely agree that before we can construe that enactment in question as affecting a right or title which had already accrued, we must be satisfied from the words of the enactment that it was the intention of the Legislature that existing rights should be affected In the present case we are so satisfied In our opinion the Legislature in enacting Section 4 intended that all right and title of our Official Assignee to the deposits referred to in the section should be determined as from the coming into operation of the Act It seems to us that the Legislature did not intend that the operation of the section should be limited to cases where the vesting order was made after the coming into operation of the Act If this had been the intention some such words as, after the commencement of this Act the right, title and interest of an Insolvent in compulsory deposits in a Railway Provident Fund shall

(1) 1 L R, 10 Bom 313

(2) 1 L R 14 Bom 516.

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not vest in the Official Assignee under a vesting order made under Section 7 of the Insolvency Act, would have been used. What the section enacts is that the Official Assignee shall not be entitled to, or have any claim on, the compulsory deposits.

It appears to have been conceded that if the Official Assignee was not entitled to retain the money in question the widow was entitled to it.

The appeal is dismissed with costs.

Mr. C. H. King for Appellant

Messrs. Grant and Greatorex for Respondent

**The Indian Law Reports, Vol. XXIX. (Bombay) Series,
Page 259.**

ORIGINAL CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Batchelor.*

VEERCHAND NOWLA AND OTHERS (PLAINTIFFS)

v.

B. B. & C. I. RAILWAY COMPANY (DEFENDANTS).*

AND

DOOLA DEVICHAND (PLAINTIFF)

v.

B. B. & C. I. RAILWAY COMPANY (DEFENDANTS) *

1904
October, 6.

Provident Funds Act (IX of 1897, as amended by Act IV of 1903) Sections 2 (4) 1—Compulsory deposit—Provident Fund—Contributions by a railway servant—Liability of the contributions to be attached on the servant leaving the Company's service—Attachment—Civil Procedure Code (Act XIV of 1882), Section 278

The contribution which the employee of a Railway Company makes towards the Railway Provident Fund, governed by the provisions of the Provident Funds Act (IX of 1897) is a compulsory deposit within the meaning of Section 4 of the Provident Funds Act (IX of 1897) as amended by Act IV of 1903.

The deposit does not cease to be compulsory, when the employee leaves the service of the Company since it was not when made repayable on

* References from the Court of Small Causes at Bombay in Suits Nos 1192 of 1904 and 12358 of 1904

demand, and was, therefore at that time a compulsory deposit, and having once acquired that character with the attendant consequences it continued to retain it

A compulsory deposit of the above description does not become liable to be attached, under Section 268 of the Civil Procedure Code (Act XIV of 1882) on the subscriber's leaving the Company's service

The expression 'compulsory deposit, as used in the Provident Funds Act (IX of 1897, as amended by Act IV of 1903) is not merely descriptive of the sum deposited but is a term of art, which by virtue of legislative provision includes that which is not within its natural meaning for, under Section 2 clause (f) of the Act it includes 'any contribution which may have been credited in respect of and any interest or increment which may have accrued on, such subscription or deposit under the rules of the fund,

CASE stated for the opinion of the High Court by C. M. Cuscutt, Third Judge, under Section 617 of the Civil Procedure Code
The reference was as follows —

"In both these suits the defendant is the B B & C I Railway Company. In a former suit No 21245 of 1902 there was a decree obtained for Rs 112-13 0 against one Goolobhand Premchand and in two other suits No 4102 of 1904 for Rs 116 11 0 and No 6183 of 1904 for Rs 109-5 0 against one J Fisher. In execution of these decrees prohibitory orders were issued against the B B. & C I Railway Company attaching certain moneys in the Railway Provident Fund in the hands of the Company. Later Garnishee notices were served on the Company to show cause why the moneys so attached should not be paid into Court

"2 All the three Garnishee notices were heard by me, when the Secretary to the defendant's Railway Provident Fund appeared, and admitted holding monies payable to the judgment debtors aforesaid, but contended same not liable to attachment according to Section 4 of the Provident Fund Amendment Act of 1903, and declined to pay

"3 The debts were subsequently sold at a Court sale and the plaintiffs in the present suit have become purchasers of the same. The plaintiffs have filed these suits for Rs 114 and Rs 130 respectively against the said Garnishee—the B B & C I Railway Company

"4 The only defence is that the amounts in the defendant's hands are not liable to attachment, that the attachments are invalid and so was the subsequent sale of the debts. The defendant admits that at date of the attachment, that is, of the service

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of the prohibitory orders, they did hold Rs 524-15 4 payable to aforesaid judgment debtor Gulabharu and Rs. 102-3 0 payable to the judgment-debtor Fisher on account of their deposits in the Provident Fund according to the Fund Rules, both such judgment-debtors having, prior to such date, left the Railway service. The defendant Company further admits it was liable to pay up the aforesaid sums to the said judgment-debtors at any time on demand at the date of the receipt of the prohibitory orders.

"5 The question then which I have to submit is, was the attachment of such sums valid under the circumstances above detailed? I am of opinion that it was. I am not, however, free from doubt, and as the point is one of much importance and of frequent occurrence I think it should be authoritatively disposed of by a ruling of the High Court.

"6 The defendant relies mainly on the provisions of the Provident Funds Act, 1897, as amended by Act IV of 1903 and on the ruling of the Bombay High Court in Appeal No 1275, *re Alexander Miller and another*. As this decision is not, I believe, yet published, I annex a true copy of it, for ready reference. This ruling, however, does not appear to me to support the defendant's case. It merely rules that the Provident Funds Act as amended by Act IV of 1903 does not have a retrospective effect and on this ground alone upholds the ruling of Russell, J., Commissioner in Insolvency (which see *V Bombay Law Reporter*, page 454).

"7 In disposing of the question above stated the main thing I beg to submit, is to consider what is a *compulsory deposit*. Section 4 of Act IX of 1897 defines "*compulsory deposit*" as a subscription or deposit not repayable on demand or at the option of the subscriber, &c. that is to say, so long as the subscriber or depositor remains in the service he cannot withdraw the deposit and the Railway Company would not be bound to repay it to him, the deposit thus remains compulsorily a deposit. Such a deposit it is quite conceivable could not be attached as a debt since so long as it is compulsory it does not become a debt capable of being attached and sold under the provisions of the Indian Civil Procedure Code.

"8 I submit, however, that as soon as the employee ceases to be in the service by retirement, resignation or dismissal, he becomes under the defendant's Provident Fund Rules, entitled to be paid whatever sum that is there standing to his credit in the

Provident Fund, less certain deductions to be made if any. In such a case the deposit clearly ceases to be a compulsory deposit as above defined and becomes a debt payable on demand or on order and such as could properly be attached under Section 268 of Indian Civil Procedure Code.

"9 Mr Justice RUSSELL in his Judgment in *re Miller*, above noted in paragraph 5 of this reference, has come to the same conclusion and I mainly rely on his ruling in support of my opinion in these cases. The sums standing to the credit of these judgment-debtors in the defendant's Provident Fund have become unconditionally payable to them ever since they left the defendant's service and to a demand by them for payment of the same to them or on their order to a third person, the defendant could not plead the provisions of the Indian Provident Funds Act. No more, I submit, could the defendant do so as Garnishee in respect of the same moneys which this Court has attached in due form after the same had ceased to be compulsory deposit and had become merely debts due from defendant to the said judgment debtors."

The reference was heard by a Bench composed of Jenkins, C J, and Batchelor, J.

The plaintiffs in both cases were absent.

Lowndes, for the Defendants.

JENKINS, C J —I am of opinion that what was attached was a "compulsory deposit," and that the attachment was therefore bad. It is suggested in the reference that the fund ceased to be a "compulsory deposit," when the debtor left the service of the Company, but I do not think this is so. The deposit when it was made, was not repayable on demand, and therefore at that time was a "compulsory deposit" and having once acquired that character with the attendant consequences, it continued (in my opinion) to retain it.

That this is so becomes the more apparent when it is observed that the expression 'compulsory deposit' is not merely descriptive of the sum deposited but is a term of art which by virtue of legislative provision includes that which is not within its natural meaning, for under Section 2 (1) it includes 'any contribution which may have been credited in respect of and any interest or increment which may have accrued on such subscription or deposit under the rules of the fund.'

It cannot be suggested that there is a change in the character of "any contribution which may have been credited" or "any

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interest or increment which may have accrued" by reason of the subscribers leaving the Company's service the verbal argument, which has been applied to the deposit, has no place there. So far as the fund is made up of these elements it still is a "compulsory deposit," and I cannot suppose that it ever was intended that the fund should as to part be, and as to part not be, a "compulsory deposit."

There is nothing unreasonable in holding the fund to be exempt from attachment in the Company's hands, for it must be remembered that it is the result of contributions made by the debtor, not voluntarily, but under compulsion. The costs will fall as provided by the Act.

The Bombay Law Reporter, Vol VII Page 618

*Before Sir Laurence Jenkins, K C I E.,
Chief Justice, and Mr. Justice Batty*

N C MACLEOD (PLAINTIFF), APPELLANT
v

B B & C I RAILWAY CO (DEPENDANTS), RESPONDENTS *

Insolvency Act (11 and 12 Vic c 42) Section 7—Insolvent—After acquired property of the insolvent—Construction of an Act

The words of S 7 of the Indian Insolvency Act cover the after acquired property of an Insolvent.

An Act is not to be deemed to be retrospective which takes away or impairs any vested right acquired under existing laws.

APPEAL from the Judgment of TYABJI, J, reported at the *Bombay Law Reporter*, VII, 337, where the facts of the case are stated with sufficient fullness.

The Hon Mr. Rames, acting Advocate General, with Mr. Robertson, for the Appellant.

Mr. Strangman, with Mr. Datar, for the Respondents.

JENKINS, C J.—There is no dispute as to the facts; they are fully and accurately stated by TYABJI, J. The only question is whether his view of the law is correct. I think not.

It is clear that the words of S 7 of the Indian Insolvent Act, vesting the debtor's property in the Official Assignee, cover the fund not claimed. But it is sought to escape from the effect

of those words, 1st on the strength of an argument based on expressions to be found in *Cohen v Mitchell*,⁽¹⁾ and 2ndly under cover of Section 5 of the Provident Funds Act, 1897. It was not suggested either here or apparently before TRAJEE, J., that Section 4 of this Act affords any answer to the plaintiff's claim nor was the reliance placed on the *Official Assignee of Madras v Mary Dalgairns* ⁽²⁾. This, no doubt, was because a different view has prevailed in Bombay as to the operation of that section. The Madras decision is entitled to every respect, and I have carefully considered it, but with the result that I see no sufficient reason for departing from the Bombay view. It is conceded in the Judgment in the Madras case that a right in the fund became vested in the Official Assignee, but the learned Chief Justice and his colleague were justified that it was the intention of the legislature that existing rights should be affected. It was thought that had this not been the intention appropriate words would have been introduced. But it is the failure or omission of the legislature from time to time in this respect, as I understand it, that has led to the canon of construction that an Act is not to be deemed to be retrospective which takes away or impairs any vested right acquired under existing laws. A striking illustration of this rule is to be found in the recent decision of the Privy Council in *Mahammad v Kurban Hussain*,⁽³⁾ where it was said "Those enactments are clear and peremptory, and would be decisive if they applied to this case. It is not, however, in accordance with sound principles of interpreting statutes to give them a retrospective effect. The Court cannot construe Sections 8 and 10 so as to deprive the successors of the estate of a person who had died before those sections came into operation of rights which they acquired on his death."

N O Mac
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v
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But to return to the arguments advanced in this case, I think *Cohen v Mitchell*⁽¹⁾ does not help the plaintiff. In the case of *In re Clark*, the limits of *Cohen v Mitchell*⁽¹⁾ were thus stated by the present Lord Dwyer —

If we apply the words of the statute literally there can be no doubt what our decision ought to be in this case. But we had been referred to cases in which the question has been considered how far when the bankrupt while undischarged has been dealing bona fide and for value with third parties, these third parties can maintain as against the trustee a title to the property acquired by the bankrupt. Then we have only the only question to be considered in this case. I will take two examples. In

(1) (1890) 25 Q B D, 267 (2) (1902) 6 M.L. 140 (3) (1893) 11 A 30

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Morgan v Knight(1) *Esle*, C J said at page 677 The result of the cases is not only that he (the bankrupt) may acquire property, but that he may hold it against all the world except his assignees and may create rights to hold it against them if they expressly or impliedly consent to such property being in his order and disposition at the time of a subsequent bankruptcy And in *Cohen v Mitchell*(2) the rule is thus stated 'Until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value in respect of his after acquired property whether with or without knowledge of the bankruptcy are valid against the trustee' That is a very beneficial and I have no doubt a very just rule as regards the rights of third parties dealing *bona fide* for value with the bankrupt after his bankruptcy

The Advocate General has argued that the doctrine of *Cohen v Mitchell* is limited to those cases where the insolvent's after acquired property has been the outcome of subsequent trade and in support of this view he has referred us to what was said by the Court in *Nasir N Thoonthe v Kasi Sidick Mirza* (3) This, however, does not seem to have been the view of CHITTY J in the case of *in re Clayton and Barclay's Contract* (4) At any rate no reference is there made to the property having been acquired in the way of trade

And in *Herbert v Sayen*(5) it was laid down without qualification by the Court of Exchequer Chamber "The effect of the statutory enactments may be either to transfer immediately such property on contract from the bankrupt to the assignees, or to give the assignees the beneficial interest and to make the bankrupt acquire property or contract for their benefit only in the nature of an agent The cases accord with the latter supposition, and it is not consistent with convenience for otherwise there would be no protection for persons dealing with an uncertificated bankrupt the bankrupt acquires property and contracts for the assignees who may, whenever they please, disaffirm his acts, but until they do so his acts are all valid" In the face of this I hesitate to say that the doctrine on which *Cohen v Mitchell* rests is limited to subsequent acquisitions in trade, though I do not say it may not be the correct view In this connection I have not overlooked the decision in *Kerahonse v Brooks* (6) but I am not clear that their Lordships intended there to lay down an exhaustive statement of the law as to after acquired

(1) (1861) 15 O B (N S) 669

(3) (1890) 20 Bom 634 at p 633

(5) (1844) 13 L J Q B 209 at p 213

(2) (1890) 15 Q B D 35

(4) (1893) 2 C H, 210

(6) (1860) 8 M I A 332

property except so far as was necessary for the purposes of the case then before them

I think, however, that there is other and more certain ground on which to rest my decision. In *Cohen v Mitchell*, Fry, L.J. after citing the above passage from *Herbert v Sayen* and suggesting that "disaffirm" should be interpreted "intervene" lays down that from the moment of his intervention the after-acquired property vests in the trustee absolutely and can no longer be recovered by or dealt with by the bankrupt. In my opinion Mr Macleod did intervene in this case by his letter of the 12th of January, and his intervention was thus prior to the payment by the Company to Miller.

It is no answer to this to say that the letter did not reach the Secretary of the Fund till the 13th, after the payment was made: the letter was properly addressed to the Secretary and was delivered on the 12th and if according to the Company's mode of doing business it was not handed to the person to whom it was addressed until the next day, Mr Macleod and the creditors he represents cannot be made to suffer for that. As a result of his intervention on the 12th the fund for that moment vested in him and could not be paid to the insolvent to Mr Macleod's prejudice. It is said Mr Macleod's letter was misleading though I would not refer to it as a model of particularity, I think it was enough for the purpose of constituting an intervention: it was a demand of all that was payable to him.

Then is the Railway Company protected by Section 5 of the Provident Funds Act, 1897? As the Official Assignee is entitled to the money, it requires clear words to deprive him of his right to sue for it. What is forbidden is a suit in respect of *anything done or in good faith intended to be done in pursuance of the Provisions of the Act*. But this suit is not brought in respect of any such thing: the suit is to realize a right vested in the plaintiff without any reference to the Act, and the payment to Miller though it may be the Company's reason for not paying the Official Assignee, forms no part of the cause of action.

Therefore, I am of opinion that Section 5 is no bar to the plaintiff's suit. The decree, therefore, of the first Court may be reversed and a decree passed in favour of the plaintiff for Rs. 2,389-6-0 with costs of the suit and appeal.

Decree reversed

Attorneys for Appellant — Messrs *Little & Co.*

Attorneys for Respondents — Messrs *Crawford, Brown & Co.*

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The Indian Law Reports, Vol. XXXV. (Calcutta)
Series, Page 641

ORIGINAL CIVIL

Before Mr. Justice Harrington
SETH MANNA LAL PARRUCK

v.

GAINSFORD

1908
March 3

Attachment—Provident Fund of Corporation of Calcutta—Subscriptions—Calcutta Municipal Act (Pengal Act III of 1889) Section 73 (c)—Provident Funds Act (IX of 1897) Sections 2 (4), 4, 6—Provident Funds (Amendment) Act (IV of 1903), Section 2—Compulsory deposits—Trustees

The Provident Fund established by the Municipal Corporation of Calcutta is governed by the provisions of the Provident Funds Act of 1897 and the Provident Funds (Amendment) Act of 1903

These Acts render any subscriptions to the fund in the hands of the Trustees on the Fund not liable to attachment

THIS was an application on behalf of the Trustees of the Provident Fund of the Corporation of Calcutta created under the Calcutta Municipal Act for a declaration that the sum of Rs 6,000 to the credit of the defendant, Gainsford, in the Fund, was not liable to attachment, and for an order that a previous order of June 25th, 1907, directing such attachment, be vacated or modified

On the 9th January 1907 this suit was instituted by the plaintiff against the defendant, Gainsford, who was the Secretary of the Corporation of Calcutta, and another, for the recovery of the sum of Rs 3,513 and interest due on their joint and several promissory note dated December 14th, 1905

A Rule was obtained by the plaintiff calling upon Gainsford to show cause why he should not furnish security to satisfy any decree that might be passed against him in the suit and why in default thereof the sum of Rs 6,000 payable to him out of the Provident Fund created under Section 73 (c) of the Calcutta Municipal Act should not be attached, until the final determination of the suit, and it was further ordered that until such cause

be shown, the Trustees of the Fund be prohibited and restrained from making payment of the sum to any person whomsoever. The Trustees were not parties to the rule and did not appear at its disposal.

Soth Manna
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No cause was shown by Gainsford and on the 25th January 1907, the order was made *ex-parte* against Gainsford and it was further ordered that the Trustees be prohibited and restrained from making payment of the sum to Gainsford or to any other person.

This order was duly served on the Trustees by the Sheriff of Calcutta on the 11th July 1907, and thereupon the Trustees proceeded to make the present application.

It was contended by the Trustees in their Petition that the Provident Fund was established under the provisions of Section 73 (c) of the Calcutta Municipal Act of 1899 for the benefit of the officers and servants of the Corporation and that rules were framed as empowered by that Section for the regulation of that Fund. Rule 23 was as follows: "No subscriber shall be entitled to transfer or assign, whether by way of security or otherwise howsoever, his share or interest in the Fund, or any part thereof, and no such transfer or assignment shall be valid, and the Managers, Trustees or General Committee shall not recognize or be bound by notice to them, respectively, of any such transfer or assignment and all moneys standing in the books of the Fund to the credit of the subscriber so transferring his interest as aforesaid, shall forthwith be forfeited as from the date of such transfer or assignment, to the use of the Fund, and be dealt with accordingly, and farther, if any prohibitory order, or attachment, or process of a Civil Court be served upon the Managers, Trustees, General Committee or Corporation or any of them, or any person on their behalf, by which any moneys standing to the credit of any subscriber in the books of the Fund shall be attached, or be ordered to be paid into a Civil Court, or be ordered to be withheld from such subscriber, such moneys shall forthwith be forfeited to the use of the Fund, and be dealt with accordingly."

They alleged that the defendant, Gainsford, is Secretary of the Corporation used to contribute to the Provident Fund under and subject to the Rules, until the 28th June 1907 when he resigned his appointment.

Setl Manna
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v
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—

It was also contended that in exercise of the powers vested in the Government of India under Section 6 of the Provident Funds Act, 1897, the Government, by a notification dated the 8th July 1902, extended the provisions of the Provident Funds Act, 1897, to the Provident Fund of the Corporation of Calcutta.

Section 4 of the Provident Funds Act, 1897, is as follows

"After the commencement of this Act, the compulsory deposits in any Government or Railway Provident Fund shall not be liable to attachment under any decree or order of a Court of Justice in respect of any debt or liability incurred by a subscriber to, or depositor in, such Fund, and neither the Official Assignee nor a Receiver appointed under Chapter XX of the Code of Civil Procedure, shall be entitled to, or have any claim on any such compulsory deposit."

Mr Sinha for the Trustees —By Section 4 of the Provident Funds Act, 1897, and Section 2 of the Provident Funds (Amendment) Act, 1903, both of which Acts govern the Provident Fund of the Corporation of Calcutta, compulsory deposits in that Fund are rendered not liable to attachment. The definition of "compulsory deposits" in Section 2 of the Act of 1897, covers such contributions as Gainsford's. See *Peerachand Noola v B B & C I Railway Company* (1). Further, under Rule 23 of the Rules and Regulations framed by the Calcutta Corporation under the power granted by Section 73(c) of the Calcutta Municipal Act, 1899, on any order of attachment being served on the Trustees in respect of any moneys standing to the credit of any subscriber, such moneys are forthwith forfeited to the use of the Fund. Thus, the sum of Rs 6,000 was forfeited.

Mr C B. Mitter, for the Plaintiffs —The application was misconceived. The Trustees should have instituted a separate suit to enforce whatever rights they had claim to. *Mussamut Ram-bully Kocer v Kamessur Pershad*, (2) and *Basarayya v Syeed Abbas Sahib*, (3) were referred to. Further, there was nothing to show that the contributions made by Gainsford were "compulsory deposits" within the meaning of the Provident Funds Act, 1897, Section 2.

Mr Sinha, in reply —See the Full Bench case of *Chellambara Patter v Ramaswamy Patter*, (4) dissenting from the decision in *Basarayya v Syeed Abbas Sahib* (3).

(1) (1904) I I R 29 B m 229

(3) (1900) I L R, 21 Mad 20

(2) (1874) 20 W R (C F) 29

(4) (1903) I L R 27 Mad, 67

HALLINGTON, J —This is an application made on behalf of the Trustees of a Provident Fund, created by the Calcutta Municipal Corporation, for an order that it may be declared that a sum of Rs 6,000 payable to one Gainsford is not liable to attachment

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It appears that an action was brought against Gainsford and another man, in which the plaintiff obtained an order calling upon Gainsford to show cause, why the sum of Rs 6,000 payable to him out of the Municipal Provident Fund should not be attached. I gather from what has been stated in the arguments that no cause was in fact shown, the present Trustees were not parties to the rule and did not appear and the order was made *ex parte* against Gainsford and the order prohibited the Trustees from paying this sum of Rs 6,000 either to Gainsford or to any other person, on receiving notice of that order the Trustees come forward with the present application, the object of which is to remove that prohibitory order on the ground that the sum in question is not liable to be attached.

Mr Sinha, who appears for the applicants, rests his contention on two grounds. The first is that by virtue of the Statute law deposits in the Calcutta Municipal Provident Fund cannot be attached, and secondly, that under the rules, under which this Fund is regulated, when a notice of attachment is served on the Trustees then the money standing to the credit of the subscribers against whom the attachment is issued is *ipso facto* forfeited to the use of the Fund. Mr Miller for the plaintiff first objects that the applicants are not entitled to appear. I confess I do not accede to that argument. The Fund is in the hands of the applicants. There is a Regulation under which the applicants would be entitled under certain circumstances to refuse to pay that Fund to Gainsford and to deal with it as provided under Rule 23. I fail to see why the applicants should be debarred from asserting any claim that the Trustees may have to this Fund as claimants to a Fund which has been improperly attached to answer the debt of Gainsford.

It is a case in which the present claimants do not assert their claims as Trustees for Gainsford but as Trustees for other persons, who became entitled on service of notice of attachment of the property to which Gainsford might have otherwise been entitled. In my opinion, to these funds the Trustees are as much entitled to assert their claim under the claim section of the Code as any other person claiming to be entitled to the Rs 6,000 found in question.

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Then the other argument, on which *Mr. Miller* relies on the merits, is that the Act, on which *Mr. Sinha* relies does not apply to the present fund, because he says it applies to compulsory deposits and that there is nothing in the affidavit to show that this was not a voluntary deposit by Gainsford, moreover the Regulations, by which the Fund is governed, show there were two kinds of deposits, that is, compulsory and voluntary deposits.

Now, paragraph 6 of the affidavit sets out that Gainsford used to contribute to the fund under the rules and regulations to which the affidavit refers. These rules and regulations in clause 5 contain a reference to a compulsory contribution of a sum equal to 5 per cent on the amount of the salary of the subscriber, they also provide in Sub clause 2 that any subscriber may contribute by monthly instalments such further sum as he may think proper, provided that the total amount thus voluntarily contributed in any one year does not exceed 5 per cent of his salary for such year. But both what is called a compulsory subscription, under the Rules, and a voluntary subscription are subject to the Rules and Regulations as to management of the Fund.

The expression "compulsory deposit" is defined in the Provident Fund Act (Act IX of 1897) and under Section 2, Sub section 1, a "compulsory deposit" means a subscription or deposit which is not repayable on the demand or at the option of the subscriber or depositor and includes any contribution, which may have been credited in respect of, and any interest or increment which may have accrued on such subscription or deposit under the Rules of the Fund.

These payments made by Gainsford, whether they are described under the rules as voluntary or compulsory, or both come within the definition given in Section 2, Sub section 4 of the Act which I have just read. In my opinion, therefore they are governed by that Act and by the amending Act, viz., Act IV of 1903.

It should be observed that these Acts do not of their own force apply to the fund, which is now the subject matter of the present application, but a notification was made on the 8th July 1903, under Section 6 of the Provident Funds Act extending the provisions of the Act to the Provident Fund established by the Corporation of Calcutta: that is to say, extending it to the present Fund. That Act having been extended, the amending Act (Act

IV of 1903) applies, and by Section 2 of that Act the compulsory deposits made "not liable to any attachment under any decree or order of a Court in respect of any debt or liability incurred by a subscriber to, or depositor in, any such Fund and neither the Official Assignee nor a receiver appointed under Chapter XXII of the Civil Procedure Code shall be entitled to or have any claim on any such compulsory deposit."

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The effect of these Acts is in my opinion to prevent the Fund in the hands of the Trustees being subject to attachment in respect of the debt by Gainsford to the person who is the plaintiff and the result is, therefore, I think, this application must be allowed and the attachment removed.

I desire to add that it has been stated that the notification, which extended these Acts to the particular fund in question, was not brought to the notice of the Court when the order for attachment was made. It is stated at the Bar that a search was made, but by some accident the existence of the notification was not discovered the consequence was that it was not brought to the notice of the Court and I have very little doubt that, if it had been brought to the notice of the Court, the order for attachment would never have been made.

As it is my view that the Statutes, to which I have referred, affect the fund in question it becomes unnecessary to discuss the question raised by Mr. Mitter as to the construction of the rules. The application for an order directing that the sum is not liable to be attached must be allowed with costs.

Application Allowed

Attorney for the Applicants Mr. M. I. Sen

Attorney for the Opposite party Mr. B. S. Ghose

The Indian Law Reports, Vol. IX (Madras) Series,
Page 203.

APPELLATE CIVIL

Before Mr. Justice Brandt and Mr. Justice Parker

KARUTHAN, PLAINTIFF

v.

SUBRAMANYA AND ANOTHER, DEFENDANTS *

1885
July 6
1886
January, 9

*Civil Procedure Code, Section 268—Decree—Execution—Attachment—
Deposit by servant of Railway Company—Rights of attaching creditor*

Where money deposited with a Railway Company by one of its servants as a guarantee for the due performance of his duties was attached by a judgment-creditor of such servant under Section 268 of the Code of Civil Procedure

Held, that the creditor was not entitled to have his decree satisfied out of the deposit, but was entitled to a stop order under cl (c) of Section 268, and also to payment of the interest if any, due by the Company on such deposit to the servant

THIS was a case referred under Section 617 of the Code of Civil Procedure by R. Vasudeva Rao, Subordinate Judge of Negapatam.

The case was stated as follows —

“Plaintiff obtained a Small Cause Judgment against both the defendants jointly and severally, and having applied for execution, moved the Court for attaching about Rs. 300, being the guarantee amount deposited by the defendant No. 1 with the South Indian Railway Company for the faithful performance of his duties. The attachment was made under Section 268 of the Code and the usual notice was duly served upon the Agent on the 27th August 1885, but the Agent addressed to me a letter on the 4th September 1885, inviting my attention to subsidiary orders accompanying Government of India Circular No. 13, Railway, dated Simla, 7th August 1884, and informing me that the Honourable the Advocate General of Bengal had therein represented to Government that compulsory deposits made by

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railway employes in India cannot be attached by judgment-creditors. I have not been able to find a copy of the order, but on a reference to the additional rule 3 A appended to page 130 B to be found in page 3 of the twelfth list of corrections to be made to the Civil Account Code received in this office on the 5th instant, I find that the said Advocate-General has expressed his opinion accordingly. He says 'If, as stated in this case, the deposits under notice are payable to discharged railway employes subject only to Government claims, and they can insist on having payment thereof made to them, I am of opinion such deposits can be attached by judgment-creditors. My previous opinion has been very properly limited (as the case on which I advised would show) to the case of a railway servant in actual service.'

"Upon the foregoing facts, although I see the propriety of the rule proposed to be followed by the Advocate-General, I doubt whether I am bound to follow the said rule. On one hand, it would be very inconvenient for the Railway Company if the rule were otherwise. It is very seldom that a railway employe allows the guarantee amount to be attached, as he is sure that any reduction of the guarantee amount would entail the forfeiture of his appointment, and when he finds it impossible to avoid it, the attachment is effected. The moment it is effected, the Railway Company hands up the amount to the Court and dismisses the man for want of sufficient guarantee being deposited. At present, on an average, amounts are drawn from the Railway Company in the case of two employes in a month. I need hardly point out how inconvenient and difficult it would be for the railway authorities to turn out old and experienced men and go on enlisting new people who can furnish sufficient amount of guarantee and this simply because the employes concerned have turned poor and not dishonest or inefficient. When they enter the service they entrust the amount with the authorities with a special object, and until that object is fulfilled and the guarantee amount becomes returnable, it is my impression that the authorities have virtually a prior lien over the particular amount deposited with them in preference to other simple money decree-holders.

"On the other hand, it may be urged with equal plausibility that the rule, if allowed to have effect would to a great extent, help a dishonest debtor who, having recklessly contracted debts and spent money for improper purposes may, as the last resource, enter the railway service having collected and deposited all that he has in the shape of a guarantee amount, while

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his honest creditors could have no other means of recovering their debts but quietly to look on then debtor lending a decent life with a portion of his property quite safe in a public office which would otherwise be liable to be appropriated for some of his proper debts

"Section 266 of the Code of Civil Procedure contains a list of the property which is held not liable to attachment, but while it includes a moiety of the salary of a servant of the Railway Company, it does not include the guarantee amount now in question. But, considering the principle involved, it appears to me that the object of the Legislature is to see that the man is not allowed to starve, which would be the consequence if the whole of his salary is attached and taken away by his creditors or his guarantee amount is attached and he is left without any employment whatever. Hence my impression is that such compulsory deposits by railway servants in actual service should not be attached by judgment creditors in execution of their decrees consistently with the intention of the Legislature and with the despatch of public business in railway offices. There are four similar petitions now pending before me which are at the decision of the question, and I feel diffident to decide the question one way or the other. Hence the reference

"The question, therefore, that I would respectfully submit for the decision of the Honorable Judges is, whether, with reference to the opinion of the Honorable the Advocate General of Bengal referred to by the Acting Agent of the South Indian Railway Company, compulsory deposits of railway employes in actual service are liable to be attached and realized for satisfaction of decrees under the Code of Civil Procedure"

Mr Wedderburn for the attaching creditor

The judgment-debtor did not appear

The Court (BRANDT and PARKER, J J) delivered the following JUDGMENT — The question for decision, as we understand it is whether money or other valuable securities deposited as security for the due performance of their duty by servants in the employ of a Railway Company can, while the depositor remains in the service of such Company, be attached and sold in execution of decrees obtained against such servants. The learned Counsel who argued the case for the execution creditor before us does not contend that more can be done than to place an attachment

on such deposits so as to prevent the Railway Company from paying over the deposit either to the depositor or to any one else without the order of the Court, it is admitted in fact that the Railway Company has a lien on the deposit, which is pledged to it for a specific purpose so long as the relation of master and servant continues between the Company and the servant

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We are opinion that this is so, and that it is not therefore open to a Court executing a decree against a person so employed to order sale of the deposit or to direct that it be paid over to the judgment creditor. But we see nothing to prevent an attachment being placed thereon at the instance of the judgment creditor, indeed, this appears to be a case to which the provisions of Sections 266 and 268 of the Code clearly apply

The deposit is movable property belonging to the judgment debtor subject to the lien of the Company on termination of the contract of service the judgment debtor is entitled to its return, provided that the Company has no right under the terms of the contract under which it is deposited to retain the whole or a portion of it, and Section 268 provides for attachment of such property not in the possession of the judgment debtor by a written order prohibiting the person in possession of the same from giving it over to the judgment debtor. We answer the question then as follows —The Court may place an attachment on such deposits, subject to the lien of the Company, but cannot proceed to order the sale thereof until the deposit is at the disposal of the judgment debtor free from the lien of the Company, and if the deposit carries interest, and the interest is not, under the terms of the contract between the employer and the employe, at the disposal of the employer, order may be made for payment to the judgment creditor of the interest as it from time to time falls due

N W P. High Court Reports, Vol. V Page 240

CRIMINAL JURISDICTION

Before Pearson, J.

THE QUEEN

v

MANPHOOL

1873
August 11*Act VI III of 1854 Section 27—Act XXV of 1871 Section 29—Endangering the safety of persons—Absence of signaller from duty—Negligence*

The prisoner a servant of a Railway Company, was convicted under Section 29 of Act XXV of 1871 of endangering the lives of the persons in a certain train by negligence. There was no evidence that the safety of any persons in any train had been endangered by his neglect of duty. On the contrary by reason of precautions taken by other persons any possible danger which might have resulted from his neglect was avoided.

Held that he could not be convicted and punished under Section 29 of Act XXV of 1871.

The prisoner was charged under Section 29 of Act XXV of 1871 as follows, viz, that he being a railway telegraph signaller bound to be present from the hours of 2 A.M. to 10 A.M., on the 8th of May at Hattrass Railway Station, in the telegraph signal room and to answer such railway signals and messages as might come within that time, did negligently omit so to do, whereby he endangered the safety of persons in a certain goods train.

It appears that when the goods train was about to leave Palee Railway Station for the Hattrass Station, the telegraph signaller at Palee signalled to Hattrass, previously to inquiring whether the line was clear, but, although they continued to signal from 4.21 A.M. to 5.6 A.M., no answer was received from the prisoner. At 5.6 A.M. the prisoner signalled in reply, on which the signaller at Palee telegraphed to the effect that the goods train had left for Hattrass a message having been received by them from Juleysur, the station next beyond Hattrass, that the line was clear. The prisoner was convicted of the offence charged against him by the Assistant Magistrate of Allypore, and sentenced to rigorous imprisonment for nine months. The Sessions Judge upheld the conviction. The High Court, the prisoner having

prayed that the conviction might be quashed on the ground that his neglect of duty did not, and in fact could not amount to the offence of endangering the lives of the persons in the goods train, as the goods train could not leave Palee until a message had been received that the line was clear between Palee and Hattrass, which message was received from Juleysur, the station beyond Hattrass, before the goods train was allowed to leave Palee for Hattrass, called for the record of the case under the provisions of Section 294 of Act X of 1872.

L. Dillon, for the Petitioner

By the Court —The prisoner has been found guilty of endangering the safety of persons in a certain goods train by negligence, but, although he is shown to have neglected his duty, there is no evidence whatever of the safety of any persons in any goods train having been endangered by his neglect of duty. On the contrary, it is plainly apparent that, by reason of the precautions taken by other persons, any possible danger which might have resulted from his neglect was avoided. Although, therefore, he may be punishable departmentally or otherwise for neglect of duty, it does not seem that he can be convicted and punished under Section 29, Act XXV of 1871. It is not a good and sufficient answer to the plea here urged on his behalf to argue that, because a neglect of duty such as he was guilty of may sometimes lead to the endangering of the safety of persons in a goods train, or that because, had not precautionary measures been taken, and had the line not been clear, his neglect of duty would probably or certainly have endangered the safety of persons in a goods train, he should be held to have actually endangered the safety of persons in a goods train. As he has been sufficiently punished, it is unnecessary to determine whether he was not punishable under Section 27, Act XVIII of 1854.

The finding and sentence of the lower Court are set aside, and the immediate release of the prisoner is ordered.

The Indian Law Reports, Vol VI. (Madras) Series,
Page 201.

APPELLATE CRIMINAL

*Before Sir Charles A. Turner, Kt, Chief Justice
and Mr Justice Kindersley*

CHARLES SNELL AND ALEXANDER SEDDONS

v

THE QUEEN *

Railway Act Section 26—Disobedience of rule—Accident—Liability

1883
February 9

Liability to conviction under Section 26 of the Indian Railway Act 1879 arises not from the consequences directly referable to the breach of the rule but because of the danger which the breach of the rule entail

On the 27th of October 1882 a collision took place between a ballast train, of which the prisoners were respectively guard and driver, and a hand shunted waggon on the Mysore State Railway at Seringapatam Fort

Sidda, a cooly who was pushing the waggon, was killed

The prisoners were charged under Section 26 of Act IV of 1879 † with having driven their train through the Seringapatam Station without having obtained a "line clear" certificate. Claiming to be European British subjects they were tried by Colonel Pearse, a Justice of the Peace, District Magistrate of Mysore

* Appeal 29 of 1883 against the sentence of Lieutenant Colonel G J Pearse District Magistrate and Justice of the Peace of Mysore in Case No 1 of the Calendar for 1882

† If any Railway servant in the discharge of his duty endangers the safety of any person—

- (a) by disobeying any general rule sanctioned and published and not to the manner prescribed by Section 8, or
- (b) by disobeying any rule or order not inconsistent with the general rules aforesaid and which such servant was bound by the terms of his employment to obey and of which he had notice; or
- (c) by any rash or negligent act or omission,

he shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five hundred rupees or with both

The prisoners admitted that they had disobeyed the rule which required them to obtain a written authority from the station master before leaving the station

Having been convicted and sentenced to two months' rigorous imprisonment they appealed to the High Court on the grounds—

- (1) that had they applied for a certificate they must have got one as the station master was ignorant of the fact that the line was not clear,
- (2) that the wagon had been ordered to be left in a siding, and the accident was caused by this order being disobeyed,
- (3) that the rule was never enforced, and on this occasion the station master had given oral permission to proceed past the station under the impression that the line was clear

Mr *Johnstone* for the Appellants

Mr *Menalshi Iyyar* for the Government of Mysore

The Court (TUNNEL, C J and KINDERSLEY, J) delivered the following:

JUDGMENT.—It is shown that, by a general rule sanctioned and notified as required by law the guard and driver of a ballast train should, on a line worked on the block system stop the train at a station and should not leave the station till the guard has received from the station master and delivered to the driver a "line clear" certificate

It is also shown that on the 27th October the appellants disobeyed that rule, and it cannot be doubted that by so doing they endangered the safety of persons using the railway between the Seringapatam and French Rocks Stations

It is no answer to the charge that the rule had been habitually broken, if the evidence as to the disregard of it is reliable, nor is it any answer to the charge that obedience to the rule would possibly not have prevented the accident which occurred. The appellants are liable to conviction not by reason of consequences directly referable to their default, but by reason of the danger or risk which it entails. The sentences are not unreasonably severe

The appeal is dismissed

Ordered accordingly

The Indian Law Reports, Vol. VI. (Allahabad) Series,
Page 248.

CRIMINAL REVISIONAL.

Before Mr. Justice Oldfield.

QUEEN EMPRESS

v.

NAND KISHORE

1884
March, 8

Act XLV of 1860 (Penal Code), Section 304 (a)—Causing death by a rash or negligent act

N, a servant of a Railway Company, charged with moving some trucks by coolies on an incline, discharged this duty negligently, and in consequence lost control of the trucks. Under his orders one of the coolies attempted to stop the trucks, and was killed in such attempt.

Held, that N had caused the coolie's death by his negligence, within the meaning of Section 304 (a) of the Penal Code.

THIS was an application for revision, under Section 439 of the Criminal Procedure Code of the order of Mr W. R. BURATT, Magistrate of the Muttra District, dated the 23rd October 1883, convicting the applicant under Section 304 (a) of the Indian Penal Code, and of the Appellate order of Mr. J. C. LEPOULT, Sessions Judge of Agra, affirming that order.

The facts of this case are set out in the Judgment of the Court Mr H Nibett, for the Petitioner.

The Junior Government Pleader (*Babu Dwarika Nath Banerji*) for the Crown.

The Court delivered the following Judgment —

OLDFIELD, J.—The facts proved are, that the Petitioner, who was a sub-storekeeper at the Muttra Station on the Muttra and Hathras Railway, was in charge of 6 trucks to convey by coolies across the river. On the line leading to the bridge there is a steep incline, and in disregard of the explicit instructions given him he carried out the duty with negligence, in that he did not uncouple the trucks so as to convey them singly, but allowed them to be sent down the incline coupled together, and with an insufficient number of coolies in charge of them, and without

ropes necessary to hold them back in going down the incline. In consequence, they got out of control, and in their course one of the coolies, who, under orders of the Petitioner was endeavouring to stop them, slipped under the wheels, and was run over and killed.

The petitioner was convicted under Section 304 (a) of the Indian Penal Code.

There is no doubt that he has committed a rash and negligent act in the conveyance of the trucks, and the only question which can arise is whether, in the terms of the section he can be said to have caused the coolie's death by his negligent act.

It was contended that the man's death was rather caused by his own act, in attempting to stop the trucks, and by the accident in slipping in the attempt, than by the negligence of the Petitioner in sending the trucks along the line without sufficient precaution being taken. But the contention has no force. Had the deceased in part contributed his own death by his negligence, that circumstance would not exonerate the petitioner from the consequences of his negligent act, see Russell on Crimes, 4th ed., Vol 1, pp 817 and 871, where a boat overloaded with passengers had upset, if the passengers had remained seated the accident would not have happened. WILLIAMS J, held that "if the circumstance of the passengers jumping up really caused the accident, the overloading of the boat was immediately productive of such a result and that the prisoner is answerable, for he should have contemplated the danger of such a thing happening."

The case here against the Petitioner is stronger, for the deceased met his death in the discharge of his duty and in obedience to the order of the Petitioner in an endeavour to stop the trucks and prevent the consequences resulting from the Petitioner's negligence. Under the circumstances, the Petitioner must be held to have caused the death of the deceased by his negligent act in allowing the trucks to go down the line without proper precaution. The petition is dismissed.

Application refused

In the Chief Court of the Punjab.

CRIMINAL REVISION

Before Mr. Justice F. P. Beachcroft.

FAZAL SHAH (ACCUSED), PETITIONER

v.

THE EMPRESS, RESPONDENT.*

1890
June, 30*Indian Railways Act, IX of 1890 Section 101 (a)—Disobedience of General Rule 245 (a)—Collision—Train not under control.*

The accused, the driver of a train, on approaching the distant signal of a station, saw that it was against him, the facing points of the line on which a goods train was at the time was 600 yards from the distant signal, the driver failed to stop his train and collided with the goods train while it was crossing the facing points.

Held, that the accused might have stopped his train short of the facing points, that his inability to do so was due to his not having his train under control within the meaning of General Rule 245 (a), and that he was consequently guilty of an offence under Sec 101 (a) of the Indian Railways Act 1890.

For Petitioner—*Mr Broune, Pleader*For Respondent—*Railway Inspector of Police*

PETITION for revision, under Section 435 of Act X of 1892, of the order of R Sykes, Esquire, Magistrate, first class, Lahore, dated 30th June 1890.

JUDGMENT—The petitioner has been convicted and sentenced, under Section 101 (a) of the Railway Act for disobeying general rules, 214, 245 (a) and 265, to one month's rigorous imprisonment.

244 forbids a driver passing through facing points at a speed exceeding 10 miles per hour.

215 (a) says that drivers are not to depend upon guards for assistance in pulling up trains, more particularly when there is only one brake-van. "Drivers must enter stations with their trains fully under control."

Section 265.—“Drivers with trains must run within the limits of speed fixed for the section of the line upon which they are running”

Kazal Shah
v
The
Empress

As regards the latter rule, I do not find that there is any evidence on the record to show at what time the train left Rokanwala, and the evidence as to the time of its arrival at Riewind is not satisfactory. It is said to have arrived at 6.15, an obvious impossibility, if it left Rokanwala at the proper time 6.7, the distance being 8 miles. As regards rule 244—the collision occurred at the facing points, and I am unable to find any reliable evidence to show at what pace the train was then going. Possibly, it was less than ten miles an hour as they are close to the station and the platform where the train had to draw up.

The real question seems to be whether the accused was entering the station with his train fully under his control within the meaning of rule 245 (a).

He admits that when he came close to the Distant signal it was raised against him. Now even if that signal had been lowered to all right at the time when he first saw it, it should have been accepted by him as a caution signal—rule 74 (f), which is equivalent to an order to go slowly.

If he had done this, there would have been no difficulty in stopping the train before he arrived at the facing points which are a clear 600 yards from the distant signal. He alleges that he reversed the motion of his engine and turned the lever back. There is no reason alleged for these steps not being effectual.

As I have said before there is no reliable direct evidence to the price at which the train was brought in. But the very fact of a collision having occurred at a point said to be 50 yards from the platform where the train was to be drawn up shows that the train was not under his control. It is impossible to suppose that he did not see the luggage train with which he collided, and there can be no reason why he should not have stopped his own train, had it been under his control short of the facing point which the luggage train was crossing at the time of the collision. It seems clear that had it been, he could have stopped it independently of the aid of the guards on his train, otherwise a rule like 245 (a) could not have been drawn up.

Fazal Shah
v
The
Empress

I come, therefore, to the same conclusion as the Magistrate, that whatever be the faults of the staff of the station, the accused might have stopped his train short of the facing points, and that his inability to do so arose from his not having his train under control.

The punishment inflicted was one month's rigorous imprisonment. I do not look upon this as over-severe, considering the great actual damage to property which has occurred, and the possible loss of human life from careless driving.

The petition is rejected.

In the High Court of N. W. Provinces.

*Before the Honourable Sir John Edge, Knight, Chief Justice,
and the Honourable H. F. Blair, Justice.*

THE EMPRESS

v.

O. C. BHATTACHARJI AND PURAN

1892
May, 2

Indian Railways Act, IX of 1890, Section 101—General Rule 151—Neglect of duty by Station Master and Line Jemadar—Points unlocked

A passenger train was standing on the station platform line and a passing goods train should have passed the station by means of a siding line. Under Rule 151 of the General Rules it was the duty of the Station Master to see that the facing points were accurately locked before allowing a train to come on into the Station, the Station Master failed in such duty and the Line Jemadar not having locked the facing points the goods train ran into the station platform line and collided with the passenger train.

Held that the Station Master had been guilty of gross negligence thereby causing the accident that the Line Jemadar was guilty of negligence to a less degree, and that each had committed an offence under Section 101 of the Indian Railways Act, 1890.

JUDGMENT of the Lower Court. This is a case of railway servants, when on duty, endangering the lives of some person or persons by a negligent omission under Section 101 of the Indian Railway Act. The main facts of the case which are undisputed are as follows:—

On the night of December 3rd, the No 3 Up Mixed arrived at Shahganj Station of the Oudh and Rohilhand Railway at the fixed time, namely 11-24 p.m. The Down Goods No 10 crossed

this train at the Shahganj Station. It is due at 11 43 p.m. As the passenger train is on the station platform line (there is only one platform at Shahganj) the goods train runs on to the station siding, and the facing points to the North, which are, as a rule, kept locked for trains coming into the station platform line had to be unlocked and again locked over for the siding line. This, however, was not done on the night in question and consequently the goods train came on to the station line and collided with the passenger train which was standing in the station. The cow catchers of the engines were broken and one or two passengers were shaken, but with these exceptions no other damage was fortunately caused.

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O C Bhatta
clerk and
Puran

There also seems to be no doubt that the Station Master or the Lane Jemadar is the person responsible for the accident, and they naturally throw the blame on one another. The Station Master accused that he had Puran jemadar called when the passenger train left Khetra Sarai, and that he gave him the key of the North points to unlock them for the goods train that he proceeded to the points and returned the key in 7 or 8 minutes saying they were all right. Further, that Puran then returned to the points with a light and remained there till the goods train arrived. He further says that he saw the green light at the points before ordering the station semaphore to be lowered. The Station Master cannot explain how the points became locked for the station line when they had been locked for the siding line. On the other hand, Puran Jemadar says he was never called on the night in question and that he did not wake till the goods train engine whistled, and that when he dressed and came on to the platform arriving there just before the collision. Several witnesses corroborate the Station Master's statement but all are under him more or less, except the engine driver of the goods train. There are four witnesses unconnected with the station, and except Illahi Baksh, the driver of the goods train, the evidence of all is against the station master. Illahi Baksh says he saw a green light at the points, and when the collision took place, he saw a man running away who said "Ram Ram hya ghazab hua". I certainly attach more importance to the statements of the guard and the driver of the passenger train and according to their evidence the station master never satisfied himself that the points were all right before ordering the signal to be lowered, in fact, he never left his office. The driver Norris certainly says he saw the jemadar Puran after the collision.

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coming from the goods shed, but I do not attach very much importance to this statement, as I expect that after the collision there was a good deal of confusion and in the dark too it is hard to say what happened

Moreover, according to rule 151 (a) the Station Master must personally lock every pair of facing points at intermediate stations. The Station Master, however, urges that this rule is modified by rule (f), which says that at stations where a line jamadar is kept, the Station Master must obtain the keys of all the points in the yard over which the train is to pass from the line jamadar, and keep them on his person before line clear is handed to the guard for an outgoing train, or the signal is lowered for an incoming train. It certainly appears that at Shahganj the points are not always locked by the Station Master. The railway authorities contend that he is bound to lock all facing points but he need not himself lock trailing points. The matter is not quite clear, but it is the duty of the Station Master to see that facing points are securely locked before allowing a train to come on. He certainly never went to the north points and I do not believe he left the office to see if any light was exhibited there. He took everything for granted and inferred that the line jamadar was doing his duty as usual. Probably the absence of the signaller may account for some of his negligence. I accordingly come to the conclusion that the Station Master did by his gross negligence cause the accident which of course might have been serious. As to Pinu jamadar there is no doubt that he ought to have been present when these ordinary trains arrived and should have made arrangements to be awakened. He seems however, to have always been taking rest at this time and to have been called by some one, and considering his long hours he was certainly entitled to some rest. I cannot therefore acquit him altogether, but considering his long and good service I do not think a severe punishment is called for, especially as he may too be punished departmentally. As to the Station Master, he admits that he has been fined previously for causing a derailment. It is urged by his Counsel that he was very hard worked and hardly got any continuous rest and also that not much damage was caused by the accident. On the latter point I fail to see why the sentence should be mitigated as this happy circumstance was quite independent of the Station Master. As to his work, there is no doubt that it is fairly continuous. It must however, be remembered that the safety of the

public is in the hands of railway officials, especially Station Masters, and that if serious notice is not taken of all acts of negligence, serious results will follow. I accordingly find both accused guilty as charged under Section 101 of the Indian Railways Act, and sentence O C Bhattacharji to one month's simple imprisonment and a fine of Rs. 100 or one month's additional, and Puran jemadar to a fine of Rs. 10 or 15 days' simple imprisonment.

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On the case being referred to the High Court of North-Western Provinces by the Sessions Judge of Munpur, the following Judgment was delivered on 2nd May 1892 —

All cases of criminal negligence are cases of degree. Although we might have sentenced Puran to a period of imprisonment if we had been trying him in the first instance, still we think it better not to interfere with the discretion of the Magistrate as the evidence does not clearly prove a case of gross and very culpable negligence against Puran. The rule is discharged. The record may be returned.

In the Chief Court of the Punjab.

CRIMINAL REVISION

Before Sir Meredyth Plowden, Judge.

THE CROWN

v

IAJIU, Accused.

Indian Railways Act of 1890, Section 101—Neglect of duty by gate man—Failure to lower signal and open gate

1892
September 7.

The duties of the accused, a gateman, were to see that the lamps on a Semaphore Signal near a gate were properly lighted, and to lower the signal and open the gates when he heard a train coming. The accused being asleep on the approach of a train failed to lower the signal or to open the gates and the driver of the train disregarding the fact of the signal being against him proceeded and crashed through the closed gates.

Held that irrespective of the question of the liability of the driver through proceeding while the signal was against him the collision between the train and the closed gates was due solely to the neglect of the gateman who was asleep on duty, and that he was rightly convicted under Section 101 of the Indian Railways Act 1890.

* Suit No. 1301 of 1892, reported by P. D. AGNEW, Esq., District Magistrate, Delhi.

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The facts of this case are as follows —

The driver of a night train on the Rajputana-Malwa Railway ran through a closed gate, which was in accused's charge at the time, while the accused himself was asleep on duty.

The accused, on conviction by Rā Bahadur Piyari Lal, exercising the powers of a Magistrate of the first class in the Delhi District, was sentenced, by order dated 23rd June 1892, under Section 101 of the Railway Act, IX of 1890, to pay a fine of Rupees fifty (50), or to suffer three months' rigorous imprisonment in default.

The proceedings are forwarded for revision on the following grounds —

I Bāru Mohindro Lal Ghose, who conducted the prosecution on behalf of the railway authorities, acted without the sanction of his superior officers, and misrepresented to the Magistrate the duties of a gateman, which are merely to see his lamps properly lighted and to lower his signal and open his gates when he hears a train coming.

II The gate, of which accused was in charge, is protected on each side by a semaphore signal the arm of which must be lowered before a driver is entitled to pass by day. The same lever which works the arm also works a spectacle in front of a lamp for use by night which shows a red light when the arm is up and a green light when the arm is lowered. After passing the signal the driver at night would see a red light in the centre of the line on the gate, if closed, and a white light on the side if open to the railway. Had the driver stopped his train when he saw the signals against him, as he was bound to do by railway rules, there would have been no accident and only a short delay would have been necessary.

III The fault in my opinion, lay with the driver and not the gateman, the conviction against whom should be quashed, and the fine refunded.

Order of the Chief Court —

After reading the evidence of Bāru Mohindro Lal Ghose, I cannot find that he gave any evidence as to the duties of a gateman, so far as the record shows, and I am at a loss to understand upon what basis the allegation that he misrepresented to the Magistrate the duties of a gateman, is founded.

The duty of a gateman is now described, on the authority of the Executive Engineer of the Railway, who has furnished this reference, to be "to see his lamps properly lighted and to lower his signal and *open his gates when he hears a train coming*" The Magistrate has found that the accused, a gateman, being asleep on duty did not open his gates when a train was coming, and that the accused was therefore negligent on duty, and that the safety of human beings was thereby put in danger, and he holds that the accused is not free from responsibility, because the engine driver also neglected to stop his train before reaching the gate

A railway servant—and a gatekeeper is such,—who when on duty endangers the safety of any person by any negligent omission, commits an offence punishable under Section 101 of the Railway Act, 1890

The conviction is right, unless it can be held that there is no evidence that the endangering of safety was the consequence of the gatekeeper's negligence

But it is clear to my mind that this cannot be held. The immediate cause of the danger to personal safety was the collision between the train and the closed gates. The efficient causes of this collision were two, *viz* the continuance of the train in its course, notwithstanding the signals being against it, and the closed condition of the gates. The collision would have been impossible, in spite of the driver's omission to stop the train, if the gates had been opened as they ought to have been. That they were not opened was due solely to the neglect of the gateman, who was asleep on duty.

There is no difficulty to my mind, in accepting the view that, on the facts found, both the gatekeeper and the driver might be within the reach of Section 101, the former by reason of not having the gates open before an approaching train, the latter by not stopping the train short of the closed gates. At present, I am concerned only with the gateman whose conviction by the Magistrate appears to be warranted by law on the facts found.

It is not clear whether revision is also sought on the ground that this prosecution instituted by the Bdm, an Inspector of the Engineering Department, had not been sanctioned by his superior officers. No such sanction is requisite under the Railway Act or the Criminal Procedure Code. The due

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Fattu

discharge by a railway servant of a duty on which the safety of persons using a railway may depend, is a matter of public concern rather than of mere departmental discipline; and it is not apparent why departmental sanction to a prosecution for breach of the duty should be requisite.

The conviction will accordingly be maintained.

Weir's Reports, Page 869.

In the High Court of Madras.

CRIMINAL REVISION.

Before Sir A. J. H. Collins, Kt, C.J. and Handley, J.

APPASAWMY, Accused

CASE No. 325 of 1892.

1892
Sept, 12.

Indian Railways Act, IV of 1890, Section 101—Driver running his train against signals through closed gates

Accused who was the driver of a Goods train ran his train at full speed with danger signals against him through a closed gate. He was prosecuted under Section 101 of the Act, but was discharged on the ground that it was not shown that he endangered the safety of any person.

Held, that the acquittal must be set aside, because the act of the accused endangered the safety at least of himself and the other persons in the Goods train.

ORDER.—The Deputy Magistrate was clearly in error in holding that even if the accused neglected his duty and ran his train at full speed with danger signals against him through a closed gate, he cannot be convicted under Section 101 of the Railway Act, because it is not shown that he endangered the safety of any person. Such an act certainly endangered the safety of him and the other persons in the train, viz, the Fireman and the Guard. The case quoted from the North-West Provinces Reports is not in point.

We must set aside the order of discharge and direct the Deputy Magistrate to proceed according to law.

In the High Court of Judicature at Madras.

Before the Honourable Sir Arthur J. H. Collins, Kt.,

Chief Justice and the Honourable Mr. Justice Parker.

THE ACTING GOVERNMENT PLAIDER AND PUBLIC
PROSECUTOR, APPELLANT,*

v.

J. BENTLEY AND MUNISAWMY, (ACCUSED) RESPONDENTS

*Indian Railways Act, IX of 1890, Section 101—Disobedience of Rules as to
neglect of duty by Driver and Gatekeeper.*

1892
October 4

The 1st accused was the Driver of a Goods train the 2nd accused was a Gatekeeper at a level crossing and his duty was to warn the station by an electric bell when a train was in sight and, on receiving certain signals from the station, to lower the signal near the level crossing to permit the train to enter the station owing to the 2nd accused being asleep, or for some other reason, he omitted to warn the station of the approach of a train or to lower the signal near the level crossing or to open the level crossing gates, and the 1st accused neglecting to observe the danger signal at the level crossing and coming on at an excessive speed, ran through and smashed the level crossing gates.

Held that both the accused were guilty of an offence under Section 101 of the Indian Railways Act 1890.

Counsel for the 1st accused —Mr F. Norton

This appeal coming on for hearing on Wednesday, the 11th September 1892. Upon perusing the Petition of Appeal and the record of the proceedings in the above and upon hearing the arguments of the appellant and of Mr E. Norton, Counsel for the 1st accused, and upon hearing the 2nd accused in person, and the case having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—This is an appeal by Government against an acquittal by the Special 2nd Class Magistrate of Chingleput under Section 101, Clause (c), of the Railway Act, IX of 1890.

The 1st accused was the Driver of a Goods train due at Chingleput Station from Madras at 3 A.M., on October 18th, 1891. The

* Criminal Appeal No 296 of 1892 against the Judgment of acquittal passed on the accused in Calendar Case No 29 of 1892, on the plea of the Special 2nd Class Magistrate of Chingleput Taluk.

Acting
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Leader and
Public
Prosecutor
J Bentley
and
Counsel
—

2nd accused is the gatekeeper at the level crossing at the Fort double gates at Chingleput near the Bastion semaphore, whose duty it was on the approach of the train to warn the station by an electric bell that the train was in sight, and then on the lowering of the platform and repeating semaphores by the officials at the station to open the gates and then lower the Bastion semaphore to permit the train to come in.

The case for the prosecution is that on the night in question after the gatekeeper (2nd accused) had been warned from the station that the train had left Singaperumalkovil, and had acknowledged that warning he went to sleep and neglected to watch for the train warn the station and open the gates or lower the Bastion semaphore to let the train in, and that the driver (1st accused) improperly passed the Bastion semaphore while it showed the red (danger) signal and coming up at excessive speed ran through and smashed the gates at the level crossing.

The Sub Magistrate acquitted the 2nd accused on the ground that no one had seen him asleep and that it was improbable he would have gone to sleep after he knew that the train had left Singaperumalkovil. The 1st accused was acquitted as the Magistrate doubted whether the Bastion semaphore showed the danger signal when the train passed it. He further held that even assuming there had been rashness and negligence no one's safety had been endangered.

We are of opinion that the Sub Magistrate's findings, both on the law and on the facts, are absurd. For a railway driver to pass a danger signal and go on when the line is not clear must necessarily endanger the lives of all persons crossing the line as well as those of persons in the train, while the conduct of the gatekeeper in going to sleep and omitting to open the gates caused similar danger.

As to the facts there is overwhelming evidence that the gatekeeper admitted over and over again after the accident occurred that he had gone to sleep, and not only this, but he gave a statement in writing to that effect on October 18th, 1891. He appeared before us on the appeal and denied these admissions assigning as an excuse for not leaving his lodge that it was a wet and rainy night and he did not like to go out to open the gates. The negligence is the same in either case.

As regards the driver there appears to us to be overwhelming evidence that the Bastion semaphore showed the danger signal

It was still standing at "danger" after the accident, and as the gatekeeper clearly did not leave his lodge to lower the signal the evidence must be accepted. To the contrary there is only the statement of the driver himself and the evidence of the two firemen on his engine,—all of whom have their own conduct to exculpate.

Acting
Govt
Magistrate and
Public
Prosecutor
J. Bentley
Esq.
Munisawmy

At the hearing of the appeal we intimated our opinion that both accused must be convicted, but we deferred passing sentence in order that enquiries might be made about their previous character and whether negligence of this kind was of frequent occurrence on the line. We were informed that the Railway Company while prosecuting these men had still retained them in service, and this notwithstanding that an appeal was preferred against their acquittal by the Magistrate. It was stated by Mr. Norton that the driver Bentley had been since dismissed and had gone to the north of India to seek employment, but that the gatekeeper was still in the service of the Company and employed at the same level crossing where this accident occurred. We, therefore, considered that some explanation of the conduct of the Railway Company was desirable before passing sentence.

We are now informed that the driver Bentley had been six or seven years in the service of the Company and was lately promoted from the post of fitter to that of driver. We are also informed that accidents of this nature do sometimes occur on the South Indian Railway through the rashness of drivers in passing the danger signals. The fault is a very serious one and might cause great danger to life. At the same time as the accused appears to have borne a good character it is fortunately no great damage occurred and as the Company did to a certain extent condone the fault we shall on this occasion pass a lenient sentence and we direct that the first accused Bentley be kept in simple imprisonment for six weeks.

The gatekeeper Munisawmy is still in the service of the Company. His neglect though causing danger would not have resulted in ill effects if the driver had not passed the Bastion semaphore—but it is clear that either because he went to sleep or on account of the rain he shirked his duty of opening the gates for the train. His pay is only Rs. 8 per mensem. We shall therefore direct that he pay a fine of Rs. 10 and in default be kept in simple imprisonment for 15 (fifteen) days.

Ordered accordingly

In the Chief Court of the Punjab

CRIMINAL REVISION

*Before Mr. Justice C. A. Roe and Mr. Justice
A. W. Stogdon.*

SANT DASS (ACCUSED), PETITIONER *

v.

THE EMPRESS, RESPONDENT

1891
November 6

Indian Railways Act IX of 1890, Section 101—Degree of danger necessary to constitute offence

To constitute an offence under Section 101 of the Indian Railways Act 1890 the act or disobedience must itself endanger the safety of persons; thus where the accused by disobedience of General Rule 28 did not himself endanger the safety of any person but merely facilitated a second act of disobedience by another person, which did endanger safety, it was held that the accused could not be convicted of an offence under Section 101 of the Indian Railways Act, 1890.

For Petitioner—*Babu K. P. Roy*, Pleader.

For Respondent—*Mr. Bates*, Junior Government Advocate.

JUDGMENT.—The facts found are that accused, Sant Dass, a station master, in contravention of Rule 28, which requires that a "line clear" message shall not be written out, whole or in part, till required, wrote out such a message in his book, that the Guard entering the office during the station master's absence tore out the message, and started the train and caused an accident.

On these facts accused has been convicted under Section 101 of Act IX of 1890, and sentenced to fifteen days' imprisonment, and Rs. 100 fine. This sentence was reduced by the Sessions Judge to a fine of Rs. 50 only.

Revision is asked for (1) by accused, on the ground that accused's act, though technically a breach of a rule, did not endanger the safety of passengers, (2) by the Crown, for enhancement of sentence.

* Criminal Revision Case No. 1019 of 1891. Petition for revision of the order of P. I. HARRIS Esq. Sessions Judge, Mooltan Division dated the 1st June 1891 affirming the order of Lala Tikhan Lal, Magistrate 1st Class Mooltan dated 1st May 1891.

The Junior Government Advocate is not prepared to resist the contention of accused's Pleader that, if the facts are correctly found by the First Court, accused is not guilty of an offence under Section 101. But he urges that the finding is wrong, that the Magistrate should have found that the message was taken by the Guard from the accused's table with the full knowledge and consent of the accused, and the conviction should be upheld and the original sentence maintained or enhanced. He points out the irregularity of the Sessions Judge in hearing the appeal without giving notice to the Head of the accused's Department, and asks that at any rate the Sessions Judge's order may be set aside, and that he may be directed to rehear the appeal after issue of proper notice to the railway authorities.

We are certainly not prepared to grant this last application for we cannot say that the irregularity of the Sessions Judge has caused a failure of justice. Had the railway been represented in his Court, and Counsel for it taken the same view of the law as accepted in this Court, the result would have been the entire acquittal of the accused. The Sessions Judge could not, on the accused's appeal, have questioned the finding of fact in his favour by the Magistrate. If he considered that finding erroneous, his only course, in order to set it aside, would have been to report the case for revision. Had he done so, the case would have come before us, as it is at present.

As to the finding of the facts by the Magistrate there is no doubt considerable evidence in support of the contention for the prosecution but there is also a considerable amount of evidence against it. The Magistrate has considered this fully and fairly to the best of his ability, and his finding even if open to doubt, is certainly not so clearly improper that we should interfere with it on revision.

Accepting the Magistrate's finding of the facts we think that the view of the law put forward by the Pleader for the accused and accepted by the other side is correct. The disobedience of Rule 28 by the accused did not itself endanger the safety of any person, it merely facilitated a second disobedience by another person, which did endanger safety. We think that to constitute an offence under Section 101 the act or disobedience must itself endanger safety. If we were to hold otherwise and to admit the doctrine of constructive or contributory negligence, it would be difficult to say where we could stop. A line of superior vision on the part of superior authorities such for instance

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as permitted Rule 28 to be habitually disregarded in practice, might be held to be an offence under Section 101. It appears to us to have been, and to have properly been, the intention of the Legislature to make only those acts or omissions offences which themselves led to or might lead to certain serious results, and to leave all subsidiary acts or omissions to be dealt with departmentally. Under these circumstances we set aside the conviction, and acquit the accused.

In the Chief Court of the Punjab

CRIMINAL REVISION.

*Before Mr. Justice O. A. Roe and Mr. Justice
A. W. Stogdon.*

HAKUMAT RAI (ACCUSED), PETITIONER*

v.

THE EMPRESS, RESPONDENT

1895
January 7

Indian Railways Act IX of 1890, Section 101—Degree of danger necessary to constitute offence

A point Jemadar, whose duty it was to close and lock certain points failed to do so.

Held that the accused a Station Master, though he might be departmentally liable for not having ascertained that the point Jemadar had performed his duties did not by such omission commit any offence under Section 101 of the Indian Railways Act 1890.

For Petitioner—*Lala Lajpat Rai*, Pleader

JUDGMENT.—We are of opinion that the man who endangered the safety of the travelling public by not properly closing and locking the points was Buddhu, Jamadar, whose duty it was to close the points. The station master may be departmentally liable for not having ascertained that Buddhu had performed his duties, but he did not commit any offence punishable under Section 101 of the Railway Act. The case is in many respects similar to Criminal Revision Case No. 1049 of 1894 decided by this Bench on the 5th November last. We set aside the conviction and sentence, and direct that Hakumat Rai be discharged from custody.

* Criminal Revision case No. 1936 of 1894 for revision of the order of L. G. O. Beaton District Magistrate, Umballa dated 10th November 1894 affirming the order of W. S. HAMILTON Esq., Magistrate Second Class Umballa, dated 5th November 1894, convicting the accused.

In the Chief Court of the Punjab.

APPELLATE CRIMINAL.

Before Mr. Justice C. A. Roe and
Mr. Justice P. C. Chatterji.

JOSEPH DOLBEN (ACCUSED), APPELLANT*

v.

THE EMPRESS, RESPONDENT

*Indian Railways Act, IX of 1890, Section 101 (b)—Breach of subsidiary rule
—Driver uncoupling engine—Collision*

1895
January, 14

The Accused, the driver of a ballast train standing in a station, caused his fireman to uncouple the engine, in consequence of which the ballast train started down the line and overtook and ran into a mail train, causing the loss of two lives and considerable damage to property, the act of uncoupling the engine under such circumstances amounted to a breach of one of the Subsidiary Rules of the N. W. Railway published in that Railway's Working Time Table

Held, that the accused was guilty of an offence under Section 101 (b) of the Indian Railways Act, 1890

For Appellant—Mr. Herbert, Pleader

For Respondent.—Mr. Bates, Officiating Junior Government Advocate.

JUDGMENT.—The admitted facts are that a ballast train of the engine of which Joseph Dolben, accused, was driver, was standing at the Shalibagh Station from 12-15 to 1-25 on October 6th on an incline of 1 in 40, waiting for the Up-mail to pass, that as soon as it had passed the accused uncoupled his engine, that is, caused his fireman to do so in order to get water, and the consequence of this act was that the ballast train started down the gradient, overtook and ran into the mail train some two and a half miles from the station, and that the result of the collision was the loss of two lives, and damage to property to the extent of some 50,000 Rupees.

The accused has been tried and convicted by the Sessions Judge, Quetta, with the aid of three European assessors for an

* Criminal Appeal No 525 of 1894 against the order of Major G. GAINSFORD, District Magistrate and Sessions Judge, Quetta, dated the 26th October 1894

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offence under Section 101 clause (c) of the Indian Railway Act, on the ground that his act of uncoupling his engine was a breach of rule vi of Section 19 of the Working Time Table which came into force on 1st October 1894, and was also a rash and negligent act. He has been sentenced to six months rigorous imprisonment.

It has been urged at the commencement of the appeal that the accused has not had a fair and impartial trial. But we see no reason for supposing this. It is true that the accused named two witnesses on October 23rd and that the Court did not take any steps to secure their attendance. But the accused never asked it to do so or made any objection at the close of the trial that his witnesses had not been called.

It also appears that these witnesses were not to have been called to prove any particular fact in dispute in this case, but merely to prove that it was a general practice for engines to be uncoupled by the driver and fireman and not by the traffic staff.

On the merits, the first plea of the accused is that he did in fact obtain the sanction of the guard to his uncoupling the engine himself. This is denied by the guard. It is urged that the guard is as much interested in denying it as the accused is in asserting it, and that it is only one man's word against another. Assuming this to be the case, it is essentially the province of the Jury to say which man's word is to be believed. In the present case the three European assessors were practically a jury and we are not prepared to differ from them and the Sessions Judge on this point.

It is contended further that the accused's act was neither a breach of the rules nor a rash act. The rule quoted XIX with its various clauses, including clause (b), occurs in a chapter headed "Station Yards and Shunting," and it is urged that it does not apply to the circumstances under which the accused was placed on 6th October, but that the rule applicable to these circumstances is the one given at page 85 of the General Rules which says that the fireman is to uncouple the engine for all purposes except shunting.

It is also urged that the accused's act was not a rash act as he had no reason whatever to suppose that the result of it would be to set the ballast train in motion. He would naturally presume that the brakes had been all properly applied, and even if they

had been, the natural result of uncompling the engine would be to apply the automatic brake and not to take it off

We are of opinion that the Rule XIX (b) of the Working Time Table was the one applicable to the circumstances, and as, already stated, we consider that the accused did in fact commit a breach of this rule. It is not therefore necessary to consider further whether his act was not also a rash one, and we must uphold the conviction merely formally altering it to one under clause (b) of Section 101 of the Railways Act. But as regards the sentence we think that although the results of the accused's act have been disastrous, the act was not one from which any disaster would ordinarily have resulted. The fact that the train had been standing for over an hour would warrant the inference that the brakes were on, and, as stated by experts, the natural result of uncompling the engine would have been to put them on, if they were not on before. On the other hand, there was a heavy train on a steep gradient, which would be likely to move if from any cause the brakes failed to act, and if accused took the responsibility of uncompling the engine himself he was bound to make perfectly certain that everything was safe. No doubt his motive for acting as he did was to avoid delay, in the interest of the railway, but the act done by him has caused most serious harm, and a substantial punishment must be awarded. Considering the circumstances of the accused and the probable consequence of the conviction on his prospects, we think that a sentence of three months' rigorous imprisonment would have been sufficient. Accused was imprisoned on 25th October, released on bail on 26th November, but on his bail withdrawing re-imprisoned on 3rd January, and he is now in the Central Jail, Lahore. We think that further rigorous imprisonment for one month from the date of this order will be sufficient, and we reduce the sentence accordingly.

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In the Chief Court of the Punjab.

APPELLATE CRIMINAL

Before Chief Justice J. Frizelle, Mr. Justice A. W. Stoydon
and Mr. Justice A. H. S. Reid

J J MULLINEAUX (ACCUSED), APPELLANT*

v.

THE EMPRESS, RESPONDENT.

1896
August,
13 and 15

Indian Railways Act, IX of 1890, Section 101—Degree of danger needs to constitute offence

The accused, a driver, ran through signals, which were against while a Station Master was engaged in shunting engines in defiance of rules, but no collision took place between the train and the shunting engines.

Held convicting the accused under Section 101 of the Indian Railways Act, 1890, that on seeing that the signals were at danger he ought to have known that they were so placed because there was danger, that if he ran through them there was danger of an accident, and that he could not escape on the plea that danger ought not to have been caused by improper shunting of engines.

For Appellant—Mr. Browne, Pleader.

For Respondent—Mr. Sinclair, Government Advocate.

FRIZELLE, C J., and STOYDON, J.—The appellant in this case John Joseph Mullineaux, an European British subject, is an engine driver employed on the North-Western Railway. On the 4th February last he was committed by the District Magistrate of Jallundar to the Court of Session of the Jallundar Division on a charge of disobedience of rules and orders and negligent conduct punishable under Section 101, Act IX of 1890, of the Indian Railways Act, 1890. At the time of his commitment he claimed to be tried as an European and not by a Jury.

Appeal No. 297 of 1896, made at the order of Captain C. S. Jullien, Umballa Division, dated the 10th July 1896, corrected.

On the 2nd March this Court passed an order transferring the case to the Sessions Court, Umballa Division. The Sessions Judge, Mr KENINGTON, was of opinion with reference to a ruling of this Court in the case of *J Skilling v The Empress of India*,⁽¹⁾ that the accused had a right to be tried by a Jury, that he as Sessions Judge could try him only with the aid of assessors and that under such circumstances the accused could be tried only by the District Magistrate, or by the Chief Court and that the order of commitment to the Court of Sessions was consequently illegal and should be quashed under the provisions of Section 215, Criminal Procedure Code. He accordingly reported the case to this Court for orders. His opinion was formed after a preliminary hearing of the case in which the accused was represented by Mr Browne, Pleader, and the Crown by Mr Sinclair, Government Advocate. In reply this Court informed him that under Section 451 (1), Criminal Procedure Code, he must try the accused by a mixed Jury and he was directed to try him accordingly. The accused was accordingly tried by a mixed Jury consisting of three Europeans and two natives before Captain MARTINDALE, Sessions Judge, Umballe, on the 6th July and following days. On the 10th July the Jury found him guilty of running through the signals when they were at danger against him but they recommended him to mercy on the ground of the loose way in which the work had been carried on at Ambour Station where the offence was committed and where the accident which resulted from the accused's disobedience or negligence occurred. The Sessions Judge thereupon sentenced him to be simply imprisoned for two months and to pay a fine of Rs 150. He has appealed to this Court, but as the trial was by Jury, the appeal under Section 418, Criminal Procedure Code, is on a matter of law only and not on a matter of fact. The first ground is that the accused was illegally tried by a Jury. This ground has been taken with the avowed object of enabling this Court to consider the Judgment in Skilling's case and to express an opinion regarding the correctness of the ruling that an European British subject can be tried in a Sessions Court only with the aid of assessors and not by a Jury. Mr Browne for the accused does not support the ground. On the contrary, he contends that the accused was rightly tried by a jury. The learned Government Advocate on the other hand upholds the correctness of the ruling in Skilling's case. It must be admitted that the

(1) F R Cr, J 13 of 1888.

In the Chief Court of the Punjab.

APPELLATE CRIMINAL.

Before Chief Justice J. Frizelle, Mr. Justice A. W. Stoydon
and Mr. Justice A. H. S. Reid.

J J MULLINEAUX (ACCUSED), APPELLANT*

v.

THE EMPRESS, RESPONDENT

1890
August,
13 and 15

Indian Railways Act, IX of 1890, Section 101—Degree of danger necessary to constitute offence

The accused, a driver, ran through signals, which were against him while a Station Master was engaged in shunting engines in defiance of rules, but no collision took place between the train and the shunting engines.

Held, convicting the accused under Section 101 of the Indian Railways Act, 1890, that on seeing that the signals were at danger he ought to have known that they were so placed because there was danger, that if his train ran through them there was danger of an accident, and that he could not escape on the plea that danger ought not to have been caused by the improper shunting of engines.

For Appellant—Mr. Braune, Pleader.

For Respondent—Mr. Sinclair, Government Advocate

FRIZELL, C J, and STOYDON, J.—The appellant in this case is John Joseph Mullineaux, an European British subject, lately an engine driver employed on the North-Western Railway. On the 4th February last he was committed by the District Magistrate of Jullundur to the Court of Session of the Jullundur division on a charge of disobedience of rules and orders and rash and negligent conduct punishable under Section 101, Act IX of 1890 (The Indian Railways Act, 1890). At the time of his commitment he stated that he claimed to be tried as an European British subject by a Jury.

* Criminal Appeal No 27 of 1890 presented at the order of Captain C B Martineau, Sessions Judge, Umballa Division, dated the 10th July 1890, convicting the accused.

On the 2nd March this Court passed an order transferring the case to the Sessions Court, Umballa Division. The Sessions Judge, Mr KENINGTON, was of opinion with reference to a ruling of this Court in the case of *J. Skilling v. The Empress of India*,⁽¹⁾ that the accused had a right to be tried by a Jury, that he as Sessions Judge could try him only with the aid of assessors and that under such circumstances the accused could be tried only by the District Magistrate, or by the Chief Court and that the order of commitment to the Court of Session was consequently illegal and should be quashed under the provisions of Section 215, Criminal Procedure Code. He accordingly reported the case to this Court for orders. His opinion was formed after a preliminary hearing of the case in which the accused was represented by Mr Browne, Pleader, and the Crown by Mr Sinclair, Government Advocate. In reply this Court informed him that under Section 451 (1), Criminal Procedure Code, he must try the accused by a mixed Jury and he was directed to try him accordingly. The accused was accordingly tried by a mixed Jury consisting of three Europeans and two natives before Captain MARTINDALE, Sessions Judge, Umballa on the 6th July and following days. On the 10th July the Jury found him guilty of running through the signals when they were at danger against him but they recommended him to mercy on the ground of the loose way in which the work had been carried on at Phileur Station where the offence was committed and where the accident which resulted from the accused's disobedience or negligence occurred. The Sessions Judge thereupon sentenced him to be simply imprisoned for two months and to pay a fine of Rs 150. He has appealed to this Court but as the trial was by Jury, the appeal under Section 418 Criminal Procedure Code lies on a matter of law only and not on a matter of fact. The first ground is that accused was illegally tried by a Jury. This ground has been taken with the avowed object of enabling this Court to consider the Judgment in Skilling's case and to express an opinion regarding the correctness of the ruling that an European British subject can be tried in a Sessions Court only with the aid of assessors and not by a Jury. Mr Browne for the accused does not support the ground. On the contrary, he contends that the accused was rightly tried by a jury. The learned Government Advocate on the other hand upholds the correctness of the ruling in Skilling's case. It must be admitted that the

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course adopted by the accused's Counsel is a somewhat novel one, but as the question involved is one of considerable importance, we have allowed it to be argued

The material portion of the Judgment in Skilling's case is as follows —

"The case was one committed to the Sessions Court by the District Magistrate under Section 447, Criminal Procedure Code. It was not a case which, falling under Section 451 (a), had been transferred into the Sessions Court under Section 451 (b). Under the latter section alone is an European British subject entitled to be tried by a Jury in a Sessions Court. Under Section 268, Criminal Procedure Code, in the absence of any notification under Section 269, a trial in the Court of Session must be with the aid of assessors, and there has been up to the present time no notification as regards the Punjab under Section 269."

The learned Judges do not appear to have considered the provisions of Section 451 (1), Criminal Procedure Code, which are as follows —

"In trials of European British subjects before a High Court or Court of Session, if, before the first juror is called and accepted, or the first assessor is appointed, as the case may be, any such subject requires to be tried by a mixed jury the trial shall be by a jury of which not less than half the number shall be Europeans or Americans or both Europeans and Americans."

The meaning of this sub section appears to be that whatever may be the procedure in vogue in the Court before which the accused is about to be tried, whether trials before it are ordinarily by jury or with the aid of assessors, the accused if an European British subject, has the right to require that he shall be tried by a mixed jury. If the trial would in the ordinary course be by jury, he cannot claim to be tried with the aid of a mixed set of assessors.

All he can claim is to be tried by a mixed Jury. If on the other hand it would in the ordinary course be with the aid of assessors, he has a right to claim a mixed Jury, but sub section 2 shows that he can if he likes waive that claim and require that not less than half the number of the assessors shall be Europeans or Americans or both Europeans and Americans. Trials in the Punjab in Sessions Courts are held with the aid of assessors. Under Section 271, Criminal Procedure Code, when the Court

is ready to commence the trial, the accused appears or is brought before it and the charge is read out in Court and explained to him and he is asked whether he is guilty of the offence charged or claims to be tried, the Court proceeds to choose assessors as directed in Section 284, Criminal Procedure Code. A Court of Session trying an European British subject would probably proceed in the ordinary way to choose assessors, but if before the first assessor had been appointed the accused required to be tried by a mixed jury the Court would have no alternative but to accede to his requisition. If he made no such requisition the Court would try him in the usual manner with the aid of assessors.

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Mr Sinclair contends that no trial before a Court of Session can be by jury because the Local Government has not under Section 269, Criminal Procedure Code, directed that the trial of all offences or of any particular class of offences before any Court of Session shall be by jury in any district. Mr Browne on the other hand urges that under Section 268, Criminal Procedure Code, a Court of Session can try either by jury or with the aid of assessors just as it pleases. We think, however, that trial with the aid of assessors is the rule, and by jury the exception, and that ordinarily trials before Sessions Courts must be with the aid of assessors, otherwise there would have been no need for the enactment of Section 536, Criminal Procedure Code. Even an European British subject would in the ordinary course be tried with the aid of assessors, but the law as laid down in Section 451, Criminal Procedure Code is perfectly clear that if he claims to be tried by a mixed jury his claim must be granted. His right to such mixed jury is absolute and is not subject to any qualification. There appears to have been originally an idea that he could claim a jury consisting entirely of Europeans, but this is erroneous. All he can claim is a mixed jury as defined in Section 451(1). For these reasons we are of opinion that the accused was rightly tried by a mixed jury.

The second ground of appeal is that the verdict of the jury is in effect an acquittal. The meaning of this appears to be that notwithstanding the fact that the accused ran through signals which were against him there would have been an accident but for the action of the station master in shunting engines in defiance of rules. The accused, however, has not been found guilty of causing a collision with the said engines. He has been found guilty of endangering the safety of the persons in the train he was driving.

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by disregarding signals that were at danger and running through them. An engine driver when he sees that signals are at danger must know or at all events have reason to believe that they have been put at danger, because there is danger, that if his train runs through them there will be an accident and he cannot escape on the plea that danger ought not to have been caused by the improper shunting of engines. It was enough for him that he was ordered by signal to stop and he was bound to obey orders unquestionably.

As regards punishment, the accused is an old driver of fairly good character and the sentence imposed on him by the Court is probably not the most severe portion of his punishment. He has been under suspension for some months and has we are informed now been dismissed from his employment, but the offence committed by him was one of such gravity and the consequences of his disobedience or rashness were so serious that we are not prepared to hold that he has been treated with undue severity. We therefore dismiss the appeal.

REID, J.—I concur. The learned Counsel for the Crown, in his attempt to support the ruling in Skilling's case (18 Punjab Record, 1888), submitted that the meaning of Section 451 (1) of the Code of Criminal Procedure is doubtful and that this doubt is possibly due to hasty drafting. I fail to see what doubt can be entertained as to the meaning of the sub-section.

Following Sections 267 and 268 in the chapter governing trials before High Courts and Courts of Session, which provide that trials under that chapter before a High Court shall be by jury and that trials before a Court of Session shall be either by jury (in cases governed by Section 269), or with the aid of assessors, Section 451 (1) confers on an European British subject the right to be tried by a mixed jury before a High Court or a Court of Session, provided he claims the right to be so tried before the first juror is called and accepted or the first assessor is appointed, while Section 451 (2) confers on him the right to be tried by mixed assessors, in a case ordinarily triable by assessors if he prefers assessors to a jury.

Section 268, the first paragraph of Section 269 and Section 536 have nothing to do with the special provisions for the trial of European British subjects, and appeared practically *totidem verbis* as Sections 232 and 233 of the last Code of Criminal Procedure, (X of 1872), while Section 267 appeared as Section 532

of Act X of 1875, an Act to regulate the Procedure of the High Courts, repealed except as to certain powers conferred on Advocates-General by the present Code

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Section 451 (1) reproduces Section 35, Act X of 1875, with the addition of certain provisions for trials in Courts of Session, necessitated by the interpolation of the words "except the Sessions Judge" in Section 444 by Act III of 1884, just as the constitution of the various High Courts necessitated provisions for trials by mixed juries in Act X of 1875. It is obvious that Sections 451 (a) and 451 (b) were not applicable either to the case before us or to Skilling's case. The prisoner as an European British subject, had a right, before the first juror was appointed, to claim to be tried by a mixed jury, and this claim was very properly allowed in the case before us—to have denied it would have been illegal.

**The Indian Law Reports, Vol. XXXII. (Calcutta) Series,
Page 73.**

CRIMINAL REVISION.

Before Mr. Justice Pratt and Mr Justice Handley.

SHANKAR BALKRISHNA

v

KING EMPEROR *

Railway collision—Endangering safety of persons—Death by rash or negligent act—Contributory negligence—Indian Penal Code (Act XLV of 1860) Section 304 A—Indian Railways Act (IX of 1890) Section 101

1904
May, 13 25

The Bengal Nagpur Railway is worked on the 'line clear and caution message' system, no train being allowed to leave a station without a 'line clear' certificate, in a prescribed form, to the effect that the line is clear up to the next station. The petitioner, the Assistant Station Master of Gombarria station, who was on duty and busy issuing tickets to passengers wrote out in the prescribed form book the following conditional line clear message, although he had received no message from Sini station: "On arrival of 15 down passenger at Gombarria line will be cleared

* Criminal Revision No. 424 of 1904 against the order of A. C. Sen, Additional Sessions Judge of Chota Nagpore, dated March 23, 1904, affirming the order of J. C. TRIDELL, Deputy Commissioner of S. N. B. L., dated March 21, 1904.

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for No 80 Up goods train from Gomharria to Simi. All the particulars required by the rule were not filled in, no number was entered on it nor was the time of arrival of the train filled in. The form book was left in the Station Master's room.

The guard of No 80 Up goods train which was waiting at Gomharria entered the Station Master's room in his absence, took the imperfect certificate out of the book and without reading it appended his signature, passed it on to the driver and gave the signal for the train to start—all without the knowledge of the petitioner. The result was a collision between the 15 Down passenger train and the 80 Up goods train causing the death of several persons.

The petitioner was convicted under Section 304A of the Penal Code and Section 101 of the Indian Railways Act of 1890, and sentenced to rigorous imprisonment—

Held that the act of the petitioner did not in itself endanger the safety of other persons and that the effect was too remote to be attributable to such a cause.

Sant Dass v The Empress⁽¹⁾ followed.

RULE granted to the petitioner, Shankar Balkrishna.

This was a rule calling upon the Deputy Commissioner of Singhbhum to show cause why the conviction of the petitioner dated the 21st March 1904 for offences under Section 304 (A) of the Indian Penal Code, and Section 101 of Act IX of 1890 should not be set aside on the ground that the conviction was not warranted by the facts found.

The Bengal-Nagpur Railway is worked on the "line clear and caution message" system, no train being allowed to leave a station without a "line clear" certificate to the effect that the line is clear up to the next station. Such certificate is entered in a prescribed form and is in terms of a copy of a telegram from the Station Master of the station to which the train is to run, to the effect that the line is clear. On the early morning of the 27th December 1903 the petitioner, the Assistant Station Master of Gomharria, a station on the Bengal Nagpur Railway, who was on duty and had been busy issuing tickets to passengers, wrote out in the prescribed form book the following conditional line clear message although he had received no message from the Station Master of Simi: "On arrival of No 15 Down passenger at Gomharria, line will be cleared for No 80 Up goods from Gomharria to Simi." All the particulars required by rule were not filled in. There was no private number entered on it, and

the time had not been filled in. The petitioner left the book containing the imperfect "line clear" message lying on the counter in his room. Palmer, the guard of the 80 Up goods train which was waiting at Gombarria entered the Station Master's room in his absence, tore the imperfect certificate out of the book and without reading it appended his signature and passed it on to the driver and gave the signal for the train to start, all without the knowledge of the petitioner. The train started and came into collision with the 15 Down-passenger train which had started from Simi in consequence of which a number of persons were killed and others wounded.

The petitioner and Palmer were convicted on the 21st March 1904, by the Deputy Commissioner of Singbhoom under Section 304 A of the Penal Code and Section 101 of the Indian Railways Act of 1890, and were each sentenced to three months' rigorous imprisonment. The petitioner appealed to the Sessions Judge of Chota Nagpore who, on the 23rd March 1904, rejected his appeal summarily.

The Deputy Legal Remembrancer (Mr Douglas White), for the Crown. Under the Railway rules the petitioner who was on duty should not have written the line clear message till he had actually received it on the instrument from Simi, and he should then have taken down the message word for word as he received it on the wire. The line clear message should not have been written out until required for use, these provisions are for the purpose of preventing the line clear message from getting into the hands of some person other than the Station Master. It was the petitioner's duty to see the signals set and the points fixed and he should himself have started the train. He, however, did none of these things but kept his attention fixed on the booking of the passengers. He wrote out the line clear message before he actually received it from Simi and while the line was blocked, and left it on the table. The guard of the goods train entered the Station Master's room and seeing the line clear message on the table concluded it was a proper message. He accordingly took possession of it, gave it to the driver and started the train before the passenger train had come in from Simi. The fact that what the Station Master wrote out was a conditional line clear does not help him, he should not have written anything at all. He disobeyed the rules. Had he obeyed the rules he would have written out nothing and the guard would never have been able to start the train. The guard was misled by what the petitioner did.

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The petitioner paid more attention to the issuing of tickets to passengers than to the arrival or departure of the trains. Under the circumstances the conviction of the petitioner is, I submit quite legal, see *Queen Empress v Nand Kishore*(1), *Charles Snell v The Queen*(2), *Reg v Elliott*(3), *Reg v. Instan*(4)

Mr C R Das (Babu Jyoti Prosad Sarbadhakary with him) for the petitioner. There are two messages to be considered in this case, the one is the line clear message and the other is what is called a conditional line clear. The first is a certificate to the guard to start the train, the second is of no value. The petitioner broke no rule. But assuming that he did so, in writing out the conditional line clear message when he did, how can it be an offence? He merely wrote down, "line will be cleared on arrival of 15 Down," that could not be construed into a bogus message. When he received the line clear he would have to write on that document that the line was clear. The conditional line clear purported to be a message from the Station Master of Sini that the line would be clear for the departure of the 80 Up for Sini on the arrival of the 15 Down at Gomharria. How could the petitioner be said to have "endangered the safety" of any one? The document was merely waste paper so far as starting the train was concerned and would not be accepted by any driver or guard who knew his work. When the train came in he would have to write down line clear, enter the time of the arrival of the 15 Down at Gomharria and the private number. Before these details were entered neither guard nor driver had any power to start the train. Had the act of the petitioner led to the collision he would no doubt be liable. But here the breach of rules by the guard has to be considered. The guard should have taken the line clear message from the petitioner's hand; he had no right to enter the office and tear it out of the book nor had he any right to start the train. To make the petitioner liable the collision must be the direct consequence of his act. The case of *Sant Dass v. Empress*(5) is directly in point and in my favour, the facts of that case being exactly the same as in this case, there the Station Master was not held liable. The two cases cited from Cox's Reports are entirely in my favour showing that the petitioner could not be held criminally liable. In *Queen Empress v. Nand Kishore*(1) the accused did not follow

(1) (1894) 1 L. R. 6 All. 249

(2) (1893) 1 L. R. 6 Mad. 201

(3) (1889) 10 Cox C. C. 716

(4) (1893) 17 Cox C. C. 602

(5) See *Ante* page 883

out the instructions given him and in consequence of his neglect the coolie was killed. He was directly responsible for the man's death. How in the present case can it be said that the collision was the natural consequence of anything the petitioner did? How was he to know that an inexperienced guard would be employed by the Company, who did not know his work or what a conditional line clear message was? The case of *Charles Snell v. The Queen*(1) is not against me. The petitioner's act entailed no danger. Without the intervention of the guard no accident would have happened. The danger referred to in that decision, is the danger which would naturally follow any act done, and not a danger which could not be foreseen, and which followed upon the act of another which was contrary to all reason.

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Cur adv vult

PEATT AND HANDLEY, JJ.—Sankar Balkrishna, Assistant Station Master of Gomharria, on the Bengal Nagpur Railway, and William Palmer, guard of goods train, have been convicted of offences under Section 304 A of the Indian Penal Code and Section 101 of the Indian Railways Act, 1890, and have been sentenced each to three months' rigorous imprisonment. They are held to have been criminally responsible for a collision between the 15 Down passenger train from Simi and the 80 Up goods train from Gomharria, which resulted in 15 people including the engine driver of the goods train being killed and several others being wounded. The Bengal-Nagpur line is worked on the "line clear and caution message" system, no train being allowed to leave a station without a "line clear" certificate to the effect that the line is clear up to the next station. Such certificate is entered in a prescribed form and is in terms of a copy of a telegram received from the next station. The Assistant Station Master who was on duty during the small hours of the night and had been busy issuing tickets to passengers wrote out in the prescribed form-book the following conditional line clear message, although he had received no message from Simi, "On arrival of 15 Down passenger at Gomharria, line will be cleared for No 80 Up goods from Gomharria to Simi." All particulars required by rule were not filled in. There is no private number entered on it, and the time has not been filled in. Rule No 18 of the prescribed rules lays down that no certificate shall be written out either in full, or in part, or signed, before it

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is required for use The Assistant Station Master explains that he wrote the conditional line clear certificate in order to save time as he would require to insert only a few words when the line clear message was actually received

It would appear that guard Palmer entered the Station Master's room in his absence, took the imperfect certificate out of the book and without reading it appended his signature and passed it on to the driver and gave the signal for the train to start—all without the knowledge of Balkrishna The train started and soon came into collision with the passenger train from Sim which had started on receipt there of the line clear message from Gomharria

Now the guard had disobeyed several standing rules In the first place he had no business to enter the Station Master's room and without his permission take the certificate He might only take it personally from his hands In the next place he might not use it or pass it on to the driver without first satisfying himself that it was a line clear message with the private mark Then he had no right to start the train without the Station Master's permission Finally the driver ought not to have started without examining the certificate and seeing that it was all in order The guard has been rightly convicted and we have refused to interfere in his case, though we think it is greatly to be regretted that the railway authorities placed such a young and inexperienced man (18½ years of age) in so responsible a position and without having him thoroughly instructed in his duties

The question we have to consider is whether the facts found can justify the conviction of Balkrishna either for causing death by doing a negligent act not amounting to culpable homicide or for endangering the safety of others by disobeying rule 19 previously referred to He never intended that the conditional certificate should be used in that state as a line clear message nor could he have anticipated that the guard would remove it from the book in his absence and contrary to rule Much less could he have anticipated that the guard would take such a manifestly imperfect certificate without even glancing his eye over its contents or that he would venture to start the train without his express permission The driver has paid with his life the penalty of his neglect of rule That he and the guard would act as they did could not have been reasonably anticipated

by Balkrishna and certainly he had no reason to suppose that the guard would depart from the usual practice and would possess himself of a conditional and clear certificate which was not intended for him, and "which," as Mr Eaglesome the Acting District Traffic Superintendent says, "no guard who knows anything about his work would accept as an authority to order the driver to proceed."

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We think that the act of Balkrishna did not in itself endanger the safety of others, and that the effect was too remote to be attributable to such a cause. The disobedience of rule by Balkrishna merely facilitated, though in quite an unexpected way, a second disobedience by the guard which did endanger safety. If we were to hold that every act of contributory negligence, however remote, was criminal, one would hardly know where to stop, and even the carelessness of the person who appointed Palmer as a guard might bring him within the pale of the Penal Code. As was observed by the learned Judges of the Punjab Chief Court in the case of *Sant Dass v The Empress* (1), it appears to us to have been and to have properly been the intention of the Legislature "make only those acts or omissions offences which themselves led to certain serious results and to leave all subsidiary acts or omissions to be dealt with departmentally." That case was an exact counterpart of the present one, and the learned Judges acquitted the Station Master. On like grounds we set aside the conviction of Shankar Balkrishna, and direct that his sureties be discharged.

Rule absolute

The Punjab Law Reporter, 1907. Case No 59.

Before Mr Justice Chitty

FAZAL DIN (PETITIONER)

v

KING EMPEROR (RESPONDENT)

Case No 489 of 1906.

Railways Act (IX of 1890) Section 101—Railway—Endangering the safety of any person—Starting train without having been given the clear

1906
May, 25

A driver of a train is guilty of an offence under Section 101 of the Indian Railways Act 1890 when he starts a train without having been given a

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line clear, though owing to distance of the train coming from the opposite side danger to persons in the trains is remote

PETITION for Revision of the order of Captain A. A. IRVINE
Additional Sessions Judge, Amritsar Division, dated the 31st
March 1906

Mr Morrison, *Advocate*, for Petitioner.

The Government Advocate, for Respondent

JUDGMENT CHITTY, J.—I accept the facts as found by the Magistrate. There is no doubt that in starting the train at all, and in driving it some four miles down the line without having been given "line clear" the accused broke the rules of his service, and did a rash and negligent act. The only question is whether by so doing he "endangered the safety of any person," so as to bring the case within the purview of Section 101 of the Indian Railway Act, 1890.

The point is not wholly free from doubt, owing to the difficulty of determining when, if at all a position of danger was created. The persons, if any, whose safety was endangered, were the second fireman on the goods train driven by the accused, and the driver and the others on goods train No 88, which was coming in the opposite direction. Danger, which means the risk of loss or injury, is a relative term. It may be immediate or remote, but it is none the less danger, because it is remote, and there is, therefore, a better chance of avoiding it. The accused's Counsel argued that because the two trains were brought to a standstill at a distance of some 300 yards from one another, there was never any danger to the safety of any person. There was none from the time when the trains stopped. The danger had then been averted. But that is practically equivalent to an admission that up to that moment there had been danger. On the whole, I am of opinion that the safety of the persons on the two goods trains was endangered by the act of the accused. The case cited by his Counsel *The Queen v Manphool*(1) is distinguishable. There, owing to the precautions of others, the state of danger, which might have arisen from the negligence of the accused, never did arise. As the learned Judge says "Any possible danger which might have resulted from his neglect, was avoided." Here, I think, that a state of danger was created when the accused took his train on to, and proceeded to drive it down the line. Fortunately, owing to the distance of the other goods train

the danger was remote. Fortunately also, owing to the precautions taken by the driver of goods train No. 88 and the accused himself, a collision was avoided.

I must, therefore, uphold the conviction, but it is clear that under the circumstances, and having regard to the fact that the accused did contribute to the avoidance of any injury to life or property, the sentence of six months' imprisonment is much too severe.

The accused has been in Jail since 27th February 1906, and has been sufficiently punished for the offence. I reduce the sentence to the period of imprisonment already undergone, and direct the accused be set at liberty.

The Calcutta Weekly Notes, Vol. XI. Page 173.

CRIMINAL REVISIONAL JURISDICTION.

Before Mitra, J. and Ormond, J.

JOY GOPAL BANERJEE, (PETITIONER)

v.

THE EMPEROR, OPPOSITE PARTY.

REV No 820 OF 1906

Criminal Procedure Code (Act V of 1898), Section 437—Further enquiry, Order for—Notice to the accused—Power to direct further enquiry—Indian Railways Act (IX of 1890), Section 101—Negligence of Station Master—Collision—Endangering safety

1906
August, 28.

The power conferred by Section 437 of the Criminal Procedure Code to direct a further enquiry should be used sparingly and with great caution.

Though it is not illegal to make an order directing further enquiry under Section 437 Criminal Procedure Code without notice to the accused, it is always desirable that notice should be given. The ordinary rule is that no order should be passed against an accused without notice to him.

A question may be very clear to a Court directing further enquiry but still it ought to give an accused already discharged an opportunity to be heard.

Where, in consequence of the omission of a Station Master to take down the line clear signal, a mixed train was run into the Station and a collision took place in which one wagon was derailed, but as the train was moving slowly no person was injured.

Held, that the omission on the part of the Station Master constituted an offence under Section 101 of the Indian Railways Act.

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The Queen v Manphool(1) distinguished

THIS was a rule granted on the 24th of July 1906, against an order of the Deputy Commissioner of Sylhet, dated the 22nd of May 1906, directing a further enquiry in the case which had resulted in the discharge of the Petitioner by the Extra Assistant Commissioner of Karimgunge (Mr K Chowdhry) on the 28th of March 1906

The facts are briefly these —

One evening the accused, a Station Master, allowed a mixed train to enter the station as if the line was clear, although there were at that time 6 or 7 wagons on the line. In consequence there was a collision in which one wagon was derailed but as the train was moving slowly no person in the train was injured. Thereupon the Railway authorities prosecuted the accused under Section 101 of the Indian Railways Act, but the Extra Assistant Commissioner of Karimgunge who tried the case, discharged the accused under Section 253 Criminal Procedure Code, by his order, dated the 28th March which was in these words 'The Traffic Inspector, A B Railway, states that there was no fear of danger to the safety of any one as the train was passing very slowly. Section 101 of the Act does not apply to the accused. He is discharged under Section 253 of the Code.'

The Deputy Commissioner of Sylhet by his order dated the 22nd May 1906, directed further enquiry into the case, without giving any notice to the accused. The accused moved the High Court to have this order of the Deputy Commissioner set aside.

Mr Rasul and Moula Nuruddin Ahmed for the Petitioner

No one appeared to shew cause against the rule.

The Judgment of the Court was as follows —

The Deputy Commissioner of Sylhet has, by his order, dated 22nd May last, directed further enquiry in the case under Section 101 of the Indian Railways Act against the Petitioner. The Extra Assistant Commissioner of Karimgunge tried the case and on the 28th March 1906 discharged the Petitioner but on the application of the Railway Administration a retrial has been directed without any notice to the accused.

The power conferred by Section 437 of the Criminal Procedure Code to direct a further enquiry should be used sparingly and with great caution, and though it is not illegal to make an order under

the section without notice to the accused, it is always desirable that notice should be given. The ordinary rule is that no order should be passed against an accused without notice to him and this rule has been uniformly followed in this Court and the Allahabad High Court. It is not necessary for us to refer to authorities as they are well known. On this ground alone we ought to set aside the order of the Deputy Commissioner. A question may be very clear to a Magistrate but still he ought to give an accused already discharged an opportunity to be heard.

We therefore set aside the order of the Deputy Commissioner of Sylhet dated the 22nd May 1906.

The next question is—should we direct a further enquiry into the case against the accused? The answer depends on the legality or otherwise of the order of discharge passed by the Extra Assistant Commissioner of Karimgunge.

The order of the 28th March is in these words—"The Traffic Inspector, A. B. Railway, states that there was no fear of danger to the safety of any one as the train was passing very slowly. Section 101 of the Act does not apply to the accused. He is discharged under Section 253 of the Code."

Now Section 101 of the Railways Act runs thus—101—"If a Railway servant while on duty endangers the safety of a person (c) by any rash or negligent act or omission, he shall be punished with imprisonment for a term which may extend to two years or with fine which may extend to five hundred Rupees or with both."

The facts before us are these —

One evening, the petitioner, a Station Master, allowed a mixed train to enter the station as if the line was clear, whereas there were 6 or 7 wagons on the line. There was a collision and one wagon was derailed, but the train was going slowly and no person was injured.

The question is—should the petitioner, whose duty it was to see that the signal was up, be prosecuted, i.e., is there any evidence to show that "the safety of any person was endangered" by his omission?

The fact that there was a collision and one wagon derailed is more than sufficient to show that the persons in the mixed train were in danger not necessarily of being killed, but of being injured by a collision with the wagons. They were led into this position of danger by the signal having been allowed to

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remain up. There is no doubt that at the time of passing the signal the mixed train was in a position of danger and the fact that just before or at the moment of impact the train was moving so slowly that there was then no danger, does not prove that there never was any danger. In other words, the fact that no injury or even that no accident happens does not show that the safety of persons had not been in danger.

In the case of *The Queen v Manphool*(1) the following passage occurs in the Judgment —“Although he (accused) is shown to have neglected his duty, there is no evidence whatever of the safety of any persons in the goods train having been endangered by his neglect of duty on the contrary, it is plainly apparent that by reason of the precautions taken by other persons any possible danger which might have resulted from his neglect was avoided.’ In that case the accused, a signal man, was absent from his post and no answer to a telegraphic message, enquiring if the line was clear, could be obtained from him, the authorities therefore telegraphed to the station beyond and received an answer that the line was clear before despatching a train. There was therefore no danger at any time. The line was clear and the authorities despatching the train knew it. We do not consider that case to be an authority for the proposition that if a collision or injury is averted, there cannot be a conviction under Section 101 of the Indian Railway Act.

We therefore direct a further enquiry in the case against the petitioner Joy Gopal Banerjee, under Section 101 of the Indian Railway Act.

Rule made absolute

In the High Court of Judicature at Madras

CRIMINAL REVISION

*Before the Hon'ble Mr Justice Benson and the
Hon'ble Mr. Justice Wallis*

THE PUBLIC PROSECUTOR, (PETITIONER)

v

HENRY GILBERT BRINDLEY, (ACCUSED)

CRIMINAL REVISION CASE No 535 of 1906

Endangering safety of passengers—Collision—Guard failing to protect his train—Railway Act IX of 1890 Section 101

1907
April, 24.

A mixed train was running from U to K stations. The driver having run short of water left the vehicles on the road and proceeded to K to take water. The Station Master at K thought that the whole train had arrived and gave Line Clear to Station Master at U for a Mail train who allowed the train to start for K, the consequence being that it collided with the mixed train which was standing between these two stations and 5 persons were killed and several injured. The chief guard of the mixed train and the Station Master of K were charged and tried for endangering the safety of the persons in the train by disobedience of the rules of the Company under Section 101 of the Indian Railway Act IX of 1890 and the guard was convicted and sentenced to three months rigorous imprisonment.

Held that the statement of the chief guard that he instructed his under guard to protect his train in the rear and gave him detonators was false and the sentence passed by the Joint Magistrate was confirmed.

PETITION under Sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the Judgment of the Sessions Court of Cuddapah in Criminal Appeal No 29 of 1906,* presented against the Judgment of the Joint Magistrate of Madanapalle in Calendar Case No 43 of 1906.

This case coming on for hearing on Wednesday the 17th instant, upon perusing the petition, the Judgments of the Lower Courts, and the material papers in the case and upon hearing the petitioner and the argument of Mr E R. Osborne, Counsel for the accused, the Court delivered the following

JUDGMENT BENSON J.—In this case the Public Prosecutor asks that the sentence passed by the Sessions Judge of Cuddapah in

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the appeal of Chief Guard Brindley in what is known as the Kodur accident case, may be enhanced. On the early morning of the 11th May last, Mail train No 14 ran into the rear of Mixed train No 4 between the Urampad and Kodur Station. Five persons were killed and several injured and great injury was done to the rolling stock and permanent way.

Brindley, the Chief Guard of the mixed train, and the Station Master of Kodur were tried by the Joint Magistrate for endangering the safety of the persons in the train by negligence and disobedience of rules which they were bound to obey and as such punishable under Section 101 of the Indian Railways Act 1890.

In his Judgment, the Joint Magistrate examined the evidence very fully and carefully and found that the Engine Driver of the mixed train ran short of water, and therefore left the train at the 112th mile and ran with his engine to Kodur Station where the Station Master thinking that the engine was the train then due, gave the line clear signal to Urampad Station Master who then allowed the Mail to leave Urampad and run on towards Kodur, and that it thus ran into the mixed train which was stationary at the 112th mile. Under rules 180 and 182 of the rules for the guidance of Railway officials which the accused in this case was admittedly bound to obey, it was his duty, when the train was left on the line, to "either go back himself or send a competent man back, to protect the train by showing a "danger" hand signal and placing detonators on the line in order to prevent any other train from approaching on the same line.

It was his duty to protect the rear of the train in this way first and then to protect the front in the same way. Brindley's defence as to this part of the case was that he hastened back to the rear of the train and instructed the Under Guard Narayanram to go and protect the rear of the train in the manner required by the rules, gave him two detonators to enable him to do so, saw him start out along the line and then himself went to the front of the train to take precautions there. The Joint Magistrate found that this defence was totally false and that Brindley took no steps whatever to protect the train but relied entirely on the security which the Block system of working the trains was supposed to give. He was led to this conclusion by a minute examination of the several statements made by Brindley after the accident and by the manner in which Brindley's expli-

nation grew with each fresh statement. He also attached great importance to the fact that the Under Guard Narayanasamy's body was found in such a position in the wreckage after the accident that it was certain that he was in his van when it occurred. He therefore found him guilty of the great neglect of duty and amazing indifference to the safety of the public and of the property of the Company whose servant he was and sentenced him to three months' rigorous imprisonment under Section 101 of the Indian Railways Act IX of 1890.

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On appeal the Sessions Judge found that Brindley did instruct Narayanasamy to take the required steps and even gave him two detonators but that Narayanasamy was lazy and unwilling to go and that Brindley did not see that his instructions were carried out. He therefore confirmed the conviction but reduced the sentence to a fine of Rs. 100.

In arriving at this conclusion the Sessions Judge has made no reference at all to the successive statements made by Brindley to different persons after the accident nor has he referred to the fact that Narayanasamy's corpse was found in such a position that he must have been in his van at the time of the accident. The Sessions Judge does indeed find that Brindley's statement that he saw Narayanasamy go a distance of 40 yards along the line in rear of the train in order to protect it is false and he so finds on the strength of the evidence of the Police Constable that he found Narayanasamy asleep in the van a few minutes after the time when Brindley said that he sent out Narayanasamy. I find it difficult, if not impossible, to believe that if Narayanasamy had really been sent out by his Chief Guard and had gone 40 yards along the line in order to protect it with detonators and a hand lamp, he would have returned without placing any detonators and been found asleep a few minutes later in his van.

The various statements made by Brindley, the undoubted fact that no detonators were laid on the line and that Narayanasamy was in his van at the time of the accident, strongly confirm the conclusion of the Joint Magistrate that Brindley did not in fact send out Narayanasamy at all. The reasoning and the conclusion of the Sessions Judge on this fundamental question and on some others also in a less degree are so unsatisfactory that I was at first inclined to think that we ought to set aside the Judgment of the Sessions Judge and order the appeal to be retried. Counsel for the accused, however, and that owing to the expense involved in a retrial, his client would prefer to have the matter

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dealt with by this Court, and the Public Prosecutor, though he resented as unfounded many of the strictures passed on the Superior Staff of the Railway and asked us to expunge them from the Judgment, and that he did so of his own motion and had no instructions to do more than apply for an enhancement of the sentence. I do not see how we can expunge a part of the Sessions Judge's Judgment, as the Public Prosecutor desires us to do. I must not, however, be taken to endorse the various conclusions and criticisms of the Sessions Judge, some of which refer to matters more or less extraneous to the question before him in appeal.

Indeed these matters have not been argued before us nor was it necessary to do so in order to enable us to dispose of the application for enhancement of sentence on the ground that the Courts below have found Brindley guilty of negligence and of not obeying the rules laid down for his guidance, with a view to prevent accidents and that such neglect led to the present deplorable catastrophe and have convicted him of an offence punishable under Section 101 of the Indian Railways Act. I think that a mere fine of Rs. 100 for such an offence is wholly inadequate, even on the view taken by the Sessions Judge of the exact nature of the neglect.

I, however, find that the neglect of the Guard was not a failure to see that Narayanasamy carried out his instructions for the protection of the train but that he did not in fact instruct Narayanasamy at all.

Having regard to the terrible consequences that such neglect of duty may entail, it is essential that the sentence imposed should be sufficient to mark the gravity of the offence. It is into consideration the previous service and age of the Guard and the consequences that must follow his conviction and I so I still think the sentence of three months' rigorous imprisonment imposed by the Joint Magistrate was not more than the circumstances required. I would therefore enhance the sentence to that extent and remit the fine imposed by the Sessions Judge. Any imprisonment already suffered by the accused under the Joint Magistrate's sentence will, of course count towards the three months.

WATKINS, J.—I am of the same opinion. In this case the Joint Magistrate convicted the accused under Section 101 of the Indian Railways Act, 1890, of disobedience to rules and was liable to life by failing to protect the rear of the train in the

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manner prescribed by rule 182. The Sessions Judge also found him guilty but his finding as to what the breach was was so unsatisfactory that we are unable to accept it in considering the adequacy of the sentence passed on the accused and I should have been in favour of directing a re-hearing of the Appeal, if the Counsel for the accused had not appeared to us to save his client the expense and anxiety of a re-hearing by finally disposing of the case ourselves.

The Sessions Judge has found that the accused so far complied with rule 182 as to give the Assistant Guard two detonators and order him to go and protect the train. On the basis of this finding I have some difficulty in understanding how the accused was convicted of any offence at all having regard to the shortness of the time and the pressure of other duties upon him. But I am entirely unable to accept the finding that the accused took any such steps to protect the train for the reasons stated by my learned brother and more fully by the Joint Magistrate. We must, I think, deal with the sentence on the footing that the accused wholly neglected to take the precautions to protect the train prescribed by rule 182 relying on the working of the block system to prevent any accident. The precautions prescribed by rule 182 are expressly designed to guard against the failure of the block system from any cause, and it was especially incumbent to observe them at a time and the Mail train was due at the point where the accused's train was stopped. The time which the accused had for taking action to protect the rear of his train was probably more than the 15 minutes allowed by the Sessions Judge and less than the 33 minutes allowed by the Joint Magistrate, but if the accused, after his train stopped, had with reasonable promptitude sent off the Under-Guard with red light and detonators to protect the rear of the train as required by the rules, there can, I think, be little doubt that the accident would have been averted. The offence of which the accused was guilty is a very serious one, and the fine of Rs. 100 imposed by the Sessions Judge appears wholly inadequate.

We must, I think, set aside the sentence of the Sessions Judge and sentence the accused to suffer three months' rigorous imprisonment. The fine, if levied on the accused, must be refunded.

In the High Court of Judicature at Madras

CRIMINAL REVISION

*Before the Hon'ble Mr. Justice Benson, and the Hon'ble
Mr. Justice Wallis*

THE PUBLIC PROSECUTOR, PETITIONER

v

KASARGOD ACHUTHA SHENAI, ACCUSED

CRIMINAL REVISION PETITION No 584 of 1906

Railways Act, IX of 1890, Section 101—Endangering the safety of passengers—Collision—Disobedience of Rules

1907
July, 30

The Assistant Station Master at K gave line clear to the Station Master at U for No 14 Mail without observing personally that the whole of No 4 Mixed train, which was running in advance had arrived at his station and that the rear portion of the train was missing. He was convicted under Section 101 of the Railways Act IX of 1890. On a revision petition being presented by the accused to the High Court they declined to interfere on the ground that they took the facts to be as found by the Sessions Judge.

PETITION under Sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the Judgment of the Sessions Court of Cuddapah in Criminal Appeal No 70 of 1906,* presented against the conviction and sentence of the Joint Magistrate of Madanapalle Division in C C No 44 of 1906.

This case coming on for hearing

Upon perusing the petition and the Judgments of the Lower Courts and the records in the case and upon hearing the petitioner and the arguments of Mr Ramanad Shennu for Mr K P Madhava Rao, Vakil for the accused, the Court made the following —

Orders — We must as a Court sitting in Revision take the facts to be as found by the Sessions Judge.

He finds that the Engine with ten or twelve carriages did in fact, run into Kodur Station. It was in this state of things that the Assistant Station Master signalled "Line clear" to Uraipad Station without observing that the rear portion of the train was missing.

We cannot say that on these facts the carelessness of the Assistant Station Master was such as to require us to revise the sentence passed upon him. We therefore decline to interfere.

* See Appendix A Case No 41

Lower Burma Rulings, Vol. IV., Page 139.

CRIMINAL REVISION

Before Mr. Justice Irwin, C S I

KING EMPEROR

v

A C DASS

No 321 B of 1907

Danger caused by disobedience of Railway Rules—Responsibility of Station Master—Consequences of disobedience of Rules—Collision—Indian Railways Act, 1890, Section 101

1907
Nov, 29

A, an Assistant Station Master, allowed the signal to be given for a train to run through his station without satisfying himself as required by the rules made under the Railways Act, that all the prescribed precautions had been taken by the jemadar subordinate to him. The train was switched off the main line on to a line on which some wagons were standing and collided with them. This could not have occurred if the rules had been complied with. A was tried, under Section 101 of the Act, for having when on duty endangered the safety of persons travelling in the train by disobeying general rules. He was convicted, and fined Rs 30, the Magistrate remarking that he considered his offence merely technical and that the collision was practically the result of the acts and omissions of the jemadar.

Held—that the Magistrate's view of the relative responsibility of A and the jemadar was in view of their relative positions, radically wrong, and that A was the more guilty of the two.

Held further,—that the essence of the offence was the danger or risk entailed by the neglect of the rules, irrespective of the consequences that actually ensued.

A substantive sentence of imprisonment was passed upon A.

Snell and Sedgwick v The Queen (1) *Burma Railways Company v Fox* (2) (unreported), referred to.

Government Advocate for the Crown

Foran for Respondent.

The charge on which A. C. Dass was tried was that he, on 8th February 1907 at Pynbongyi, by disobedience of general rules caused the collision of a train with wagons and on-

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dangered the safety of persons in it, an offence under Section 101 of the Indian Railways Act, 1890. He was convicted and fined Rs 30. The Government Advocate under instruction from the Local Government applies for enhancement of the sentence.

The Judgment does not contain a statement of all the material facts. In order to ascertain them I have had to read the depositions and the examination of the accused. It is not apparent why the examination of the accused was recorded in Burmese. That is not his mother tongue, and he presumably spoke English in Court.

The charge is defective. A minor point is that the accused ought to have been described by his full name, not by initials. The charge ought to have set out that he was Assistant Station Master and on duty. The Rules which he disobeyed ought to have been specified. I cannot ascertain from the record that the rules were before the Magistrate at all. The learned Government Advocate produced them at the hearing of the appeal.

The facts as they appear on the record are these. At Pymbongyi Station there are 4 lines. The second line is the main line which runs straight through the station. The first facing points which a Down train (travelling north to south) meets are the points of the first or platform line. About 15 yards south of these points are the points by which the 3rd line branches off from the main line. At the first or platform line facing points, is the line clear post where the line clear for the section Pymbongyi to Pyigy is given to the driver of a Down train which does not stop at Pymbongyi. The line clear is stuck in a cane hoop to enable the driver of the moving train to pick it up.

On 8th February 1907 about 5 to 5.15 A.M. the No. 4 Down Mail train approached Pymbongyi Station. At that time No. 155 Up Goods train was standing in the station on the platform line and six wagons which had been detached from it were standing on the third line near the north points. It is the signaller's duty to set points when shunting. He had set the points to shunt the 6 wagons. After doing this it was his duty to set both the facing points for the main line, lock the points and return the keys to the Assistant Station Master and then himself go to the trailing points at the South end of the station. Thus he did not do. The first facing points were set correctly. The second facing points were set for the third line, and the key

left in the lock. The jemadar stayed at the first facing points and told the porter to lower the signal which he did. The Assistant Station Master went to the first points and gave the line clear to the driver. The train ran on to the third line and collided with the wagons. The porter's evidence is this, "The Assistant Station Master asked me to bring the rattan hoop. I gave it to him. Then he went to the second line to the point. Little while after the jemadar showed me a green light and shouted to me and I lowered the signal. This is the way I have been working daily. The Assistant Station Master never shows a green light to me."

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Now I turn to the rules framed under the Railway Act. In these rules various duties are imposed on the Station Master and other Railway servant appointed by the authorised officer. There is no suggestion in this case that any person except the Assistant Station Master Dass was appointed to perform any duties of a Station Master. I therefore read the rules without noticing any reference to persons so appointed.

Rule 113 (1) reads thus: "The Station Master will be responsible that all facing points over which a train will pass are correctly set and secured, and trailing points correctly set."

Under that rule, subsidiary rule (f) (iii) reads thus, "When a train runs through, or is timed to run through, any station without stopping, the Station Master must inspect all facing points over which the train will run, and is personally responsible that all such points are set correctly and locked for the running through train."

Rule 91 (2) reads thus, "The Station Master shall be held responsible that the signals are not lowered to admit a train until all facing points over which the train will pass are correctly set and secured."

Under this rule subsidiary rule (a) (i) reads thus, "No Home or Outer signal is to be lowered for the admission of any train unless the Station Master has satisfied himself that, in the case of a 'running through' train the keys of all facing points over which the train will pass are in his possession, secondly, that he has complied with the instructions laid down in subsidiary rule (f) (iii) under general rule 113."

Rule 11 (i) (a) reads thus, "Every certificate issued at a station under rule 8 clause 2," i.e., a line clear certificate "shall

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be delivered by the Station Master, if the train runs through the station without stopping, to the driver."

The importance of the rule that the Station Master must have the keys of the facing points in his own possession is seen from the evidence of the driver, J R Hall, who explains that the key of the third line facing points cannot be taken out of the lock except when the points are set for the main line.

Now the Assistant Station Master's duty is clear. He had to first inspect the facing points of the platform and 3rd line and see that they were correctly set for the main line and locked and that the keys of both points were in his own possession. Until this was done he should not have allowed the signals to be lowered, much less have given the line clear to the driver. He did not inspect the points although he passed close by them. The keys were not in his possession. The jemadar in his presence called to the porter to lower the signals, and Dass does not even allege that he told the porter not to do so. Finally he gave the ticket to the driver. His excuse is that after writing out the line clear in triplicate he had no time to examine the points. This is simple nonsense. If he had time to reach the line clear post he had time to examine the points on the way, and nothing could excuse his allowing the signals to be lowered before he had the keys of the points in his possession. The fact that he delivered the line clear certificate shows that he acquiesced in the lowering of the signals, and, if the porter is to be believed, this disobedience of rules by Dass was not an isolated instance but habitual.

The jemadar and the Guard of the Goods train also disobeyed rule and the three are jointly responsible. The jemadar and Guard absconded. The Magistrate wrote, "The acts or omissions of the abscondors are much more serious than what may be attributed to Dass," and again "as it is shown that the train came in practically through the act of another I would view what occurred so far as Dass is concerned as a technical offence."

This view of the case is radically wrong. When a superior is lax his inferiors will certainly be lax too. The strict observance of the rules framed to ensure the safety of trains is of such enormous importance to the travelling public that leniency is out of the question, and much more so in the case of a Station Master than in the case of a jemadar who is subject to constant

and detailed supervision I consider that Dass is more guilty than the jemadar

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The insertion in the charge of the words "caused the collision of a train with wagons" was in my opinion not merely superfluous but undesirable, and the Magistrate's remarks about the probable consequence of setting the points wrong shows that he did not understand clearly the nature of the offence for which he was trying the accused. The offence was endangering the safety of any person, and that offence would equally have been committed if the driver had succeeded in stopping the train before it reached the wagons. In *Snell and Seddons v The Queen*(1) the learned Judges said "appellants are liable to conviction not by reason of consequences directly referable to their default, but by reason of the danger or risk which it entails"

The present application was made nearly five months after the conviction. In the *Burma Railways Company v Fox*(2) which was an application for an order to the Magistrate to make farther enquiry into an offence under the Railway Act, the learned Judge said that an application for revision by prosecution should not be entertained after the period (6 months) allowed by the Limitation Act for an appeal against an acquittal has elapsed, except under, perhaps, very exceptional circumstances. In this case the period of six months has not been exceeded, but it is 10½ months since the offence was committed. In consideration of this fact, I shall pass a much more lenient sentence than I think the Magistrate ought to have passed, but the offence was, in my opinion, such a grave one, that I should consider myself to some extent responsible for the next accident that occurs on the Burma Railways through similar disobedience of rules, if I did not pass a sentence of imprisonment.

The fine of Rs 30 was paid. I sentence Dass to fifteen days' rigorous imprisonment in addition to the fine.

(1) 1 L. R., 6 Mad 201

(2) Crim Revision, No 1500 of 1901

In the Chief Court of the Punjab

APPELLATE CRIMINAL

*Before the Hon'ble Sir William Clark, Kt, Chief Judge,
and the Hon'ble Mr A Kensington, Judge*

THE KING EMPEROR, APPELLANT

v

KARIM BAKHSH, RESPONDENT

CASE No 159 of 1908

*Endangering the safety of officials on Engine—Railway Act IX of 1890
Section 101—Disobedience of Rules—Running against signals*

A driver ran on his train without paying any attention to the danger signal against him and thereby violated the Railway rules with the result that his Engine collided with another Engine which was engaged in shunting. He was charged before a First Class Magistrate under Section 101 of the Indian Railways Act IX of 1890 for endangering the safety of the officials on the Engine but was acquitted.

On appeal, the order of acquittal was set aside and the accused was convicted and sentenced to undergo rigorous imprisonment for six months.

APPEAL from the order of AKHWAND ABDUL SHAKUR KHAN, Magistrate, 1st Class, Multan, dated the 30th September 1907, acquitting the respondent.

Charge —Under Section 101, Act IX of 1890

Appellant —By Mr Turner, Government Advocate

Respondent —In person

JUDGMENT —This is an appeal by the Crown from an acquittal.

Karim Bakhsh the accused was charged under Section 101 of the Indian Railways Act IX of 1890, for bringing his train into the Station Dera Bakhsh, when the danger signal was against him.

Karim Bakhsh was the Driver of 70 Down Goods train, and the case against him is that though the danger signal at the Distant signal was against him, he omitted to stop his train but proceeded, and ran into No 41 Up Goods train at about 1400 feet beyond the Distant signal and 100 feet short of the

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Home signal, where No 41 Up train was shunting, he thereby endangered the safety of the officials on the No 41 Up train, and in fact caused injury to Chiragh, Driver of that train.

That No. 70 train was going at a fast pace when the collision occurred is proved by the distance to which No 41 train was driven back.

Accused's defence was that the Distant signal was not against him, and whether this was so or not was the essential question in the case.

The Magistrate in a Judgment characterised by great confusion of thought found that the Distant signal was against the accused, but that there was a dust-storm blowing at the time, and apparently that the accused could not see the Home-signal.

This has nothing to do with the case, as a matter of fact we think it is clear that there was no dust storm blowing at the time. The accused admitted that he saw the Distant signal, and so did the Guard of his train—it was not necessary for him to see the Home-signal, he was bound to stop his train when the Distant signal was at "danger."

The Magistrate appears to have been also influenced by the fact that the Assistant Station Master was to blame in allowing shunting to proceed within 10 minutes of the time when No 70 train was due. This also has nothing to do with the case, that the Assistant Station Master was also to blame does not clear the accused from his breach of rule.

The question we have to consider then is whether the Distant signal when accused brought up his train was at 'danger' or at 'proceed'. We have no hesitation in finding that it was at 'danger'. It has been clearly established that while shunting is going on the Distant signal must be at danger, under the Lost-Morse interlocking system, which is in force at this station.

The evidence of the Guard of No 70 train and of Shib Datt, Overseer, proves that the signal was in fact at 'danger'.

The accused before us urges that the interlocking system is irregular in its working, and that the signal was at 'proceed'. He did not urge this flaw in the working in the Lower Court, and if there had been any, it must have been discovered at once, and the signal would have had to be repaired, no questions were asked of the witnesses to support this.

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The accused, therefore, in our opinion, ran on his train without paying any attention to the danger signal against him, and violated rule 100 of rules for Indian Railways, which required him to stop his train as quickly as possible. We accept the appeal and find him guilty under Section 101 of the Indian Railways Act and sentence him to six months' rigorous imprisonment.

In the Chief Court of the Punjab.

CRIMINAL REVISION.

Before the Hon'ble Mr. W. Chevis, Judge.

SHAHAB DIN, CONVICT, PETITIONER

v

THE KING EMPEROR, RESPONDENT.

CASE No 455 of 1908.

1908
June, 8

Endangering the safety of passengers travelling by train—Indian Railways Act, IX of 1890, Section 101—Disobedience of General Rules by Driver—Collision—Loss of life

The Driver of a Down Goods train standing in the loop line waiting to pass an Up passenger train received a line clear ticket prepared for the latter train and started his train without satisfying himself that the ticket was for his train disregarding the signal which was against him the consequence being that his train collided at the crossing with the passenger train which was running from the opposite direction. He was charged before the First Class Magistrate under Section 101 of the Railways Act, IX of 1890, for endangering the safety of passengers in the train by disobeying the General Rules and was convicted and sentenced to undergo six months' rigorous imprisonment.

On appeal, the conviction was upheld, but the sentence was reduced to three months' rigorous imprisonment.

PETITION under Section 139 of the Criminal Procedure Code, for revision of the order of Major B O ROE, Additional Sessions Judge, Lahore Division, dated the 18th March 1908, affirming that of S S HARRIS, Esquire, Magistrate, 1st Class, exercising enhanced powers under Section 30 of the Criminal Procedure Code, Lahore, dated the 15th February 1908, convicting the petitioner.*

* See Appendix A, Case No 42.

Charge —Under Section 101, Act IX of 1890

Sentence —Six months' rigorous imprisonment

Petitioner —By Mr Morrison, Advocate

Respondent —By the Government Advocate

JUDGMENT —Having gone through the record I can find no reason whatever for hesitating to accept the findings of the Magistrate and Sessions Judge that the petitioner broke the three rules in respect of which he has been convicted

It is urged that the law required that all alterations or additions to the rules shall be communicated to the persons concerned, and that the rules have been altered since the petitioner passed his examination as a Driver, and that the new rules have neither been communicated to him orally nor has he been supplied with them in writing although the rules laid down by the Railway Board require that every Driver shall have with him a copy of the rules, and that the administration must see that every railway servant is acquainted with the rules relating to his duties. But it would be useless to give a copy of the rules to an illiterate man like the petitioner, and the administration could not do more than examine him and so satisfy themselves that he knew his duties, and understood the rules. As to change of rules since the time when petitioner was examined, I have looked up the old rules (11, 124 and 149) corresponding to the new rules which have been broken, and find that there has been no practical difference at all. The forms of the "line clear" certificates have been changed, but the change is not material, and even an illiterate man has only to use his eyes to see the difference between a 'line clear' for an Up train and one for a Down train. Both the old and new 'line clears' for Down trains are on all white paper, the old Up train form had one thin red line drawn diagonally, while the new Up train "line clear" form has two thick parallel red lines drawn down it. So red still shews clearly a "line clear" for an Up train. This holds good both for the Lahore-Phillour Section and for the Lahore Multan Section, and in fact for the whole of the N.-W. Railway. So petitioner, had he looked at the "line clear," must have known that it could not possibly be for a Down train.

There is nothing more to be said about the conviction, which I uphold. It remains to consider the question of sentence.

There can be no doubt that the petitioner had been very heavily worked. He had been on the sick list with fever from 26th

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September 1907 till 9th October 1907, and the particulars given in the Magistrate's Judgment shew that long hours he had worked from 20th to 24th October. In addition it must be remembered that a Driver has to come on duty 45 minutes before his engine leaves the shed, and to stay on duty for 15 minutes after his engine reaches the shed, and that the traffic staff are allowed the use of an engine for 15 minutes before a train starts and for 15 minutes after a train arrives. So we may cut a good 2 hours from the time which could possibly have been devoted to sleep between two journeys. On 20th October petitioner did a journey of about 16 hours, and was then off for about 17 hours. This gave him ample time for rest, but after that the hard time began. On 21st—22nd October his journey lasted from 5 P.M. to 11 A.M., about 20 hours, including a whole night. He then had 9 hours off which would give him about 7 hours clear, he might get about 6 hours sleep (some time must be allowed for meals). Then on 22nd and 23rd he had another journey lasting about 20 hours, and including a whole night, and ending at 6 P.M. The next morning he was ordered out again at 3 A.M. owing to another Driver having fallen ill. So again apparently he could have had only about 7 hours sleep. It is obvious, considering the strain involved in the work of engine driving, that the journeys were too long and the intervals too short, and that the accused had cause for complaint. At the same time, even allowing that the accused was in a sleepy state, he might surely have taken the trouble to look at his "line clear" and seen if it was a white one or a red line one before he acted on it and started his engine. He might surely have done so much even if he forgot to look at the signals or wait for the guard. The Magistrate has made considerable allowance for the fact that the accused had been overworked. But for this fact a sentence of six months' imprisonment would have been totally inadequate for such gross carelessness, leading as it did to the death of several persons. It is very difficult to mete out sentences exactly appropriate in such cases, and I am not at all sure that any further reduction of sentence can justly be asked for, but I presume that my learned brother had in view some reduction when he admitted the petitioner to bail, so I will reduce the sentence. At the same time I do not wish it to be thought either by the petitioner or by other members of the Locomotive staff that this Court has entirely condoned the offence, so I decline to listen to the plea that the sentence should be reduced to the amount of imprisonment already

undergone (about 5 weeks) I reduce the sentence to one of three months' rigorous imprisonment

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The petitioner should surrender to the District Magistrate to undergo the rest of his sentence, if he does not surrender, the District Magistrate should take steps to arrest him

In the Chief Court of the Punjab

CRIMINAL REVISION.

*Before the Hon'ble Mr. A. Kensington and the Hon'ble
Mr H A B Rattigan, J.J.*

MUHAMMAD RASHID, PETITIONER

v.

THE KING EMPEROR, RESPONDENT.

CASE No 697 OF 1908

1908
August, 6.

Indian Railways Act, IX of 1890, Section 101—Station Master endangering the safety of passengers—Preparing Line clear certificate and starting a Down train before the arrival of an Up train

The accused gave Line clear to Ludhiana for No 5 Up train and prepared a line clear ticket for No 12 Down train to proceed to Ludhiana from Ludhowal and handed it over to the Guard before No 5 Up train arrived. Then the Guard gave it to the Driver of the train. No 12 Down train started and collided with No 5 Up train between Ludhiana and Ludhowal with the result that no less than 21 persons were killed, besides several injured.

The accused was charged under Section 304 A of the Indian Penal Code and Section 101 of the Indian Railways Act IX of 1890 and sentenced to undergo rigorous imprisonment for two years.

On appeal the Sessions Judge acquitted the accused so far as Section 304-A is concerned, but upheld the conviction under Section 101 of the Indian Railways Act for breach of rules.

On a Revision Petition presented to the Chief Court by the accused to set aside the conviction under Section 101 of the Railways Act, it was held that there was no reason for the Court to interfere nor to reduce the punishment. The petition was dismissed.

PETITIONER —By Mr H W Morrison, Advocate.

RESPONDENT —By the Government Advocate

Order. The District Magistrate convicted both under Section 304-A, Indian Penal Code, and Section 92 (1) (a) of the General

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Rules for Railways The Sessions Judge acquitted so far as Section 304-A is concerned, but upheld the conviction under the Railway rules. The only charge under the Railway Rules is of a breach of rule 92 (1) (a).

The prosecution rely on Exhibits P 13 and 14 as genuine and say Exhibits 12 and 15 are forgeries, the defence say just the reverse.

The Sessions Judge acquitted under Section 304-A, holding it not proved that Exhibits 13 and 14 were genuine. If this view be correct, then it is not proved that Exhibits 12 and 15 are forgeries, and if Exhibit 15 be genuine then appellant cannot possibly be convicted under Section 92 (1) (a), as Exhibit 15 is the permission from Ludhiana for 12 Down train to leave Ludhiana. But if Exhibits 12 and 15 are forgeries then I think (at present, though I have not heard arguments) that there can be not the least doubt that the appellant is guilty under Section 304 A, as well as under the Railway Rules.

So, practically, it comes to this, that I either accept this application or reverse the Sessions Judge's acquittal under Section 304-A. The Sessions Judge maintained the sentence in full, so rejection of this application on the ground that Exhibits 13 and 14 are the genuine ones and Exhibits 12 and 15 are the forgeries would practically mean restoring the District Magistrate's Judgment. But under the rules of the Court only a Division Bench can hear an appeal from an acquittal. And this is a most important case.

I refer the case to a Division Bench. Appellant to remain on bail meanwhile.

JUDGMENT — This petition for revision was we think referred to a Division Bench under a misapprehension. The petitioner had been convicted by the District Magistrate of offences under Section 304 A, of the Indian Penal Code and Section 101 of the Indian Railways Act, IX of 1890, and sentenced to two years' rigorous imprisonment. The learned Sessions Judge on the accused's appeal set aside the conviction under Section 304-A, of the Indian Penal Code, but maintained that under Section 101 of the Indian Railways Act, he declined to interfere with the sentence imposed. From this order no appeal has been preferred by the Local Government in respect of the accused's acquittal, of the charge under Section 304-A, of the Indian Penal Code, but the

accused has petitioned this Court to interfere as regards that part of the order which maintains the conviction under Section 101 of the Railways Act

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The learned Judge in Chambers seems to have been under the impression that it might be incumbent upon this Court, if it took a certain view of the case, to reverse the Sessions Judge's finding with regard to the charge under Section 304-A, of the Indian Penal Code and he held that as this would be tantamount to accepting an appeal from an order of acquittal the case must, under the rules of the Court be heard and determined by a Division Bench. We cannot agree with this view. The Local Government has not appealed from that part of the Sessions Judge's order which acquits the accused of the offence under Section 304-A, of the Penal Code, and we do not think it would be in accordance with practice for this Court upon an application for revision preferred by the accused, to set aside that part of the Sessions Judge's order and convict the accused of an offence in respect of which he had been acquitted. We are quite aware that the powers of this Court upon its Criminal Revision Side are not circumscribed, nor do we desire to lay down any general rule as to the limit of its authority as a Court of revision. But we do not think that we are going too far when we say that in practice this Court should not save possibly for very exceptional reasons, upon a petition for revision presented by an accused person and in the absence of any appeal by the Local Government, set aside an order of acquittal in respect of a particular charge and convert it into an order of conviction. In our opinion, and we say it with all deference, the learned Judge would not have been acting in accordance with the practice which obtains in this Court if he had in this case set aside the order of acquittal in respect of the charge under Section 304-A of the Penal Code.

The case has, however, come before us for determination and we accordingly called upon Mr. Morrison to show grounds which would justify our interfering on the revision side, with the order of the learned Sessions Judge.

In support of the application Mr. Morrison contended (1) that Mr. Fagan the District Magistrate was disqualified from trying the case inasmuch as he had already taken part in the departmental inquiry, and (2) that the Sessions Judge wrongly laid the onus of proof on the accused when he held that his case failed

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because he had failed to prove that P 16 (the "line clear" authority given to the driver) was issued *after* the receipt of P 15 (the alleged telegram said to have been received by the accused from the Ludhiana Station Master)

Neither of these contentions is tenable. As regards the first, we need do no more than say that we entirely endorse the remarks of the Sessions Judge upon the subject, Mr Fagan took no active part in the inquiry. He only attended two of the meetings and he did not sign the report. It is obvious from his file and his Judgment that the accused received at his hands a most impartial trial and that there is nothing whatever to suggest that Mr Fagan was in the slightest degree biassed against the accused. The case relied upon in this connection (No 13 P R 98 Criminal) is obviously distinguishable upon its facts. We might also note that this ground is not mentioned in the petition for revision filed in this Court.

The second point is equally weak. Exhibit P 16 is, on its face stated to have been issued at "3 56," and Exhibit P 15 (assuming it to be genuine), purports to have been received at Ladhwal at "3 59." Presumably these documents correctly represent the actual facts and it was clearly incumbent upon the accused if he disputed their accuracy, to prove that they were incorrect. The learned Sessions Judge was, therefore, right in holding that it was for the accused to prove that P 15 was received *before* P 16 was issued. In point of fact he holds that the accused has failed to discharge this *onus* and even if we ourselves were inclined to take a different view, we do not consider that we would be justified in interfering on the revision side with his finding on a pure question of fact.

Mr Morrison, however, contends that this Court is competent on the revision side to deal with findings of fact and he has referred us to a decision given by one of us sitting as a Single Bench. We have referred to this Judgment and find that it in no way supports the wide proposition of Counsel and that it dealt with a very peculiar and exceptional state of facts. We are ready to concede that it is open to this Court, if for special reason it so thinks fit to interfere on the revision side with findings of fact supported by evidence, but we have no hesitation in holding that interference in such cases must necessarily be rare and be justifiable only on very strong grounds. To hold otherwise would be equivalent to converting this Court into a Court of

Appeal in cases in which under the law no appeal lies to it. In the present case we can find no such grounds. In order to see whether any such existed we allowed Mr Morrison, to refer to the documentary evidence filed in the case, but a consideration of this evidence satisfies us that the accused was duly informed that No 5 Up train had left Ludhiana, *before* he gave the line clear" (P 16) to the Driver of No 12 Down train. That this was so is, we think clear from Exhibit P 9 and Exhibit P 21. What obviously happened was that the accused had forgotten that "No 5 Up" was on its way to Ladhawal that he had prepared P. 16 prior to the arrival of 'No 12 Down' and had given it to guard Baxter immediately on the latter's entering his office, that he with gross carelessness allowed 'No 12 Down' to proceed on its journey and that after the occurrence of the terrible accident which ensued he concocted both P 12 and P 15. But even if P 15 is genuine (which we do not believe) it is clear from the entries on the documents themselves that the accused handed over P 16 to guard Baxter previously to the receipt of P 15. Mr Morrison relied strongly on the evidence of Baxter to the effect that P 16 was given to him only half a minute before 4 o' clock. But this evidence does not, in our opinion, prove that P 16 was not given several minutes earlier, and we cannot attach much weight to the witness' memory upon this point. We have no doubt that No 12 Down left Ladhawal at 4 o' clock, but Baxter distinctly states that P 16 had been given to him when he entered the accused's office. He must have been there a minute or two, he then had to hand it to the driver and we know that the driver had some talk with the accused about the signals and points being against him and that these points had to be adjusted before the train could proceed. All this could not have occurred in a second and probably at least three or four minutes elapsed between the time when Baxter received P 16 and the time when the train eventually started.

Even upon the assumption, therefore, that we are justified upon this petition in going into the facts of the case, we can find no reason whatever for differing from the concurrent finding of the Courts below that accused was guilty of an offence under Section 101 of Act IX of 1890. As regards the sentence, we are of opinion that in the interests of the public an exemplary punishment was called for. The accused cannot, as pointed out by the District Magistrate, plead that he was overworked. He had only just returned from one month's leave and had gone on duty only

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two or three hours before the occurrence. He had a responsible post and the lives of hundreds depended upon his duly discharging his duties. In the discharge of these duties he showed the most culpable negligence and the result of that negligence was an appalling mishap which caused the deaths of no less than 21 persons and the infliction of injuries, more or less severe, to several more. We accordingly reject this petition.

The Lower Burma Rulings, Vol IV. Page 350.

CRIMINAL REVISION.

Before Mr. Justice Irwin, C.S.I., Officiating C. J.
KING EMPEROR

v.

M N ATCHATARAMAYYA

1908
Sept, 4

Danger caused by disobedience of Railway Rules—Duty and responsibility of Station Master—Consequences of disobedience of Rules—Collision—Indian Railways Act, 1890, Section 101

A, an Assistant Station Master, expecting the arrival of a Down Mail train in his station, instructed his jemadar to let it come into the station main line, and after it had come in, to set the points at the Up end of the station so as to allow an Up Goods train to proceed from a side line. At the time of issuing these instructions he gave the keys of the points to the jemadar, although the points were already set for the main line. The jemadar without waiting for the Mail to come in, set the points for the side line on which the Goods train stood. On the approach of the Mail, A allowed the signal to be given for it to enter the station without further satisfying himself as required by the rules by which he was bound that the points were correctly set. The Mail in consequence ran on to the side line and collided with the Goods train.

Held that A endangered the safety of many persons by his disobedience of the rules and his conduct therefore brought him within the terms of Section 101 (b) of the Act.

King Emperor v A. G. Dass, (1) followed.

Shanker Balakrishna v King Emperor (2) distinguished.

ABOUT 2-30 A.M. on 25th January 1908 a collision occurred at Nyaungbintha Station. The respondent was Assistant Station Master on duty at the time, and he was prosecuted under Section 101 of the Railways Act 1890. The Additional Magistrate, Youngoo, discharged him. Application was made to the District Magistrate to order further enquiry. The District

Magistrate, while finding that the respondent did not do his duty, and that if he had done his duty the accident could not have occurred, yet considered that he was not criminally negligent within the meaning of the Act. The local Government have therefore directed the present application for revision to be made to this Court.

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There is no doubt about the facts of the case. There are three lines at Nyaunghintha. No 1 is the platform line. No 2 is the main line, on which a running through train would ordinarily run. No 186 Down Goods arrived on the platform line. Then No 183 Up Goods arrived on the main line, and was moved ahead and was shunted back to the third line. Then No 3 Up Mail passed through on the main line. On this particular night, it would pass No 4 Down Mail at the next station North, viz., Pyu. When No 3 Up Mail had passed Nyaunghintha, No 186 Down Goods was despatched to Kanyutkwin. No 4 Down Mail was timed to run through Nyaunghintha but line clear to proceed to Kanyutkwin could not be given to it until No 187 Goods reached Kanyutkwin. At this time the keys of the point were in the possession of the accused. No 3 Up Mail had just passed, therefore it must be assumed that the northern points of lines 2 and 3 were set for the main line 2, the only alternative is that 3 Up Mail must have hurst the trailing points. If the points had not been hurst they were correctly set to let No 4 Down Mail pass, and no alteration in any points ought to have been made until after No 4 Down Mail had passed. This being so, the accused called the jemedar, gave him the keys of the northern points, and told him that No 4 Down Mail was to come in on the main line and stop and after it had come in, he was to set the trailing points to let No 183 Up Goods proceed to Pyu. The jemedar, without waiting for the Down Mail to come in set the points for the third line. Then the Down Mail whistled. The jemedar called for the signal. The accused came out of the office, let down the Home signal, and under his orders the porter let down the Distant signal. The Down Mail came in on the 3rd line and collided with No 183 up Goods.

Of the rules framed by the Government of India under Section 147 of the Act and which came into force on the 1st January 1907, Rule 247 throws on the accused the responsibility for ensuring that all points are correctly set and all facing points securely locked, for the passage of trains. Subsidiary rule (f) (iii) runs thus —

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In the case of running through trains or trains timed to run through the Station Master shall inspect and is personally responsible that all facing points over which the train will pass are correctly set and locked

Subsidiary Rule (j) (i) under the same rule contains the following directions —

If a train which is booked to run through has to be stopped for any cause whatever it must be brought to a stand still by keeping the Home and Outer signals at danger. Engine Drivers of trains that are booked to run through shall when they have been stopped outside signals and are subsequently admitted into the station yard, be prepared to stop there if an authority to proceed is not received at the outer most points.

The accused disobeyed subsidiary rule (f) (iii) by omitting to inspect the points before ordering the signal to be lowered. That brings him within the terms of Clause (b) of Section 101. His culpability is greatly increased by the fact that he gave the keys to the jemadar before the Down Mail came, as he knew that they would not be required until that train had passed.

The accused said that he saw the Down Mail stop at the outer signal. He is contradicted in this by the driver, and is not supported by any witness. In case of any further proceedings being taken, it would be necessary to enquire further into this, as no notice was taken of it by the Magistrate. If the train did not stop at the Outer signals, the accused disobeyed subsidiary rule (j) (i) by ordering the porter to lower the signal. The Additional Magistrate held that the accused was not guilty of negligence and that it was not proved that he had endangered the life of many persons. Neither of these questions was strictly in issue. The questions were whether he disobeyed a rule which he was bound to obey, and whether he thereby endangered the safety (not necessarily the life) of any person. It is proved up to the hilt that he disobeyed the rule which he was bound to obey, and I do not think the Magistrate could have arrived at the conclusion that he had not endangered the safety of any person if he had read the report of *King Emperor v A. C. Dass* (1). It is quite obvious that his disobedience of rule by making it possible for the jemadar to switch the train on to third line, very greatly endangered the safety of many persons on the Mail train and of the driver and fireman of the Goods train. The case of *Shankar Balakrishna v King Emperor* (2) was relied on by the accused. It is in no way parallel to the present case. The disobedience was of a very different kind, and the consequences altogether unexpected.

The District Magistrate came to no finding on the points really in issue

King
Emperor

The learned Government Advocate did not press for further action against the accused as he has been under suspension for several months. What is desired by the prosecution is an emphatic pronouncement by this Court that disobedience of rules such as is proved in this case is punishable by imprisonment. Such a pronouncement it is believed will be more effectual than many departmental punishments in preventing future disobedience. The ruling in Das's case which I cited above ought to be sufficient warning to Railway servants and guide to Magistrates, but probably it had not been published when the District Magistrate dealt with the present case. For that reason I abstain from making any order for further enquiry into the case.

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The Lower Burma Rulings, Vol. IV. Page 353.

CRIMINAL APPEAL.

Before Mr. Justice Irwin, C.S.I.

KING-EMPEROR

v.

PO GYI

No 530 OF 1908

Danger caused by disobedience of Railway Rules—Duty and responsibility of Station Master—Consequence of disobedience of Rules—Indian Railways Act 1890 Section 101

1908
Dec 14

A, an Assistant Station Master at Pyuntaza, having ascertained that the line was clear to Daiku the next station, gave the ticket conveying authority to proceed to the Guard of a Down train, which was then waiting at his station. He then received a message from Daiku asking him to withdraw the ticket in order to allow an Up train to proceed from Daiku to Pyuntaza. In contravention of the rules by which he was bound he at once signalled to Daiku that the line was clear, without first getting back the ticket from the guard. On going out to get the ticket he found that the Down train had started. The result was that the two trains met between the stations although the drivers were able to stop in time to avoid a collision.

Being prosecuted under Section 101 of the Railways Act for endangering the safety of persons by disobedience of rules A pleaded that he told the Guard of the Down train not to start without telling him

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Held, that although if the Guard started without A's verbal permission he also contravened a rule A's disobedience of rule in connection with the written ticket was the more serious and was the principal cause of the danger that ensued A was convicted under Section 101, and was sentenced to a term of imprisonment. *Shanker Balakrishna v King Emperor* (1) distinguished

Young—Government Advocate

D M Karaka—for Respondent

THE accused, who was Assistant Station Master on duty at Pyantira Station, received intimation from Daiku that the line was clear for No 180 Down Goods, and he then prepared the line clear ticket, or "authority to proceed," and handed it to the Guard of No 180 Down Goods. Shortly afterwards, Daiku asked him to cancel the line clear he had received and allow No 89 Up to take precedence. He did so at once, without taking back the line clear ticket he had given to the Guard, and he gave line clear to Daiku for the No 89 Up to come. Then he went out to look for the Guard, and found that No. 180 Down had started. The two trains met on the single line about half way between the two stations, but fortunately each driver saw the lights of the other train in time to avert a collision.

The act of giving the line clear for the No 89 Up without first getting back the line clear, which he had given to the Guard of No 180 Down, was a flagrant disobedience of rule 19 of Chapter III of the Regulations for signalling trains. Accused was charged under Section 101 of the Railways Act, 1890, with endangering the safety of the persons on both the trains by this disobedience of the rule. His defence was that he told the Guard not to start without first telling him. Rule 269 of the general rules prohibits a Guard from starting his train until he receives permission from the Station Master. Such permission is given orally, and is a separate matter from the written line clear ticket.

The Magistrate held it not proved that the accused gave the Guard permission to start, and therefore he found that the responsibility for the accident lay on the Guard, and not on the accused, as his act seemed to the Magistrate to entail no danger, and appeared too remote a cause for the incident which had happened. He was guided by the ruling in the case of *Shanker Balakrishna v King Emperor* (2) in which a Station Master wrote a line clear message, which he had not in point of fact received, <ft

it unfinished on his table in the book, the guard came in and took it away without permission, and acted on it. Assuming that that decision is correct, it is no authority for deciding the present case, as the facts are entirely different. The Guard's act in taking the ticket without leave out of the book was held to be an extraordinary one, and entirely unexpected. It does not require much knowledge of human nature to know that when a Guard of an empty train is given a proper line clear ticket nobody need be much surprised, if he starts without any further permission. The giving of oral permission is such an informal matter, and so difficult to prove or disprove, that it is certain to be regarded by railway servants in general as a thing of very small consequence compared to the written line clear. As a mere matter of common sense, I must regard the accused's disobedience of rule 19 as an intensely dangerous act. It was the principal cause of the two trains meeting on a single line. If the Guard started without further oral permission, that was a minor cause, and contributed in much a smaller degree to the danger which ensued. Whether the guard is to blame for the danger to life or not is quite irrelevant in the present case. The chief blame must rest on Maung Po Gyi for giving line clear for the Up train while a line clear ticket for the Down train was in the possession of the Guard of the Down train.

I therefore set aside the acquittal of Maung Po Gyi, and I convict him for endangering the safety of many persons by disobeying a rule, which he was bound to obey, an offence under Section 101 of the Railways Act 1890, and I sentence him to one month's rigorous imprisonment, a lighter sentence than I think the Magistrate ought to have passed.

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Emperor
Po Gyi

**The Punjab Law Reporter, (1910) Criminal
Case No. 8**

CRIMINAL APPELLATE

*Before Sir Arthur Reid, Kt, Chief Judge and Mr. Justice
Rattigan.*

CROWN, APPELLANT*

v.

GANESH DAS (ACCUSED), RESPONDENT

OR CASE No 369 of 1909

*Railways Act (IX of 1890) Section 101—Railway—Rash or Negligent act—
Act endangering the safety of a person*

1910
Feb 5

Under Sec 101 of the Railways Act the offence consists in (1) disobeying rules or doing any rash or negligent act and (2) thereby endangering the safety of any person. It is not sufficient to show that the act of the accused or any omission on his part was likely to endanger the safety of any person. It must be proved affirmatively that it did in point of fact so endanger any person's safety.

The Assistant Station Master of Talwandi allowed a Goods train to proceed to the next station Dogra without informing the staff of the latter station of his doing so and without previously obtaining a line clearance from that station. A passenger train was nearing Dogra from the opposite direction and the Goods train was detained at the Distant signal of the Dogra Station till line was clear to receive the Goods train.

Held that the Assistant Station Master could not be convicted of the offence under Section 101 of the Railways Act.

13 P R 1906 Cr SC 59 P L R 1907, IV Burma L R 354 I L R VI Mad 201 IV Burma L R 139, A I C W N 173, I L R XXXII Cal 73; 7 P R 1892, Criminal Revision No 1049 of 1894 referred to.

Mr Petman for Government Advocate, for Appellant

Mr Morrison, Advocate for Respondent

JUDGMENT—Reid, C J, and Rattigan J—This is an appeal by the Local Government from the order of the Sessions Judge, Ferozepur, acquitting the Respondent, Ganesh Das, of the offence with

* Appeal from the order of H SCOTT SMITH, Esq Sessions Judge Ferozepur Division dated the 26th April 1909 reversing the order of F W S Kaur Esq Magistrate 1st Class, Ferozepur dated 22nd March 1909, sentencing the accused.

which he was charged under Section 101 of the Indian Railways Act, IX of 1890. The facts are not in dispute before us. Briefly summarised, the case stands as follows — Ganesh Das, was the Assistant Station Master at Talwandi, a station on the Ferozepore-Ludhiana branch of the N-W Railway, and he was charged with having endangered the safety of various persons by disobeying rules, or by rash or negligent acts, or omissions, the allegations for the prosecution being that the accused, while on duty at the said station, on the night of the 9th and 10th September 1908, (1) allowed a "Down Special Goods train" to proceed from Talwandi to the next station on the line Dogra, without having first obtained what is technically known as "a line clear," message from Dogra, and without having informed the Dogra authorities of the departure of the said train, and (2) gave "a line clear" message to Dogra for No 61 Up mixed passenger" to proceed from that place to Talwandi along the same line of rail before he had been duly notified of the arrival at Dogra of the Special Goods train.

The Magistrate, who tried the case in the first instance, and the Sessions Judge have accepted the facts as stated by the prosecution and no attempt was made by Mr Morrison, who appeared for the Respondent in this Court, to contest these findings. It appears, however, that the Special Goods train arrived at the distant signals of Dogra at 3.25 A.M. The signals were against it and it had therefore to stop at the spot but, its arrival there was duly notified to the Dogra authorities, and it is admitted that they knew of its arrival some minutes before the No 61 arrived from the opposite direction, and that the Dogra authorities could not in the circumstances allow the latter train to proceed before the "Goods Special" had been duly provided for. Upon these facts, the Sessions Judge, relying upon the authority of *Queen v Manphool*,⁽¹⁾ has acquitted the accused on the ground that, however culpable his negligence may have been, he cannot be said to have endangered the safety of any person in either train, the Special Goods train having actually arrived (to the knowledge of the Dogra authorities) at the Dogra out signals before the Mixed Passenger train arrived at the same station. The latter train would therefore not have been allowed to proceed on its journey until the "Special Goods" train had been brought on to the other line.

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v

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The authority cited is distinctly in point and after full consideration we can see no good reason for differing from it. Mr Bevan Patman, who appeared for the Crown, has referred us to several cases in which this authority has been discussed and distinguished, but in none of them do we find any doubt thrown upon its correctness, (e g, 13 P R 1906 of (Cr) S C, 59 P L R 1907, IV Burma L R 354, I L R VI Mad 201, IV Burma Law Report 139, XI C W N 173, I L R XXXII Cal 73, 7 P R 1892, Cr Rev No 1049 of 1891.

Under Section 101 of the Railways Act the offence consists in (1) disobeying rules or doing rash or negligent act and (2) thereby endangering the safety of any person. It is not sufficient to show that the act of the accused or any omission on his part was likely to endanger the safety of any person. It must be proved affirmatively that it did in point of fact so endanger any person's safety. In the present case any possibility of an accident was averted by reason of the fact that the Special Goods train arrived at the Dogra Distant signal before the Mixed Passenger train arrived at that station and therefore it cannot be said that the safety of any person in either trains was actually endangered on the occasion in question. We quite agree that, if the fact has been different, if, for instance, the Mixed Passenger train had been started off from Dogra prior to the arrival of the Goods Special on the same line of rails the accused would rightly have been convicted of an offence under Section 101 of the Act, and this too, though no actual collision had occurred. In that event, his act or omission would unquestionably have resulted in endangering the safety of persons in the two trains. The cases above referred to are authorities for this proposition, but they go no further. In the case before us, however, the facts are very different and it is impossible to say with the knowledge we have of what actually occurred, that any person's safety was really endangered on the night in question. The Ruling of the Bombay High Court in I L R XIX Bom 715 upon which Mr Bevan Patman, laid particular stress is not in point. In that case the offence with which the accused was charged was one under Sec 279, I P C, and under that section the acts punishable are not only such rash and negligent driving or riding as endangers human life, but also such rash or negligent driving or riding as is likely to cause hurt or injury to any other person. The mere fact, therefore, that a public road happens, at the moment, to be empty is not *per se* a ground for acquitting a person of the

offence under that section, for his rash driving or riding in such public road is likely to cause injury to human life, even though in point of fact he had by the intervention of Providence, not endangered the safety of any person. But in the present case, we have to see whether the act of the accused actually endangered the safety of any person. It was a rash and negligent act, and it might have resulted in disastrous consequences. In point of fact, however, it is impossible to say that any person's safety was in the circumstances endangered, and it is to this alone that a Court has to look when dealing with a charge under Section 101 of the Railways Act.

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In our opinion the ruling relied upon by the Sessions Judge is relevant and should be accepted. We accordingly reject the appeal.

Appeal Rejected

**Southerland's Weekly Reporter, Vol. VIII. Page 43,
Criminal Rulings.**

CRIMINAL REVISION

*Before The Hon'ble L S Jackson and
O P. Hobhouse, Judges.*

QUEEN

v.

R FLOOD*

Railway accidents—Duty of Guard

Where some coolies were employed in assisting a ballast train into motion at a Railway Station and one of them, after pushing the train, in getting up on the train, or in attempting to do so fell and was so injured that he afterwards lost his life—*Held*, that the evidence did not show that it was the duty of the Guard to see that no one got up on the train when in motion.

1867
July, 22

JACKSON, J.—It appears to me that this conviction ought to be set aside.

The petitioner was convicted by the Magistrate on a charge "that he, being a Guard in charge of a ballast train, and as such

* Revision under Sect on 401 Code of Criminal Procedure

Queen
R Flood,
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amenable to the Regulations of the Railway Company, and thereby being bound to exert himself to prevent any breach of the bye-laws by passengers or others, did negligently omit to exert himself to prevent certain coolies, being persons about to proceed by a ballast train, from entering the aforesaid train after it was in motion already, one of them through falling under the train sustained serious injury which resulted in his death, and that he has thereby committed an offence punishable under Section 26, Act XVIII of 1854." On appeal to the Court of Session, the Sessions Judge stated "There is a clear breach of the bye-laws, especially Section 12, Clause 5, and Section 11, Clauses 6 and 20, and he is rightly convicted, under Section 26 of Act XVIII of 1854, in having negligently and wilfully omitted to do what he was legally bound to do, and by which omission the lives of the coolies travelling in the carriages, and the coolies on the line, were endangered."

The first and principal objection raised by the Vekeel for the petitioner in this case is that the petitioner has been convicted under Section 26 Act XVIII of 1854, for having neglected to do something which he was legally bound to do, that Section 29 interprets the expression "legally bound to do something" as meaning the obligation of a railway servant to do everything necessary for or conducive to the safety of the public, and which he shall be required to do by any Regulation of the Company allowed by the Governor-General of India in Council, and of which Regulation such officer or servant shall have notice, but that, notwithstanding this, there was no evidence whatever to shew the existence of any Regulations so made and allowed by the Governor General in India, or that the petitioner had notice of such Regulations, or that the act charged was a breach of such Regulations. Manifestly, in order to establish an offence under this section, it would be absolutely necessary to give evidence of such Regulations. The Magistrate having omitted to take evidence upon that point it would be competent to the Appellate Court under Section 422 of the Code of Criminal Procedure, to direct additional evidence to be taken upon that point, and, if this were the sole objection to the conviction raised before us, I think it would be our duty to order the Appellate Court, the Court of Session to exercise the power which it possessed under Section 422 and to direct a further enquiry to be made upon that point, so that the prosecution might be enabled to show that there were such Regulations, and that the prisoner committed a breach of them because

REMARKS
FOR

if the petitioner, by committing an act which was punishable, it was his right that he should be allowed to escape his punishment. But, upon careful consideration of the Regulations in this case, it appears to me that, if the Regulations which have been referred to before us were put in evidence, they would not establish the commission by the petitioner of any offence. From those parts of the Regulations or bye laws which I have heard read, it appears to be the duty of the guard and the petitioner held the situation of guard, to take charge of trains when in motion, and apparently it would be his duty to take all precautions prescribed by the Regulations to prevent danger to passengers or others while the train was in motion. It does not appear to be the duty of the Guard to take those precautions, nor is the train under his special control, while at the station. Apparently that is the duty rather of the Station Master, at any rate, it is not shown to be the duty of the Guard. Now, the evidence in this case shows that when the train was started, the Station Master was apparently present on the platform.

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This seems to point to the responsibility resting upon some one else rather than with the petitioner, but I think that we may go further than that. It seems to me that the Legislature, in enacting the sections referred to, had chiefly in view the protection of the public, and especially of passengers and other persons not directly connected with the railway, and I very much doubt whether it was the intention of the Act to make the officers responsible for risks to fellow servants arising out of the particular duty in which they are engaged.

Now, these coolies of whom the deceased person was one were persons actually employed upon the ballast train in question. That train was at first in the siding. To come upon the main line from that siding, the train had to pass over a curve. It appears from the evidence that the engine was not a powerful one, that the grease in the axle-boxes had become congealed, and that consequently the engine from these united causes was unable to overcome the resistance which the curve line presented, and it was necessary to employ the coolies for the purpose of putting the train in motion. There seems to be no reason why coolies employed upon the ballast train, presumably accustomed to work of this description, should not be allowed to move the ballast train any more than they should be allowed to move any

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other heavy body By the agency of their coolies, the train was moved from the siding into the main line Then it appears to have been brought to a stand-still, and after that a signal was given for the train to start

There is some conflict of evidence as to whether the train was started again with the assistance of the coolies or not Probably the coolies did assist

The Guard denies, and the engine driver denies, that he gave any orders for the coolies to push the train upon this occasion It seems quite probable that the coolies did not receive direct orders from the Guard. Then, is he answerable for the fact that they did so assist? It appears to me that he is not At any rate not answerable under the Act The Station Master was present, and this happened therefore under his eye, and I should rather say on his responsibility I say this of course merely for the purpose of showing that, in my opinion, the Guard was not directly responsible Whether, therefore, the coolies actually assisted in the starting of the train or not, it appears to me that the accident which occurred was one for which the petitioner was not responsible It is quite clear that it will occasionally happen in the case of an engine of defective power that manual labor of some kind will be required to start the train Then if the engine is to be stopped, and the coolies are to mount upon the carriages before the train gets into motion, it is quite evident that they will have to get down again and so on *ad infinitum*, or else the train will never be got into motion at all I therefore think that we ought not to direct a further enquiry, with a view to the Regulations and the sanction of them by the Governor General being put in evidence, but that the evidence discloses no case against the petitioner, and that the conviction ought to be set aside

Honnouse, J —I concur that this conviction must be set aside

I will take those facts of the case which I consider to be most against the prisoner, and I still think that there is not sufficient evidence to convict him of the offence with which he was charged I will take the facts to be that, when the train in this instance was upon the main line, a certain number of coolies amongst whom was the person who was so injured that he afterwards lost his life, that a certain number of coolies were employed in assisting the train into motion I will then take the facts to be that the person who was injured, after pushing

the train with a number of others for a certain distance, got up upon the train, or attempted to do so while it was in motion and that he thereby fell, and was injured. Then the question seems to me to be this, was any body, or rather was the accused in this instance, the person whose duty it was to start the train, and was it also his duty, before starting the train or at any other time, to see that, when the train was in motion, this particular person and others who were pushing the train did not get upon it? It seems to me that, if it was his duty in the first instance to have started the train and then to have seen that no one got upon that train at the time when it was in motion, then undoubtedly it would have been by the omission of that duty that this particular cooly in this instance lost his life. But looking to the evidence, and especially to the evidence of a person named Lall Behary, it appears to me that the prisoner in this instance was not the person whose duty it was to start the train, or to see that no persons got upon it while it was in motion, and that, if there were any such person so far as the evidence goes, it was not the prisoner, but rather the person abovenamed, viz, Lall Behary. At any rate, it is quite clear to me that the evidence, if there was any evidence against the prisoner which would have proved that this was his duty and that he had neglected it, was the evidence of certain bye laws which were not put in evidence at all, and of which it was not shown, as it should have been as the law prescribes, that the prisoner was cognizant.

For these reasons I concur that this conviction must be set aside, and the fine remitted.

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The Bombay Law Reporter, Vol. XII, Page 930.

CRIMINAL APPELLATE.

Before Sir N. G. Chandavarkar, Kt, and
Mr. Justice Heaton.

EMPEROR

v.

DONALD BRUCE WEIR.*

1910
Sept 2

Indian Railways Act, IX of 1890, Section 47—General Rules—Great Indian Peninsula Railway Working Time Table, Order VII—Rules not invalid—Ultra vires—Guard's duty to see the pair of Points to ensure the safety of his train

The rules in Order VII of the G. I. P. Railway Working Time Table though not made under Section 47 of the Indian Railways Act are yet absolutely within the power of the Company to impose, so long as they are not inconsistent with the Railways Act or with the general rules made under that Act. The Rules in Order VII are merely administrative orders or executive directions nevertheless, the Company's servants are bound to obey them. There is no inconsistency between the rules in Order VII and the Railways Act or the General Rules made under that Act.

The object of the rule 1, Order VII, is that the guard of a train waiting at a station on a loop line in order to enable another train running in the opposite direction to cross at the station, is to prevent a collision with his own train, in other words, he is to secure the safety of his own train by seeing to the particular pair of points which lead into the line occupied by his train.

DONALD BRUCE WEIR was the guard of a goods train, in the service of the Great Indian Peninsula Railway. The goods train in his charge was proceeding from Barsi Road to Bombay, and at 17-50 on the 4th March 1910, reached Bhalvani Station, which is a non-interlocked station on a single line of railway.

The goods train was received on the additional pair of rails, known as the loop line, at the Bhalvani Station, for a down mixed train from the Bombay side was expected to arrive there shortly.

The guard of the goods train went, in company of the pointsman, to the outermost facing points to see that they were properly set and locked for the mixed train to pass on to the main line. They did so, and waited there till the mixed train was received on the main line at the Bhalvani station at 17-55. The train left Bhalvani for Kom at 18-5, which it reached at 18-22.

Immediately after the mixed train passed the facing points safely, the guard returned to the station, and asked the Station Master for a line clear of his train to proceed further up towards Bombay. But the Station Master declined to give it as he expected the down Postal Express to arrive at Bhalvani.

The guard's version was that he then left a word with the Station Master that he was going to the driver of his train on the engine to have a cup of tea and he should be informed when the Express left Jeur, the station ahead of Bhalvani. The story of the Station Master was that he was not so informed.

In the meanwhile, the pointsman, who was at the points and who did not know anything about the down Postal Express, reset the points to allow the goods train to pass out to Jeur, fully expecting that it would next proceed out of Bhalvani.

The Station Master did not, as a matter of fact, inform the guard, nor did he personally go to the facing points as it was his duty to go. As the Postal Express was to run through Bhalvani Station, it was also the Station Master's duty to go personally to the points to hand over the line clear message to the driver of the Express. He, however, thought that the points that were correctly set for the mixed train were in that condition, and lowered the signal for the Express.

When the guard noticed the lowering of the signals and the smoke of the Express engine in the distance, he rushed forward to the points to see if they were correctly set, but before he could proceed more than 300 yards the Express passed the signals, crossed the points, took the loop, and ran into the goods train. This occurred at 18-20, and the collision resulted in a great loss of property and in some injuries to the running staff on the Express.

Under these circumstances, the guard was prosecuted under Section 101 (1), (c) of the Indian Railways Act 1890. He was tried by the First Class Magistrate of Sholapur, who convicted him and sentenced him to pay a fine of one Rupee.

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The guard appealed to the High Court against the conviction and sentence

The District Magistrate of Sholapur, being of opinion that the sentence passed upon the guard was inadequate to the gravity of the offence, referred the case to the High Court for enhancement of sentence.

Kolasakar with Ratanlal Ranchoddas, instructed by *Ardeshir Hormasjee Dinshaw & Co*, for the guard.

G S Row, Government Pleader, for the Crown

HATON, J.—About 18-20 on Friday the 14th March 1st the special weekly Postal Express from Bombay to Madras left the main line which is a single line at the points on the Bombay side of the Bhalvan Station, ran on to a loop line and collided with a goods train on that loop line. Had the main line points been properly set and locked this could not have happened, but they were not properly set and locked, they were set so as to take any train coming from the Bombay direction on to the loop line though they ought to have been set so as to keep it on the main line. All this is admitted. The mistake happened in this way. The goods train came into Bhalvan about 17-50, proceeding towards Bombay and took up a position on the loop line. Shortly after it arrived a down mixed train, that is a train coming from the direction of Bombay, came in. For this train the points were correctly set, so it kept on the main line and passed into the station. At this time a muccadam was in charge of the points. After the mixed train had passed, the muccadam being under the impression that the goods train would then pass out going towards Bombay, set the points accordingly. The result was that the goods train could have passed out on to the main line and proceeded towards Bombay, but also that any train coming from Bombay must necessarily leave the main line at the points and run on to the loop line where the goods train was. The goods train did not leave, as it was known that the Postal Express would presently arrive but the points were not altered, the Postal Express arrived and the collision happened.

Primarily, the Station Master was responsible, but it is said and seems to me rightly so, that the guard of the goods train was responsible for the safety of his own train, it is also alleged that had he, as it is said he was bound by the Rules to do, seen that the main line points were properly set the collision

could not have happened. In respect of his neglect of duty the guard of the goods train was charged by the First Class Magistrate at Sholapur as follows.—

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"That you on or about the 4th day of March 1910 at Bhalvan being a Railway servant, endangered the safety of persons travelling in the down Postal Express by disobeying the Order No VII rules 1 and in set out in Working Time Table, Part II by not going to the facing points to see that they were so set as to ensure the safety of the up goods train in your charge then standing in the siding at Bhalvan station waiting for the down Postal Express to pass and waiting at the points till the said Express had passed with the result that the points being incorrectly set the Express collided with the said goods train in your charge, and several persons in the Express were injured thereby and further that the said facts disclose a negligent omission on your part, the abovementioned rule not being inconsistent with the General Rules published under the Railway Act and which you were bound by the terms of your employment to obey and of which you had notice and thereby committed in offence punishable under Section 101 (b) and (c) of the Railways Act and within my cognizance."

The Magistrate has written a very clear and careful Judgment, has found the guard guilty and has imposed a nominal punishment. Against the conviction the guard has appealed to this Court, as being a European British subject, he has a right to do. The District Magistrate has also referred the case to us for the purpose of enhancing the sentence.

The duty, which it is said the guard of the goods train failed to perform, is imposed by order VII in the G. I. P. Railway Working Time Table, Part II. The Rules in Order VII are not made under Section 47 of the Indian Railways Act; nevertheless they are absolutely within the power of the G. I. P. Railway Company to impose, so long as they are not inconsistent with the Railways Act or with the General Rules made under that Act. The rules in Order VII are, it is true, merely administrative orders or executive directions, nevertheless, the Company's servants are bound to obey them. The guard of the goods train was bound by the terms of his employment to obey them and he had notice of them.

There is no inconsistency whatever so far as I can see between the rules in Order VII and the Railways Act or the General Rules made under that Act.

On all these matters the Magistrate has arrived at a correct conclusion and has given good reasons for so doing. I think also that he is right in his appreciation of the evidence.

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In this otherwise deplorable case, it is satisfactory to find that the Magistrate was rightly able to describe the accused's statement as frank. He may not have accurately remembered what passed between him and the Station Master, but substantially, to the best of his recollection he has told the truth. He, in his statement, had not put forward idle excuses. It would have been better, had his counsel followed his example.

It is perfectly clear that the main line points were not correctly set. It is equally clear that the guard thought it was his duty to see that they were properly set, it is also clear that the guard had ample opportunity to reach the main line points. He knew that the Postal Express would presently arrive, but so far as he knew, there was ample time for him to do other things before it would be necessary for him to go to the points. He also knew that if the station staff did their duty he would in some way receive further warning before he need go to the points. So he joined the driver of his train and had tea with him. In so doing he ran the risk, should others fail to do their duty, of being too late to reach the main line points in time to see that they were correctly set. But what ought to have happened and what in the ordinary course of things would happen did not happen. The guard received no further warning and the Postal Express came in sight whilst he was still with the driver on the engine. He then did what was possible but that did not enable him to avert a collision. Had he simply done what he believed to be his duty independently of the station staff he could have averted the accident. Therefore it seems to me that if it was his duty to go to the main line points he failed to do it, and failed where he might and ought to have fulfilled it.

It is of vital importance that the guard should perform his duty, though the members of the station staff fail to do theirs. By that means are accidents averted.

It would be unnecessary to say more were it clear that the duty imposed on the guard of the goods train was, as has been assumed, a duty to see the main line points properly set. The duty is founded on the rules in Order VII and on no other rules or instructions. But in a case like the present the rules in Order VII do not impose any duty at all on the guard of the goods train with reference to the main line points. The duty is thus described in Rule 1:—"to see the pair of points facing to the approaching train which lead into the line occupied by his train

are so set and locked and that a collision between the approaching train and his own is impossible." The object of the rule is that the guard should prevent a collision with his train, in other words he is to secure the safety of his own train, and is to do it by seeing to the particular pair of points which lead into the line occupied by his train. Generally speaking, that it would be the nearest pair of points, not a remoter pair. In this particular case it would be points No. 3 on the plan produced in appeal and admitted to be correct. If greater clearness be necessary as to the meaning of rule 1, it is obtained by studying the illustrations given in rule 11. In each case the guard is responsible for the pair of points immediately leading to the line occupied by his train and for no other points.

Therefore the Rules under Order No. VII in this particular case did not impose on the guard the obligation whatever to see the main line points. But the case throughout proceeded the evidence was led, and the accused defended himself, on the assumption that his duty was to see to the main line points, and he has been convicted because he has failed to perform that imaginary duty. The conviction is based exclusively on the failure to obey the rules in this particular, therefore the conviction must fail because no such duty was imposed by the rules. He cannot in this trial be convicted because of failure to obey the rules in another particular, because he was not called on to defend himself as to that and we do not know what his defence may be, or what the effect of the evidence if taken as to that matter would be.

It is a remarkable thing that apparently every one concerned, including the guard himself, supposed that the rules imposed a duty which as a fact they do not impose. There may be many cases in which the points immediately leading to a siding or loop line are the main line points and in such cases the guard would under the rules be bound to look to the main line points, but that is not the case here.

The appellant is acquitted and it is ordered that the fine, if paid, be refunded.

Empress
t
Donald
Bruce Weir

In the High Court of Madras.

*Before Hon'ble Sir T. Muthusami Aiyar and
Hon'ble Mr. Justice Best.*

MARUDAIMUTHU KONIRAYAN,

AND 12 OTHERS, APPELLANTS*

v.

THE EMPRESS, RESPONDENT.

1892
June, 10.

Unlawfully removing rails—Indian Railways Act, IX of 1890, Section 126 (b)

Where the accused had been found guilty of unlawfully removing rails from the South Indian Railway, with the result that an engine and tender were overturned and a van smashed,

Held, that the accused were rightly convicted of an offence under Sec 126 (b) of the Indian Railways Act 1890.

This appeal coming on for hearing on Wednesday, the 8th instant, upon perusing the petition of appeal, and the record of the evidence and proceedings before the Court of Sessions and upon hearing the arguments of Mr W. Grant, Counsel, and Mr. K. Srinivasa Aiyangar, Vakil for the appellants, and of the Acting Public Prosecutor in support of the conviction, the Court, having taken time to consider till this day delivered the following

JUDGMENT.—The appellants, 13 in number, have been convicted of the offence of dacoity, and also of unlawfully removing rails from the South Indian Railway at the 240th mile, within the limits of Kuttapal village in Trichinopoly Taluq, thereby endangering the safety of persons travelling on the Railway, and have been sentenced each to transportation for life.

The evidence shows that on the night of 28th September last a train was wrecked at the place indicated above, in consequence of rails having been removed, two from the north and one from the south side, that 8 or 9 carriages as well as the engine and tender were overturned, and the van in which the cash chest

*Criminal Appeal No 36 of 1892 against the sentence of the Court of Sessions of the Trichinopoly Division in Case No 42 of the Calendar for 1891.

were, was smashed, and a number of robbers thereupon pelted stones and removed the chests containing cash and currency notes exceeding Rs 5,000 in all

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The appellants were tried by a jury for the offence of dacoity, and by the Judge with the aid of the members of the jury as assessors for the offence under the Railway Act

The jury found all the appellants guilty of the offence of dacoity, and the Judge, concurring with them as assessors, found the appellants also guilty of the offence under Section 126, clause (b), of Act IX of 1890. It is not denied that the offences in question were committed, but it is contended that appellants have been wrongly convicted of the offences

The verdict rests in the main on the evidence of the 23rd and 24th witnesses for the prosecution, the former of whom is an approver and the latter a man who was the first prisoner in the case, and having pleaded guilty was convicted and sentenced before being examined as a witness in the case

The first objection taken on behalf of the appellants is that, the 24th witness being also an accomplice, the Judge erred in telling the jury that his evidence ought to be accepted as corroborative of that of the approver. There can be no doubt we think, that the evidence given by the 24th witness after he was convicted and sentenced, stands on a different footing from that of an approver or unconvicted accomplice. As observed by Sir B PEACOCK in *Queen v Elahce Buksh* (1) when the Judges speak of the danger of acting on the uncorroborated evidence of accomplices may refer to the evidence of accomplices who are admitted as evidence for the Crown in the hope or expectation of a pardon. The Judge was therefore justified in saying that there was a great difference between the evidence of the 23rd and 24th witnesses and that the jury might look to the evidence of the latter for confirmation of the story told by the approver. We find, however, that the Judge at the same time pointed out to the jury that the 24th witness was an infamous person whose evidence should be carefully weighed and would probably require confirmation

According to Section 183 of the Evidence Act a conviction is not illegal even if it proceeds upon the uncorroborated testimony of an accomplice. The Judge has accurately explained the law to the jury, and we cannot accede to the contention that the direc-

(1) 5 W R Cr P at p 80

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tion that the jury may look to the evidence of the 24th witness for confirmation of the approver's story was wrong in law

As regards the other corroborative evidence in the case it relates only to the 2nd, 3rd, 6th and 12th accused. In each case the Judge has fairly discussed the evidence and has not said anything likely to prejudice the accused.

As regards the absence of 2nd prisoner from his duty at the Railway Station on the night in question, the Judge has pointed out that the accused may have come later in the night without reporting himself.

As regards the evidence of the Deputy Magistrate that 2nd and 3rd accused admitted their guilt and promised to produce stolen property, but subsequently failed to do so, the Judge merely told the jury that if they believed this evidence it would be corroborative of that of the approver and 24th witness. But he at the same time called the attention of the jury to the evidence of two witnesses for the defence also, and that 2nd and 3rd accused denied all knowledge of the offence and he left them to decide which of these two stories is true.

As regards the picking out of 2nd and 3rd accused by the approver Sanjli from a number of men shown to him at the subsidiary jail, the Judge took care to tell the jury that he did not think that a matter of much importance.

With regard to the evidence of the 31st and 32nd witnesses, that 6th and 12th accused had asked them on the previous day to join in committing the dacoity, the Judge's observations are open to no objection.

There is this further corroborative evidence only with regard to 2nd, 3rd, 6th and 12th accused, while as to the rest the only evidence supporting the verdict is that of the approver and 24th witness, and as the jury have found all the appellants guilty, it is clear that they were satisfied that the evidence of the approver and 24th witness is true and we cannot say that their verdict with regard to the offence of dacoity is not legal. We also see no reason to differ from the Judge's finding as to the offence charged under the Railway Act.

The offence being of a serious nature imperilling as it did the lives of the persons travelling in the train that was wrecked we cannot say that the sentence of transportation for life is excessive in the case of the majority of the offenders. We find however, that the 4th, 8th, 12th and 14th accused are youths whose

ages vary from 15 to 20 years who seem to have taken no prominent part in the offence. In the case of each of these, a sentence of rigorous imprisonment of seven years is, we think, sufficient. We therefore commute the sentence of transportation for life to one of rigorous imprisonment for seven years in the cases of accused Nos 4, 8, 12 and 14 and confirm the sentence in the cases of the other appellants.

Marudamuthu
Konirayan
v
The
Empress.

The Bombay Law Reporter, Vol. I., Page 682.

CRIMINAL REFERENCE

Before Mr. Justice Parsons and Mr. Justice Ranade.

QUEEN EMPRESS

v.

KALIA KATIA *

Indian Railways Act (IX of 1890) Section 126—Maliciously wrecking or attempting to wreck a train—Offence—Abetment

1890
Sep 11.

The accused confessed that he knew of the plot to remove the rails and that he kept watch while the act was being done.

Held that the action of the accused amounted to abetment of the offence mentioned in Section 126 Indian Railways Act 1890.

The accused, with others, was charged before the Sessions Judge of Thana with having removed rails or helped others to remove them and so causing an accident near Palghur to a train on the night preceding 18th May, which resulted in injuries to passengers and two deaths.

During the course of the trial Kalia confessed that he had learned that the rails had been removed. He then mentioned Birkia and others as having planned the offence and having gone to do it, he said they had asked him to keep a watch and that he did not know when they returned.

The Jury came to the conclusion that the accused was not guilty of the offence. The Sessions Judge, however, was of a different opinion, and he referred the case to the High Court.

* Criminal Reference No 87 of 1899 made by M B Tyabjee, Esq Sessions Judge of Thana under Section 307, Criminal Procedure Code 1845

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v

Kalia Katia

under Section 307, Criminal Procedure Code The following are his reasons —

In this Court Kalia said first that he had made the statement to the Second Class Magistrate in consequence of a beating, he said then, 'I did not go to derail the train, what do I know what the others were doing?' He then admitted having been sitting in the shed before the train was wrecked, but he said he had sat there to enjoy the night air, after dinner. Later he admitted the truth of his statements to the Magistrate adding however that he did not go himself to take up the rails.

"It appears to me that when all his statements are considered together they justify the conclusion that Kalia knew that the rails were going to be displaced that he was asked to be on the watch to prevent the men committing the offence being detected or disturbed, and to give false information if any one made enquiries and that he agreed to do this and sat watching.

Mr F S. Talyarkhan, with Messrs Crawford & Co, for the B B & C I. Railway

Naubazada Nasrullahan with Mr R R. Desai, for the Accused.

PER CURIAM—The accused throughout has confessed that he knew of the plot to remove the rails and that he kept watch while the act was being done. It may be that he did more than this, but there cannot be a doubt that he is guilty of doing as much as he admits he did, which action of his amounts to abetment of the offence mentioned in Section 126 of the Indian Railways Act, 1890. We convict him of that offence and sentence him to five years' rigorous imprisonment.

Weir's Reports, Page 875.

In the High Court of Madras

CRIMINAL APPEAL

Before Sir S Subrahmania Aiyar, K.C.I.E.,
and Davies, J.J.

MUNUSAWMY (PRISONER), APPELLANT *

1902
December 2

Indian Railways Act IX of 1890, Section 126—Endangering the safety of persons—Unlocking Turn table

Accused who unlocked and turned the turn table at a Railway Station was held guilty of an offence falling within clause (c), Section 126 of the Railways Act, IX of 1890, though his act was, at the time that it was done, not likely to cause injury to any person.

*Criminal Appeal No 646 of 1902

The accused was charged with having unlocked and turned the turn table at a Railway Station with the knowledge that he was thereby endangering the safety of persons travelling or being upon the Railway and thereby committed an offence punishable under Section 126 of the Railway Act IX of 1890. There were, however, no engines on either side of the line just then.

JUDGMENT.—Though in the circumstances under which this offence was committed there was little likelihood of injury being caused to any one, the act was one falling within the purview of Section 126 of the Railway Act. Considering, however, all the circumstances, we think the punishment inflicted is excessive, and accordingly reduce the sentence from three years to 3 months' rigorous imprisonment.

In the Chief Court of the Punjab

APPELLATE CRIMINAL

Before Mr Justice C. A. Ros and Mr Justice H. T. Rivas

ARTHUR GREY (ACCUSED), APPELLANT*

v.

THE EMPRESS, RESPONDENT

Ticket, travelling without beyond authorized distance—Recovery of excess charge under Indian Railways Act, IX of 1890 Section 113—Excess charge not a fine, though recoverable as such

1891
June 6.

The accused purchased a ticket available between Rawalpindi and Gujranwala but continued his journey to Lahore without having purchased a ticket for the journey from Gujranwala to Lahore. Upon proceedings being instituted under Section 113 of the Indian Railways Act, 1890 to recover the excess charge under that Section

Held upon the facts of the case that the accused was liable to pay the excess charge, that an excess charge though recoverable under the Section as a fine is not a fine, that the demand prescribed by the Section need not be made at once or within any particular limitation of time, that the Railway servant appointed by the Railway Administration to make the demand need not have been so appointed when the passenger infringed the provisions of the Section but that it is sufficient if he was duly appointed at the time of making the demand.

The duties of Magistrates in such cases defined

* Criminal Appeal Case No 98 of 1891 against the order of J. W. O'Brien, Esq., Magistrate, 1st Class Lahore dated the 6th April 1891.

Grey
v
The
Empress

APPELLANT—In person

For Respondent—Mr *Sinclair*, Junior Government Advocate
RIVAZ, H P—The facts out of which the present application has arisen are practically undisputed. On the 1st October 1890, Mr Arthur Grey, Barrister-at-Law, arrived at Lahore by the morning train, having travelled direct from Rawalpindi. The ticket, produced by Mr Grey at the Badami Bagh Station, where the tickets for Lahore were collected, was from Rawalpindi to Gujranwala only, and the reason of this was that Mr Grey had, when he started on his journey, intended to leave the train at the latter station, and only elected to continue his journey to Lahore, where he resides, upon discovering on his arrival at Gujranwala that his professional services were not required on that day at that place as he had expected would be the case. It is not now denied that Mr Grey, when leaving the Gujranwala Station, informed the guard of the train that he was travelling on to Lahore without a ticket. It is further conceded on both sides that it was not possible for Mr Grey to obtain on application a fresh ticket at Gujranwala for Lahore and to continue his journey in the same train, inasmuch as the Regulations of the Railway Administration forbid the issue of tickets after the train has arrived in the station. On Mr Grey's arrival at Lahore he paid without demur the fare due for the distance over which he had travelled without a ticket, viz, from Gujranwala to Lahore, but he refused to pay the excess charge or penalty demanded from him first by the Lahore Ticket Collector and then by the Assistant Station Master. It is further alleged that on the 12th March 1891 the Railway Administration (through their Traffic Superintendent, who had been duly appointed in this behalf on the 19th December 1890) made a written demand on Mr Grey (which was posted to his address under registered cover) for Rs 2 8 0 which was alleged to be the penalty to which Mr Grey had rendered himself liable on the 1st October 1890 by travelling beyond the place authorized by his ticket. This letter and demand appear to have met with no response. An application was therefore made to a Magistrate at Lahore under Section 113 of the Railway Act (IX of 1890) by Mr F F Jacob Deputy Traffic Superintendent who had been specially authorized to make the application by a writing dated 24th March 1891, for the recovery of the aforesaid excess charge of Rs 2 8 0, and the Magistrate after holding an enquiry which was at first *ex parte* but afterwards conducted in the

presence of Mr Grey who was permitted to recall and cross-examine the witnesses who had been examined in his absence, decided that Mr Grey was liable under Section 113 of Act IX of 1890 to a penalty of Re 1 for travelling from Gujranwala to Lahore without a ticket. The Magistrate's order is dated the 6th April 1891. Upon the 10th April, Mr Grey lodged in this Court a petition which purported to be one of *Appeal* from the order of the 6th April 1891. In directing that the application should be laid before a Bench of the Court for disposal, Sir Meredyth Plowden recorded as follows: "No appeal lies. There is no conviction and no sentence and no offence," and the learned Judge went on to give his reasons in some detail. I entirely concur in the view that no appeal lies from the Magistrate's order, but the question has ceased to be one of any practical importance as Sir Meredyth Plowden's expressed opinion on this point was accepted by both parties at the hearing before the Bench. Sir Meredyth Plowden further observed in his order that the Magistrate's proceedings appeared to him to be open to revision under the Criminal Procedure Code, and upon this view and because the proceeding was a novel kind of proceeding before a Magistrate, he admitted the application to a Bench for disposal. The view that the Magistrate's proceedings were open to revision was not accepted by the learned Junior Government Advocate who appeared in this Court on behalf of the Railway Administration, but the jurisdiction of the Court to entertain the application was not very strenuously challenged, and I may say at once that it appears to me that the proceedings must be held liable to revision by this Court.

Mr Sinclair's main contention upon this part of the case appeared to be that the proceeding held by the Magistrate was not a judicial proceeding within the definition in clause (d) of Section 4 of the Criminal Procedure Code, inasmuch as it was not incumbent upon the Magistrate or even necessary for him to record the statements of witnesses upon oath or solemn affirmation. As to this, I would observe that the proceeding before the Magistrate was in fact conducted as a judicial proceeding, and I am not prepared to hold that there was any error in this respect or that evidence was not legally taken by the Magistrate within the meaning of the definition. I would further point out that neither Section 435 nor Section 439 of the Criminal Procedure Code limits the powers of interference of this Court

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to judicial proceedings. Section 435 enables this Court to call for and examine the record of any proceeding before any "inferior Criminal Court" within its jurisdiction, and Section 439 also speaks of "any proceeding in defining the High Court's powers of revision." I am prepared to hold then that the proceeding before the Magistrate in this case was a judicial proceeding, but I feel quite clear that it was a "proceeding" within the terms of Sections 435, 439, Criminal Procedure Code, and it is therefore, in my opinion, open to revision.

The point here decided is somewhat analogous to that recently raised before the Bombay High Court in *The Empress v Manaji* (1) where the Court held that a proceeding taken by a Magistrate under Section 8 of the Reformatory Schools Act (V of 1876) was subject to the revisional jurisdiction of the High Court.

I may mention before proceeding further that there is no question now as to the amount of the excess charge to be levied as the Railway Administration have accepted the view that one rupee only represents the sum leviable under the section. The contentions put forward by Mr Grey who argued his case in person against any sum being payable may be summarised as follows —

He contends, —

- (1) That the provision in Section 113 of the Railway Act cannot have been intended to apply and should not be applied to a case where a passenger has been compelled to override without a ticket as he was in the present case owing to the rule which forbade the issue of a fresh ticket to him after the train had arrived in the Gujranwala Station,
- (2) That there is no sufficient proof of any demand for payment of the excess charge having been made from him at all,
- (3) That if such demand was made it was not made by a railway servant duly authorised within the meaning of Section 113 of the Act, (a) because the demand contemplated by the section must be made at once, whereas the demand relied upon in this case was not made till nearly six months after the event alleged to have justified the demand, and (b) because on the

1st October there was no railway servant appointed by the Railway Administration to make such demands and the appointment of the Traffic Superintendent if made as alleged on the 19th December (which was not admitted) could not operate retrospectively so as to enable him to demand an excess charge incurred prior to his being vested with the necessary authority

With reference to the suggestion that it was not clear from the record that the Traffic Superintendent had, as deposed by Mr Jacob, been duly appointed to take action under Section 113 of the Act we requested Mr Sinclair to furnish us with a certified copy of the Resolution alluded to by Mr Jacob in his evidence and this has now been done

Before disposing of Mr Grey's contention *seriatim* it may be well to set out the portions of Section 113 of the Railway Act of 1890, which are material to the present case. That section enacts, in sub section (2), that, ' if a passenger travels in or on a carriage beyond the place authorized by his pass or ticket, he shall be liable to pay on the demand of any railway servant appointed by the Railway Administration in this behalf the excess charge hereinafter in this section mentioned ' (in this case one rupee) " in addition to any difference between any fare paid by him and the fare payable in respect of such journey as he has made "

And again in sub section (4) if a passenger liable to pay *
* * the excess charge and any difference of fare mentioned in sub section (2) fails or refuses to pay the same on demand being made therefor * * the sum payable by him shall, on application made to any Magistrate by any railway servant appointed by the Railway Administration in this behalf, be recovered by the Magistrate from the passenger as if it were a fine imposed on the passenger by the Magistrate and shall, as it is recovered be paid to the Railway Administration "

There was a somewhat similar provision to the above in the Railway Act of 1879 which enacted in Section 31 that any passenger travelling on a railway without a proper ticket should be liable to pay the fare from the place where the train originally started (subject to proof that he had travelled a less distance only) which fare shall on application by a railway servant to a Magistrate and on proof of the passenger's liability, be re-

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v
The
Empress

coverable from such passenger as it were a fine, and shall, when recovered, be paid to the Railway Administration. This section was commented upon by the learned Judges of the Calcutta High Court in *Hart v Buskin* (1 L R 12 Cal, 192), a case which will be alluded to again presently.

Mr Grey, in introducing the first of the objections noted above offered some general remarks as to the duty of a Magistrate acting under Section 113 of the Act of 1890, and as to the nature of the proceeding under that section. It appears to me that the section itself makes it clear what the action of the Magistrate is to be. He must first satisfy himself that the sum claimed is payable by the passenger, i.e., (1) that he has travelled beyond the place authorised by his ticket (or as the case may be) (2) that the excess charge (or as the case may be) allowed by the section has been demanded by a railway servant duly appointed by the Railway Administration in this behalf, and (3) that there has been a failure or refusal by the passenger to comply with the demand. To satisfy himself on these points the Magistrate is I consider, justified in requiring *prima facie* proof by sworn testimony from the Railway Administration, and if *prima facie* evidence is forthcoming in then giving the passenger an opportunity of answering the case set up against him. If a final order is passed by the Magistrate it should simply be to the effect that a stated sum is payable as an excess charge (or as the case may be). The Magistrate should not award a sentence of fine, though the sum payable may (if necessary) be recovered as a fine. As to the nature of the proceeding under the section there is no question of any offence having been committed. Certain sections of Chapter IX of the Railway Act do deal with offences and their punishment, but Section 113 merely makes certain fares and excess charges recoverable, and recoverable in a summary way. The section applies not to offenders against justice but ordinarily to innocent persons who (to adopt the language of the Calcutta High Court in the case already cited) "may find themselves in the wrong by mere accident", so that I am afraid I was not much impressed by Mr Grey's strictures upon the policy of the section itself, which (he argued) empowered the Railway Administration to drag him as a criminal before the Criminal Court though he had been guilty of no offence. Of course, sitting here as a Court of revision we have nothing whatever to do with the question of the wisdom of the legislature in enacting such a provision as that contained in Section 113 of

the Act We have merely to interpret the section, and see that it has been rightly applied It is, I think, from this point of view only that Mr Grey's first ground of argument can be considered If he meant to contend (as I think he did) that the Railway Administration *could not* under the terms of Section 113 of the Act demand the excess charge from him under the circumstances stated, I can only reply that in my opinion the present case is clearly within the scope of the section, which, as already pointed out, imputes no criminal intention or offence to the person to be dealt with thereunder or contains any qualification of the right to demand the excess charge if duly incurred As to the contention that, assuming that the Railway Administration could act under the section in the present case, it was unfair and unjust for them to have done so, this appears to me to be a matter with which we have no concern and which is wholly irrelevant to the present proceeding, as the section gives neither the Magistrate nor this Court any power to question the discretion of the Railway Administration in the matter of the levy of the fare or charge I think, therefore, that Mr Grey's first ground of argument fails I would only add that I think the procedure of the Magistrate who conducted the proceeding in the present case was correct throughout and such as is contemplated by the legislature, as I have already tried to explain

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As to the second contention it is in my opinion absolutely without force The material facts are these Mr Jacob deposed on oath that a demand was made on 12th March 1891 under a registered cover on Mr Grey to pay the excess charge which was then stated at Rs 2 8 0 A copy of the above letter and the Post Office receipt was filed When questioned by the Court, Mr Grey refused to say whether or no he had received the original letter of which the copy had been filed the ground stated being that he was not prepared to give evidence for the prosecution The Magistrate very naturally found as a fact that the letter had reached its destination and I fail to conceive how he could have arrived at any other finding Mr Grey urged before us that he as an accused person was not bound to incriminate himself and tried to draw an analogy between his predicament and that of a person being tried on a charge of murder who on pleading an *alibi* was hurried by the Judge to disclose the place where, according to his contention he really was when the offence with which he was charged was committed There is, of course, no real analogy between the two cases As already

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pointed out, Mr Grey was not being tried for any criminal offence. But even if the cases were parallel, I fail to see what error or injustice would be committed by a Judge who upon the accused pleading an *alibi* asked him to state where he really was when the crime was committed, and if he refused to answer the question, proceeded to draw an inference unfavourable to the truth of the alleged *alibi*. As to Mr Grey's specific objection under Section 114, illustration (f) of the Evidence Act the Magistrate was justified in presuming that the letter was received and under illustration (b) of the same section in presuming that if Mr Grey had answered the question put to him, the answer would have been unfavourable to him. In my opinion Mr Grey's second point is wholly without force.

A demand in my opinion was certainly made, and the only remaining question, therefore, is whether such demand was legally sufficient. I can find no indication whatever in Section 113 of the Act that the demand contemplated must be made at or within any particular time or period and I think we should be adding words of our own to the section if we accepted the contention that the demand must be made at once or within any particular limitation of time. The uncertainty of the argument carries with it its own condemnation. According to Mr Grey's view, must the demand be made on the arrival of the train or before the passenger leaves the station, or within a week, or a month or six months. The Act is simply silent upon the point from which I infer that the demand may be made at any time. The longer the Railway Administration delay, the more difficult will it be for them to make out their case, and this will probably lead to very unreasonable delay being ordinarily avoided. Nor again can we, I think hold without adding to the language of the section that the existence of some railway servant duly appointed at the time when the passenger infringed the provisions of the section is a condition precedent to a legal demand being made or renders a subsequent demand by a railway servant duly authorised at the time of making the demand ineffectual. All I think, that the Railway Administration have to show in this connection is that the demand when made was made by a Railway servant appointed by the Railway Administration in this behalf and they have shown in this case that on the 12th March 1891, when the demand on Mr Grey was made the Traffic Superintendent had been, by a resolution passed at an official meeting held on the 19th December 1890, "accorded full

powers for dealing with penalty charges in respect of passengers and goods under Clauses 58 and 113 of the Indian Railway Act of 1890" I entertain no doubt that the power "to deal with" penalty charges includes the power to make the demand which is the initial step in the proceeding. Lastly, I understand that the demand in the present case was made by the Traffic Superintendent himself though, as a matter of official routine the letter which was issued bore signature of the Deputy Traffic Superintendent Mr. E F Jacob. I assume this (1) because Mr Grey has not chosen to produce the writing which he received in original as he might have done, and (2) because there is a previous letter on the file in Mr Grey's handwriting which shows that the officer with whom he was corresponding on the subject of this very charge was the Traffic Superintendent and not his Deputy.

It follows from the above remarks that the application for revision in my opinion fails upon all points. I would reject the application.

Ror, J.—I entirely concur in the order proposed. I think it is clear that this Court has power to revise a proceeding by a Magistrate under Section 113 of Act IX of 1890, and that it is equally clear that there are no grounds for exercising this power in the present case. All the grounds that have been or could be advanced for an interference have been thoroughly examined by my learned colleague, and I quite concur in his opinion that they are untenable. The application is accordingly rejected.

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The Central Provinces Law Reports, Vol IX,
Page 1 Cr.

CRIMINAL REFERENCE

Before J F Stevens, Esquire, ICS,
Judicial Commissioner, CP,
B N RAILWAY COMPANY

v

DEVIDUTT

CRIMINAL REVISION No 230* of 1894

1894
October 2

Indian Railways Act 1890 Sections 68 112 and 113—Travelling beyond the place for which a ticket is taken

Section 112 of the Indian Railways Act 1890 does not apply to the case of a person who having entered a carriage with a proper ticket travels on the strength of that ticket beyond the place authorized by it. The only course open to the Railway officers in such a case is to proceed under Section 113 of the Act.

This reference raises a question of some importance in the Railway law.

The Assistant Commissioner has found, and I have no doubt has found perfectly correctly, that the accused deliberately and intentionally travelled beyond the place for which he had taken a ticket. He has convicted the accused of the offence of travelling on the Railway without a proper pass with intent to cheat the Company, and under Section 112 Clause (a) read with Section 68 of the Indian Railways Act, 1890, he has sentenced him to pay the maximum fine of Rs 100 in addition to the amount of the single fare for the whole distance travelled by him. The District Magistrate has referred the case for revision, being of opinion that Section 68 of the Act had no application and that the case should have been dealt with under the provisions of Section 113 of the Act.

* This was a Criminal reference made by the District Magistrate Nagpur under Section 413 Code of Criminal Procedure. The case was originally tried by the Assistant Commissioner and Magistrate 1st Class Nagpur.

It is obvious on the face of the finding that the Assistant Commissioner has been less careful than he should have been in applying the law to the facts, for in the present case there is no question at all about a pass. The accused was travelling not with a pass, but with a ticket. We have to see, however, whether if the word "ticket" be substituted for "pass" the conviction was a good conviction on the facts that I have stated.

Section 112 provides for the Judicial punishment of a person who "with intent to defraud a railway administration,—(a) enters in contravention of Section 68 any carriage on a railway or (b) uses or attempts to use a single pass or single ticket which has already been used on a previous journey or, in the case of return ticket a half thereof which has already been so used." Section 68 provides that 'no person shall, without the permission of a Railway servant, enter any carriage on a railway for the purpose of travelling therein as a passenger, unless he has with him a proper pass or a ticket'.

It thus appears that what is made punishable by Section 112, Clause (a), read with Section 68, is the entry with fraudulent intent into a carriage for the purpose of travelling therein as a passenger without a proper pass or ticket. I think it is clear that by the words 'a proper pass or ticket' in Section 68 must be understood a pass or ticket by which the person would be authorized to enter the carriage for the purpose of travelling therein as a passenger. It is difficult to see, then, how Section 112, clause (a) can be applied to the case of a person who, having entered a carriage with a proper ticket travels on the strength of that ticket beyond the place authorised by it. The fact that Section 112 provides for the enforcement of the payment in addition to the fine of the amount of the single fare for any distance which the person who may have travelled seems of itself to indicate that the section applies only to cases where either no proper pass or ticket has been obtained at all, or a pass or ticket which had already been used or attempted to be used for a second time, so that the whole of the fare remains due.

The Act appears to contain no provision for the judicial punishment of a person who intentionally travels beyond the place for which he has 'a proper pass or ticket' and the only course open to the Railway officials is to proceed under Section 113, which provides for a specially high extra charge where

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Devidutt
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the passenger has not before being detected by a Railway servant notified to the Railway servant on duty with the train the fact of the charge having been incurred

The conviction in this case must therefore be set aside and the amount realised from the accused must be refunded

I am unable to direct by this order that the refund be only of the difference between the amount which has been actually realised and that which would have been realisable under Section 113 of the Act, because that section confers the power to demand only on railway servants duly appointed in that behalf and no Court of justice can interfere except (in the case of a Magistrate) to enforce a demand which has been actually made and not complied with

The conviction is set aside The amount realised from the accused must be refunded to him

In the Chief Court of the Punjab

CRIMINAL REVISION

Before Mr Justice J Frizelle

HIRA CHAND (ACCUSED), PETITIONER*

v.

THE EMPRESS, RESPONDENT

1896
March 31
—

*Ticket Fraudulently travelling without—Indian Railways Act IA of 1890
Section 112*

Fraudulent intent under Section 112 of the Indian Railways Act 1890 is proved if on being asked to produce his ticket the accused does not at once tell the ticket collector that he has no ticket and produces a ticket which has already been used

For Petitioner—*Lala Ishwar Das*, Pleader

The facts of this case are as follows —

On the 16th December 1895, Ticket Collector Hawkenorth was checking the tickets on the Mail train at Kalka Railway Station He states that he asked accused for his ticket and that accused would not show any Said he had a return

* Criminal Case N 221 of 1896. Petition for revision of the order of Lieutenant A C ELLIOT, Magistrate First Class, Kasauli District, Simla dated 3rd January 1896

ticket and on being pressed showed a ticket—one already used from Chandigarh to Kalka. Accused was taken before the Station Master who repeats what he was told by Hawkeworth. States further that accused first denied the fact, but afterwards admitted his intention to use the ticket and asked for forgiveness. Accused on the other hand says that he arrived late at the station and could not get a ticket so got into the train intending to pay at Chandigarh. The price of the ticket was only four annas three pies and accused is the son of a well to do Zaildar.

H ra Chand
The Empress

The accused on conviction by Lieutenant A C ELLIOTT Assistant Commissioner, exercising the powers of a Magistrate of the first class in the Simla District was sentenced, by order, dated Kasauli the 3rd January 1896 under Section 112 of the Railway Act IX of 1890 to pay a fine of Rs 50 or in default to undergo one month's simple imprisonment.

The proceedings are forwarded for revision on the following grounds —

It appears very doubtful whether any fraudulent intention on the part of accused has been satisfactorily proved. It is proved on his behalf that he arrived late only a few minutes before departure of train and slipped through the first class passenger alley so as not to be stopped. He ran, moreover, the certainty of detection on arrival at Chandigarh and it seems improbable that a man of his position would run the risk involved in a fraudulent evasion of the railway rules merely to save four annas three pies. It seems not improbable that he evaded the Ticket Collector's enquiry and produced the used ticket in order to save himself from detention.

(2) In any case the fine of Rs 50 appears excessive.

Order of the Chief Court

I think petitioner's fraudulent intention is proved by his not at once telling the Ticket Collector that he had no ticket and producing an old one. I am unable to cancel the conviction but the fine was rather heavy. I reduce it to Rs 20.

In the Chief Court of the Punjab.

CRIMINAL REVISION.

Before Mr. Justice Reid.

CROWN

v.

ATA-ULLAH

1905
March 11*Railways Act, 1890 Section 112—Entry into a Railway carriage without ticket—Defrauding intention essential*

A passenger entered a railway carriage without ticket and was convicted and fined Rs 5 under Section 112 of the Indian Railways Act IX of 1890, for attempting to defraud the Railway of the fare due to it

Held, on appeal that mere entry into a Railway Carriage without a ticket did not constitute an offence under Section 112 of the Railways Act unless it was proved that he intended to defraud the Railway

CASE reported by A E MARTINEAU, Esquire, Sessions Judge, Lahore Division, on 12th December 1904

The facts of this case are as follows —

It is stated that the accused entered a railway carriage at the Lahore Railway Station without having a proper ticket

The accused on conviction by A H BRASHER, Esquire, exercising the powers of a Magistrate of the 1st class in the Lahore District, was sentenced by order, dated 5th November 1904, under Section 112 of the Railway Act, to a fine of Rs 5, or one week's simple imprisonment in default

The proceedings were forwarded for revision on the following grounds —

The accused Ata-Ullah has been convicted of an offence under Section 112 of Act IX of 1890 The act complained of is that he entered a carriage at the Lahore Railway Station, without having a proper ticket Admitting that he did this he committed no offence unless he entered the carriage with intent to defraud the Railway Administration There is absolutely no proof that he intended to defraud the Railway, and it is most probable that he can have had any such intent He is a clerk in the office of the Examiner of Accounts He says he merely went to the station to see a friend off, after getting half an hour's leave from his

office There is nothing whatever to show that this explanation is wrong That it is correct would appear from the fact that he had a platform ticket with him, as is admitted by the prosecution witness, Jiwan Shinker

Crown
v
Ata ul Jah

There being no proof of a fraudulent intent, I forward the record to the Chief Court and recommend that the conviction be quashed

The Judgment of the Chief Court was delivered by REID, J For reasons recorded by the learned Sessions Judge in which I concur I set aside the conviction and sentence. The fine, if realised, will be refunded

Application allowed

The Calcutta Weekly Notes, Vol XL, Page 100 .

CRIMINAL REVISIONAL JURISDICTION

Before Mitra, J , and Ormond, J

KULODA PROSAD MAJUMDAR, PETITIONER

v

THE EMPEROR OPPOSITE PARTY

REV No 792 of 1906

Offence—Separate Sentence—Construction of Statute—General and Special Acts Repeals by implication—General Clauses Act (X of 1897) Section 26—Indian Railways Act (IX of 1890) Sections 68 112—Travelling without ticket—Attempt to cheat—Indian Penal Code (Act XLV of 1860) Sections 417 511—Disonest or fraudulent intention

1906
August 28

The essence of an offence under Section 112 of the Indian Railways Act is dishonest or fraudulent intention the intention to defraud the Railway Administration of its just dues Merely travelling without a ticket is not an offence under the section

Bentham v Hayle (1) *Queen Empress v Rampul* (2) referred to

Travelling with a false and entirely irrelevant ticket with a fraudulent or dishonest intention is an offence under Section 112 (a) of the Railways Act

(1) L R 3 Q B D 299 (1878)

(2) I L R 20 All 96 (1897)

Kuloda
 Prosad
 Majumdar
 v
 Emperor

Facts which form the basis of a conviction and sentence under one charge cannot form the basis of a conviction and also a separate sentence under another charge. There cannot be cumulative sentences though a conviction might take place on an alternative charge or even both charges.

It is ordinarily desirable that when an act or omission is made penal by two Acts one general and the other special, the sentence should be passed under the Special Act.

Quære—Whether in this country a special penal law repeals by implication, in every case a previously existing general law relating to an offence of the same nature.

THIS was a rule granted on the 19th of July 1906, against an order of Moulvi ABDUL HUE, Deputy Magistrate of Burdwan, dated the 21st of June 1906, which order was, on appeal, modified by Mr W. N. DELFVINGNE, Sessions Judge of Burdwan, on the 14th July 1906.

The facts of the case appear fully from the Judgment.

Mr *P. L. Roy* and *Babu Narendra Chendra Bose* for the Petitioner.

The Officiating Advocate General (Mr *S. P. Sinha*) and *Babu Joy Gopal Gosha* for the Crown.

The Judgment of the Court was delivered by

MITRA, J.—The Petitioner was in the service of the East Indian Railway Company as Station Master of the Bonpas Station and he resigned the service on the 9th January last. On the night of the 8th April he was travelling without a ticket from Rampur Hat by a down train and at Bhadua, Cox, a Travelling Ticket Inspector of the Company, discovered that he had not a ticket. It has been found by the lower Courts that Cox asked the Petitioner to produce his ticket and the Petitioner thereupon produced the outward half of a return ticket for journey between Bonpas and Bankipur. This ticket had not the slightest bearing on the Petitioner's travel from Rampur Hat on the 8th April. The Petitioner was prosecuted under Section 417, Indian Penal Code, for cheating and also under Section 112 of the Indian Railways Act and was convicted by one of the Deputy Magistrates at Burdwan on both the charges. On appeal, the Sessions Judge of Burdwan modified the conviction into one under Section 417 read with Section 511, Indian Penal Code, i.e., of attempt to cheat and also into one under Section 112 of the Railways Act. He, however, set aside the sentence under Section 112 as cumulative sentences could not be passed for the

same offence under different Acts and affirmed the sentence of simple imprisonment for two months under Section 417 read with Section 511, Indian Penal Code.

On the 19th July last, a rule was issued by this Court on the District Magistrate of Burdwan to show cause why the conviction and sentence under Section 417 with 511, Indian Penal Code, should not be set aside and why such order under Section 112 of the Railways Act should not be passed as to this Court might seem proper. The learned Advocate General has shown cause on behalf of the District Magistrate.

On the judgments of the Lower Courts and the argument before us, two questions arise for our consideration—(1) whether the Petitioner committed two distinct offences, one under the Railways Act and the other under the Indian Penal Code, and (2) if not, whether he should be sentenced under the Penal Code or the Railways Act or both.

The learned Sessions Judge is of opinion that the entering into the train and travelling without a ticket and that attempt to palm off the used ticket from Bonpas to Bankipur upon Cox were not separate and distinct offences. This, in our opinion, is a correct inference from the facts found. Entering into a Railway compartment and travelling without a ticket are only some of the ingredients of an offence under Section 112 of the Railways Act. These acts in themselves are not penal under the section. The essence of an offence under the section is dishonest or fraudulent intention—the intention “to defraud” the Railway Administration of its just dues, *i.e.*, the fare payable by a passenger. In *Bentham v Hoyle*,⁽¹⁾ Cockburn, C.J., and MANISTY, J., held, in construing a bye-law similar in terms to Section 112 of our Railways Act, that *mens rea*, the intention to defraud, must be proved for obtaining a conviction. The words in the Indian Law are distinct. A passenger may travel without taking a ticket owing to mistake or want of time to take one, but he may not have the remotest intention to defraud the Railway Administration, and it will be wrong to hold him guilty under Section 112 of the Act. In this connection we may refer also to *Queen-Empress v Rampal* ⁽²⁾

The fraudulent intention of a passenger must appear from some other act or omission, than merely travelling without a ticket. The mere fact that the Petitioner before us travelled

Kuloda
Prasad
Majumdar
v
Emperor.

(1) L.R., 3 Q.B.D., 289 (1878)

(2) I.L.R. 20 All. 93 (1897)

Kuloda
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 Majumdar
 v
 Emperor

from Rampur Hat down without a ticket would not have been efficient to constitute an offence under Section 112, something more was necessary to be proved to secure a conviction. That "something" appears in this case by the Petitioner's attempt to free himself from the liability by producing an used and irrelevant ticket. The last act is evidence, and very cogent evidence of the intention of the Petitioner to cause loss to the Railway Administration. As observed by the learned Sessions Judge, "the production of the used ticket was simply one of the acts by which he sought to carry out his intention of defrauding the Company and could not have resulted in any more harm being done to the Company than he intended to cause them when he entered the train without a ticket." Cox was merely an agent of the East Indian Railway Administration. The intention to cheat him and the Railway Administration is one and the same offence, and, in fact, so far as Cox personally was concerned there could be no cheating within the import Section 417. The Petitioner intentionally attempted to deceive Cox and through him the Railway Administration, his object being that Cox might omit to demand the fare and the fine, if any, leviable under the bye-laws of the Railway Administration for travelling without a ticket.

The element of the offence under Section 417, Indian Penal Code, is precisely the same as that of one under Section 112 of the Railway Act. If the Indian Railways Act had not been passed or Section 112 were not in it, the offence of which the Petitioner would have been guilty would be one under Section 417, Indian Penal Code. Thus the Petitioner, as found by the learned Sessions Judge, committed on the 8th of April one and a single offence as regards the last Indian Railway Administration both under Section 417, Indian Penal Code, and under Section 112 of the Railways Act. He did not commit the two distinct and separate offences.

It was suggested during the argument that Section 112 of the Railways Act does not contemplate a case like the present—a case in which a false and an entirely irrelevant ticket was produced. Such a case does not come within clause (b) of the section, but it does come under clause (a) which we must read with Section 68. The accused entered a Railway car for the purpose of travelling and with a fraudulent and dishonest intention. Travelling without a ticket comes within the words of the Section 68 and so under Section 112 (a).

Should he then be sentenced severally under Section 417, Indian Penal Code, and Section 112 of the Railways Act? It is clear he cannot be sentenced under both the sections and the Deputy Magistrate was in error in sentencing him separately under both. Facts which form the basis of a conviction and a sentence under one charge cannot also form the basis of a conviction and also a separate sentence under another charge. There cannot be cumulative sentences though a conviction might take place on an alternative charge or even both. Section 26 of the General Clauses Act (X of 1897) enacts "Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of the enactments but shall not be liable to be punished twice for the same offence."

There is another principle for our guidance and that is that if an offence is punishable by the general law, such as the Indian Penal Code, and also by a later special law applicable to particular persons and particular circumstances the special law should apply. It is presumed that the Legislature intends that the special form of punishment is appropriate to special cases. The punishment so provided by the special law may be severer or lighter than that provided by the general law but that would not matter. The rule is quoted by Lord ESHER, M R, in *Lee v Danga* (1) "If one Statute make the doing of an act felonious and the subsequent act make it only penal, the latter is considered as a virtual repeal of the former" *Reg v Davis* (2) "

We are not, however, disposed to lay down broadly in this country that in every case a special penal law repeals by implication a previously existing general law relating to an offence of the same nature, and in this case it is not necessary for us to do so. If we were to do so, we might infringe the rule of interpretation in Section 26 of the General Clauses Act. We are not also disposed to accept Mr Roy's contention that the penal provisions in the Indian Railways Act are self contained and the punishment for acts and omissions regarding a Railway Administration in India must be inflicted under this Act only. The penal provisions in the Act are not obviously exhaustive and there is nothing in the Act itself or any other enactment in force in India which excludes the operation of the general laws in force as to offences which are not punishable under the Act.

(1) L R (189) 2 Q B 317 at p 343 (2) 1 Leach Cr C 271 (1783)

Kuloda
 Prosad
 Majumdar
 v
 Emperor

The case of *Chandi Parshad v Abdur Rahman*(1) was decided with reference to the Bengal Municipal Act (III of 1884) and though there are some observations in the Judgment of the Court at pp 138-139 which may favour Mr Roy's contention, we do not think the case is an authority for the broad proposition that a special penal provision as in the Railways Act would always exclude the operation of the Indian Penal Code

The utmost that can be said is that it is ordinarily desirable that when an act or omission is made penal by two Acts, one general and the other special, the sentence should be passed under the Special Act

Such a view would not militate against either the rule of interpretation prescribed in Section 26 of the General Clauses Act or the rule laid down in *Rex v Davis* (2)

We are, however, of opinion that the sentence of two months' simple imprisonment is too severe in the circumstances of the case. Even if conviction were had under Section 417, Indian Penal Code, we would reduce the sentence to one of fine only and a fine Rs 100 is, in our opinion, sufficient. It is not, therefore, necessary for us to discuss further the question of the repeal by implication of Section 417, Indian Penal Code. We leave it with an expression of the present indication of our mind. Whether the accused be convicted under Section 417 Indian Penal Code, or Section 112 of the Indian Railways Act, the result, in the present case, is the same. We affirm the conviction but reduce the sentence and direct that the accused do pay as fine Rs 100, and in default he do undergo simple imprisonment for two months.

Sentence reduced

(1) I. L. R. 22 Cal 131 (1894) (2) 1 Leach Cr C 271 (1733)

Weir's Reports, Page 869.

In the High Court of Madras.

FULL BENCH

Act IV of 1879 Section 32 (112) clause (A)—Conviction of father for evading payment of the fare due for his son a child aged 6 years—Abetment—Section 108, Explanation 3, Penal Code

1868
Dec 12

A conviction of a father accused evading payment of the fare due for his son a child aged 6 years sustained as a conviction of abetting the offence charged

JUDGMENT — The accused in the case submitted for revision has been convicted of defrauding the Railway Company by evading payment of his fare an offence punishable under the Indian Railway Act, IV of 1879, Section 32 (112) clause (a)

2 The facts are that the accused travelled in company with his son, aged 6 years, from one station to another station on the railway line without paying the half fare due for his son

3 The question which the Court have taken time to consider is whether the words "his fare," in Section 32 of the Railway Act are to be construed strictly as referring only to the charge payable for the ticket of the individual travelling or whether the words are to be held to include the charges payable for the accommodation secured for himself or others by the person travelling

4 The question is not free from difficulty

5 The accused was, however, clearly liable as an abettor (Section 108, explanation 3, Penal Code) and the conviction can be sustained as a conviction of abetting the offence charged. Thus being so, it becomes unnecessary to express any positive opinion on the question stated

6 It will be sufficient to amend the record by entering up a conviction under Section 32 (112), clause (a) Act IV of 1879, and Section 109 or 110 of the Penal Code

7 The fine of Rs 25 is however, undoubtedly severe

Kuloda
Prosad
Majumdar
v
Emperor

The case of *Chandi Parshad v Abdur Rahman*(1) was decided with reference to the Bengal Municipal Act (III of 1884) and though there are some observations in the Judgment of the Court at pp 138-139 which may favour Mr Roy's contention, we do not think the case is an authority for the broad proposition that a special penal provision as in the Railways Act would always exclude the operation of the Indian Penal Code

The utmost that can be said is that it is ordinarily desirable that when an act or omission is made penal by two Acts, one general and the other special, the sentence should be passed under the Special Act

Such a view would not militate against either the rule of interpretation prescribed in Section 26 of the General Clauses Act or the rule laid down in *Re v Davis* (2)

We are, however, of opinion that the sentence of two months simple imprisonment is too severe in the circumstances of the case. Even if conviction were had under Section 417, Indian Penal Code, we would reduce the sentence to one of fine only, and a fine Rs 100 is, in our opinion, sufficient. It is not, therefore, necessary for us to discuss further the question of the repeal by implication of Section 417, Indian Penal Code. We leave it with an expression of the present indication of our mind. Whether the accused be convicted under Section 417 Indian Penal Code, or Section 112 of the Indian Railways Act, the result, in the present case, is the same. We affirm the conviction but reduce the sentence and direct that the accused do pay as fine Rs 100, and in default he do undergo simple imprisonment for two months.

Sentence reduced

(1) I L R 22 Cal 131 (1894) (2) I Leach Cr C 271 (1793)

Weir's Reports, Page 869.

In the High Court of Madras.

FULL BENCH

Act IV of 1879 Section 32 (112) clause (A)—Conviction of father for evading payment of the fare due for his son a child aged 6 years—Abetment—Section 106 Explanation 3 Penal Code

1868
Dec, 12

A conviction of a father accused evading payment of the fare due for his son, a child aged 6 years sustained as a conviction of abetting the offence charged

JUDGMENT — The accused in the case submitted for revision has been convicted of defrauding the Railway Company by evading payment of his fare, an offence punishable under the Indian Railway Act, IV of 1879, Section 32 (112) clause (a)

2 The facts are that the accused travelled in company with his son, aged 6 years, from one station to another station on the railway line without paying the half fare due for his son

3 The question which the Court have taken time to consider is whether the words "his fare," in Section 32 of the Railway Act are to be construed strictly as referring only to the charge payable for the ticket of the individual travelling, or whether the words are to be held to include the charges payable for the accommodation secured for himself or others by the person travelling

4 The question is not free from difficulty

5 The accused was, however, clearly liable as an abettor (Section 108, explanation 3, Penal Code) and the conviction can be sustained as a conviction of abetting the offence charged. This being so, it becomes unnecessary to express any positive opinion on the question stated

6 It will be sufficient to amend the record by entering up a conviction under Section 32 (112), clause (a) Act IV of 1879, and Section 109 or 110 of the Penal Code

7 The fine of Rs 25 is however, undoubtedly severe

8 The accused was a regimental sepoy, and a fine of Rs 25/8 represents, it is believed, at least 3 months' pay of a sepoy. The sentence of fine of Rs 25 is hereby set aside, and, in lieu thereof, the High Court direct that the accused do pay a fine of Rs 5 and the half fare of Rs 2-2-0. So much of the fine paid or levied as is in excess of the amount now adjudged must be refunded.

Weir's Reports, Page 870

In the High Court of Madras

CRIMINAL REVISION

Before Shepherd and Subramania Aiyar, C I E, JJ
VLEERARAGHA VA CHARRY, (ACCUSED) PETITIONER

v

FRENCH, (COMPLAINANT), COUNTER PETITIONER

CASE NO 91 OF 1896

1896
 April 20.

Travelling with a used ticket—Rule “that tickets are only available on the day of issue —Conviction of the accused for defrauding the Company/

A ticket not valid on the day of issue according to the rule made by a Railway Company which provided that ‘tickets are only available on the day of issue’ was held to be not a proper ticket within the meaning of Section 68.

In this case the accused who travelled in a train of the Madras Railway Company on the 1st February 1896 with a ticket which was issued on the 16th August 1895, was charged under Section 112 of the Railway Act, with the offence of travelling with a used ticket. There was no evidence that the ticket was used a second time, but the Magistrate found that there was an intention to defraud and convicted him under Section 112.

Order —According to one of the Rules made by the Madras Railway Company, under Section 47 of the Act IX of 1890, “tickets are only available on the day of issue,” subject to an exception, it is immaterial in the present case. The ticket which the accused on the occasion in question used was, therefore not a proper ticket within the meaning of Section 68 of the Act and as the Magistrate finds the accused intended to defraud the Company, the conviction is right. The petition is rejected.

Weir's Reports, Page 872.

In the High Court of Madras

CRIMINAL REVISION

Before Muthusami Aiyar, C I E, and Shepherd, JJ.

IN RE RAMASAWMY NAIDU, ACCUSED

CASE No 270 of 1890

Sale or transfer of single tickets not prohibited—Accused convicted for cheating under Section 417, Indian Penal Code—Conviction set aside

1890
August 12

Sections 70 and 114 of the Railway Act being applicable only to return and season tickets, the sale or transfer of single tickets is neither prohibited nor rendered penal by the Act

Where the accused bought a number of tickets during a festival and sold one of them at a rate higher than that for which he had bought it and the purchaser was aware of the higher rate and was not misled it was held that the accused was not guilty of cheating under Section 417 of the Penal Code

ORDER.—In February last there was a festival at Thirumala vaval near Avadi and a large number of persons attended the festival. On the 3rd February the accused bought 60 third class tickets at Avadi from the Railway Company, on payment of one anna and nine pies for each ticket the fare payable from Avadi to Madras. Shortly after, he sold one of these tickets for 2 annas to the 2nd witness and 49 out of 60 tickets were in his possession. The Sub Magistrate considered that the accused was not justified in selling the tickets at rates higher than those for which he had bought them and that he ought to have returned them to the Railway Company if he did not require them for use and obtain a refund of the fare he had paid.

Under this impression he convicted the accused of cheating under Section 417, Indian Penal Code, and sentenced him to pay a fine of Rs 10. But the 2nd witness admitted before the Magistrate that he was not deceived by the accused and that he paid the excess of 3 pies to save himself the inconvenience of personally obtaining a ticket, as there was a crowd of persons struggling to obtain tickets at the place where tickets were issued. The Acting District Magistrate considers that upon the

In Re
Ramasawmy
Naidu

facts in evidence the conviction cannot be supported, and refers it to this Court on the ground that it is illegal

The sale or transfer of single tickets is neither prohibited nor rendered penal by the Act IX of 1890, Sections 70 and 114 purporting to apply only to return or season tickets. According to the 2nd witness, there was no misrepresentation and he was not misled as to the rate at which the accused had bought the ticket. Consequently there was no deception and the conviction is bad in law.

We set aside the conviction and order the fine to be refunded

The Indian Law Reports, Vol. XVIII. (Bombay) Series,

Page 440

CRIMINAL REVISION

Before Mr Justice Candy and Mr. Justice Fullon.

QUEEN-EMPRESS

v.

KUTRAPA *

1893
August 14

Railways Act (IX of 1890) Sec 113—Excess charge and fare recoverable as a fine—Magistrate not competent to impose imprisonment in default—Fine—Imprisonment

Section 113 Sub section (4)(i) of the Indian Railways Act (IX of 1890) which directs that on failure to pay on demand excess charge and fare when due the amount shall on application be recovered by a Magistrate as if it were a fine does not authorize the Magistrate to impose imprisonment in default. The excess charge and fare referred to in the section is not a fine, though it may be recovered as such.

* Criminal Review, No 179 of 1893

(1) Section 113, sub-section (4) of Act IX of 1890 provides as follows:—“If a passenger liable to pay the excess charge and fare mentioned in sub-section (1) or the excess charge and any difference of fare mentioned in sub-section (2) fails or refuses to pay the same on demand being made therefor under one or other of those sub-sections as the case may be the sum payable by him shall on application made to any Magistrate by any railway servant appointed by the Railway Administration in the behalf be recovered by the Magistrate from the passenger as if it were a fine imposed on the passenger by the Magistrate and shall as it is recovered be paid to the Railway Administration

The accused was prosecuted before the First Class Magistrate of Poona under Section 113 of the Indian Railways Act (IX of 1890) for travelling in a railway without a ticket

Queen
Empress
v
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The Magistrate ordered the accused to pay the Railway Company Rs 2 1 on account of railway fare, and Rs 1 as excess charge, or in default to undergo three days' simple imprisonment

The High Court in the exercise of its revisional jurisdiction sent for the record of the case

There was no appearance either for the Crown or for the accused

PER CURIAM —We do not think that the provision in Section 113 of the Railway Act, which directs that on failure to pay on demand excess charge and fare when due, the amount shall on application be recovered by a Magistrate as if it were a fine, authorized the Magistrate to impose imprisonment in default. Section 64 of the Indian Penal Code applies to all fines imposed for offences. And by Section 5 of the General Clauses Act (I of 1868) Sections 63 to 67 of the Indian Penal Code and 63 of the Criminal Procedure Code (now Section 386) apply to all fines imposed under the authority of any Act hereinafter to be passed. But we cannot say that the excess charge and fare referred to in Section 113 of Act IX of 1890 is a fine, though it may be recovered as such. The provisions of Section 64 of the Indian Penal Code provide imprisonment as a punishment for the offender, and not merely as a means of recovering the fine, which can be recovered under Section 386 of the Criminal Procedure Code (X of 1882). It is true that in Section 560 of the Criminal Procedure Code (as in the old Section 250) it seems to be assumed that the expression 'recoverable as a fine' includes the power of imprisonment in default of payment, but the language of Section 552 suggests a contrary inference. We think, then, that we cannot safely determine the construction of Section 113 of the Railway Act by any analogy based on the wording of either Section 552 or 560 of the Criminal Procedure Code but must be guided by the general principle that imprisonment cannot be ordered except in cases in which it is expressly prescribed

**The Indian Law Reports, Vol XX (Madras) Series,
Page 385.**

APPELLATE CRIMINAL

*Before Sir Arthur J. H. Collins, Kt., Chief Justice,
and Mr Justice Shepherd*
QUEEN-EMPRESS

v.

SUBRAMANIA AYYAR *

1897
January 14

Railway Act—Act IX of 1890, S 113—Excess charge and fare recoverable as a fine—Magistrate not competent to impose imprisonment in default—Fine—Imprisonment

Section 113, sub section (4) of the Indian Railway Act (IX of 1890) which directs that on failure to pay on demand excess charge and fare when due the amount shall, on application be recovered by a Magistrate as if it were a fine, does not authorise the Magistrate to impose imprisonment in default. The excess charge and fare referred to in the section is not a fine, though it may be recovered as such.

CASE reported for the orders of the High Court under Section 493 of the Code of Criminal Procedure by A. E. O. STUART, District Magistrate of South Arcot.

The case was stated as follows —“A passenger named Subramania Ayyar was found in a third class railway carriage of the South Indian Railway train, No 14, at the Chidambaram Railway Station on the night of the 12th July last. The Station Master forwarded the passenger to station house officer of the place with a letter requesting the latter to collect the railway fare from the passenger and send the amount to him. The station-house officer sent the passenger with the letter of the Station Master to the Stationary Sub Magistrate of Chidambaram. The Sub-Magistrate took up the case under Section 113 of the Railway Act IX of 1890, and examined the passenger who represented that he had purchased a ticket at Mayavaram for Chidambaram, and that on his way he was robbed of his bag containing money and the ticket, and that

" he knew nobody who would stand surety for him at Chidam-
 " haram where he was a stranger. The Sub-Magistrate believed
 " the passenger, and having obtained his alleged address
 " released him on his own bond for Rs 20 conditional on his
 " appearance at Chidambaram on the 18th July 1896. The
 " passenger, however, failed to appear again. A distress
 " warrant was issued by the Sub Magistrate to collect the
 " amount due, but the warrant was returned with an endorse-
 " ment that the passenger was not to be found in the place
 " mentioned. The Sub Magistrate reported the facts to the
 " authorities of the South Indian Railway Company, who repre-
 " sented to me that the Sub Magistrate's procedure was irregular.
 " When the Sub Magistrate was called upon to explain, he
 " seeks to justify his procedure by saying that Sections 64 to 67
 " of the Indian Penal Code do not apply to the cases contem-
 " plated by Section 113 of the Railway Act, and that he had no
 " power to award imprisonment in default of payment of the
 " amount. His view of the case is apparently supported by the
 " rulings of the Bombay High Court in *Queen Empress v Kut-*
 " *rupa* (1). That ruling appears to have been arrived at by their
 " Lordships with some hesitation and as the point is one of
 " considerable general importance, it seems desirable that an
 " authoritative ruling of the Madras High Court for the
 " guidance of the Magistracy of this Presidency should be
 " obtained. Should it be definitely settled that imprisonment
 " cannot be awarded in default of the payment of the excess
 " charge and fare though the law expressly enacts that this
 " sum shall be recovered as if it were a fine imposed the
 " commission of frauds upon Railway Companies, as in the
 " present case, will be greatly facilitated.

The Public Prosecutor (Mr Powell) for the Crown

Rama Rau for the Accused

Order—We agree with the decision in the Bombay case *Queen-
Empress v Kutrupa* (1). We decline to interfere.

The
 Queen
 Empress
 v
 Subramania
 Ayyar
 ———

The Indian Law Reports, Vol. XX. (Allahabad) Series
Page 95

CRIMINAL REVISION.

Before Mr. Justice Knox.

QUEEN-EMPRESS

v.

RAM PAL *

1897
August, 2

Act No IX of 1890 (Indian Railways Act) Sections 113, 132—Act No XLV of 1860, Sections 40, 64—Criminal Procedure Code, Section 33—"Offence"
—Travelling on a railway without a proper ticket—Penalment

A passenger who travels in a train without having a proper pass or ticket with him has not committed an "offence." He cannot therefore be legally sentenced to imprisonment in default of payment of the excess charge and fare which may be recovered under the provisions of Section 113 cl. (1) of Act No IX of 1890.

In this case the Joint Magistrate of Allahabad tried one Ram Pal summarily under Section 113 of the Indian Railways Act, 1890, and ordered him under that section to pay a certain excess fare together with a penalty, and further sentenced him to ten days' simple imprisonment in default of payment of the amount. The Magistrate of the District being of opinion that the sentence of imprisonment in default was illegal, the act of the accused not amounting to an "offence" within the meaning of the Indian Penal Code, referred the case to the High Court for orders under Section 438 of the Code of Criminal Procedure.

The following order was passed—

Knox, J.—Travelling in a train by a passenger without having a proper ticket with him is not an offence under the Railways Act of 1890. It is true that Section 113 together with Section 106 and the sections which follow up to as far as Section 130 are all placed under a heading of "other offences." The classification is unfortunate, for several of these sections cannot possibly relate to an offence at all, and Section 132 shows clearly that acts committed under Section 113 are not deemed offences within the technical meaning of that word. All the proceedings taken by the Assistant Magistrate are set aside and the record will be returned.

The Bombay Law Reporter, Vol. I Page 166.

CRIMINAL REVIEW.

*Before the Hon'ble H. J. Parsons, Acting Chief Justice,
and Mr. Justice Ranade.*

QUEEN-EMPRESS

v.

JAMES CROWSON *

*Railway Act (Act IX of 1890), Sec 113—Excess charge and fare recoverable
as a fine—Magistrate not competent to impose imprisonment in default—
Fine—Imprisonment*

1899
March, 23

Section 113, sub section (4) of the Indian Railways Act which directs that, on failure to pay on demand excess charge and fare when due, the amount shall on application be recovered by a Magistrate as if it were a fine, does not authorize the Magistrate to impose imprisonment in default.

Queen-Empress v. Kutrapa,⁽¹⁾ and *Queen Empress v. Subramania Iyer*⁽²⁾ followed *Imperatrix v Vaidyalingam Narayana Swami*,⁽³⁾ disapproved of.

THE accused was prosecuted before Rao Sahib Shivaram Sadasiv Bhide, Second Class Magistrate of Haveli, under Section 113 of the Indian Railway, Acts for travelling, by second class from Bombay to Kirkee, without a ticket.

The Second Class Magistrate ordered the accused to pay Rs. 3-10-0 as second class railway fare and to pay Rs. 3-0-0 as excess charge, or in default to undergo simple imprisonment for one day.

The High Court in the exercise of its revisional jurisdiction sent for the record of the case.

There was no appearance either for the Crown or for the accused.

PER CURIAM - We sent for this case in order to reconsider our decision in *Imperatrix v Vaidyalingam Narayana Swami*,⁽³⁾ which was pointed out to us as being in conflict with a previous

* Criminal Review No. 45 of 1899

(1) I L R, 13 B. m. 410

(2) I L R 10 M. 1 385

(3) Criminal Punjab No. 43 of 1896

Queen
Empress
v
James
Crowson

decision of this Court, *Queen-Empress v Kutrapa* (1) Having reconsidered it we have decided to follow the last mentioned case which we find has since been agreed in by the Madras High Court—See *Queen-Empress v Subramama Iyer* (2) There is no necessity to pass any order in the case as the monies have been paid, so we return the papers

The Nagpur Law Reports, Vol V. Page 151

CRIMINAL REVISION

*Before F. A. C. Skinner, Esquire, I.C.S., Additional
Judicial Commissioner, C. P.*

EMPEROR *

v

BULAKHI.

1909
August 24

Section 113 of the Indian Railways Act—Imprisonment in default of payment of fine—Attachment and sale of moveable property

An amount recoverable as a fine under Sec 113 of the Indian Railways Act can only be recovered by attachment and sale of moveable property Imprisonment in default cannot be awarded

Queen-Empress v Crowson (3) and *Queen-Empress v Subramama Iyer* (2) followed

On Bulakhi is reported to have been found travelling without a ticket on the foot-board of the brakeman of a goods train

Under Section 113 of the Indian Railways Act, application was made to a Magistrate for recovery from him of double first class fare from Bina to Karonda, as only first class passengers are allowed to travel by goods train (in the brakeman)

Bulakhi said he could not and would not pay the sum of Rs 1-10-0 demanded of him, and the Magistrate ordered that in default of payment he should suffer 7 days' simple imprisonment. The District Magistrate has suspended execution of the sentence, and reported the case for revision. In view of the decision of the Bombay High Court in *Queen-Empress v Kutrapa* (1) and

(1) 11 R 15 Bom 440

(2) 1 L R 30 Mad 353

(3) (1899) 1 Bom L R 168

*Criminal Revision No 331 of 1909 The District Magistrate, Sangor reported (under Sec 429, Criminal Procedure Code) the case decided by 1st Class Magistrate, Sangor, on 16th August 1909

Queen-Empress v Crooson (1), and of the Madras High Court in *Queen Empress v Subramania Iyer* (2), I must accept the recommendation of the learned District Magistrate and set aside the order of imprisonment in default of payment of the amount in question on the ground the words "shall be recovered as if it were a fine," in Section 113 of the Railways Act only authorise recovery by attachment and sale of moveable property, and not the infliction of imprisonment in default of payment though I do so with some regret in view of the difficulty in recovering such amounts, which as represented by the District Magistrate, who made the reference in the Madras case, seems likely to result.

I would point out, however, that if Bulakh persisted in riding on the foot-board after prohibition, he is liable to prosecution under the 2nd clause of Sec 118 of the Railways Act, whilst if there was no such prohibition before he was finally discovered and removed, but he entered on the Railway unlawfully, he is liable to prosecution under the 1st clause of Sec 122

In the Chief Court of the Punjab.

CRIMINAL REVISION

Before Mr. Boulnois and Mr Simson, J J

CROWN

v

GUNPAT

Railway Act XVIII of 1854 Section 3—Passenger travelling with an old pass—Conviction for cheating—Indian Penal Code Sections 417 and 411 1864 January 11

The accused travelled with an old pass altered as to date and number of persons. He was charged under Sections 417 and 411 Indian Penal Code for cheating the Railway and was sentenced to 3 months rigorous imprisonment and a fine of Rs 50. Of the term of imprisonment one month to be passed in solitary confinement.

Held that he was rightly convicted. Ordinarily a person evading the payment of his fare in any manner whatever is charged under Section 3 of Act XVIII of 1854. But in this case the passenger having made a

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Ganpat

distinct pretence to the Ticket Collector by the production of a pass with an altered number, which the accused said he had picked up, was charged under the Indian Penal Code for cheating.

Deputy Commissioner's Judgment

A case of this kind would ordinarily be tried under Section 3 of Act XVIII of 1854, but I do not think that the punishment awardable under that section is sufficient for the offence of which the accused is guilty. It was not simply that the accused attempted to travel without having obtained a ticket, and attempted to defraud the Company simply by not getting a ticket, but there is much more here. He tries to pass off an old pass, which has been altered as to date and number of persons for whom it was intended. If it could be proved that the accused made the alterations, he might be tried for forgery, if it could be proved that he used the pass knowing that it had been altered, he might be tried for using a forged instrument. Whatever suspicion there may be against the accused on these points there is no sufficient proof of them, and it is not likely that proof would be forthcoming if I delayed the case, nor is it necessary to delay it, as sufficient punishment can be awarded under Sections 417 and 511, Indian Penal Code, under which the offence committed by the accused clearly comes. He certainly attempted to deceive the Railway Company, and tried to induce the Railway Company to do a thing which they would not have done if they were not deceived, and which would have caused them damages or loss in other words, the accused attempted to "cheat," in the language of the Penal Code.

The Court finds that Ganpat attempted to cheat and has thereby committed an offence punishable under Sections 417 and 511, Indian Penal Code, and the Court directs that Ganpat be rigorously imprisoned for 3 months, and pay a fine of Rs 50, or in default suffer six weeks' further rigorous imprisonment. Of the term of imprisonment, one month to be passed in solitary confinement.

I may further add, that the accused did not err through ignorance, as he has often travelled by rail, and once had a contract on the Railway.

Commissioner's Judgment in Appeal

The offence in this case is undoubtedly a greater one than was contemplated by Section 3 of Act XVIII of 1854, and was I think, rightly dealt with under the Penal Code. Appeal dismissed.

Grown
v.
Haupt.

Chief Court's order in revision.—Mr. RATTIAN was heard for the petitioner. Act XVIII of 1851 punishes generally, by a special law, the attempt in any manner whatever to evade the payment of a Railway fare. This covers every case of intentionally riding without payment, by a person who knows the fare to be due.

In this case, however, there was a distinct intention made to the Ticket Collector by the production of a pass with an altered number, which the accused said he had picked up. This distinct act being done in addition to the unlawful riding, constitutes not merely an offence of attempting to evade payment of a Railway fare, but of cheating under the Indian Penal Code.

The accused dishonestly induced the Railway Company to do, or omit to do, what they otherwise would not have done or omitted, by his production of the altered pass. This amounts to cheating, and the conviction, in the Court's opinion, was right.

In the High Court of Judicature at Madras.

Before Mr. Justice Ayling and Mr. Justice Spencer.

GOVINDASAWMY NAIDU (Petritioner), APPELLANT*

v.

EMPEROR.

*Travelling with a forged pass—Indian Penal Code, Sections 110, 111—
Railways Act, IX of 1890, Section 112.*

1911
July, 17.

A person travelled from Tiruchloopoly to Podanur without a ticket, and on arrival at Podanur he produced a forged Railway pass made out in the name of a servant of Mr. Brown, Assistant Stationer. It was not shown to a Ticket Examiner or any other Railway Official before the journey was completed. He was convicted of the offence of cheating by personation under Section 110, Indian Penal Code, and under Section 112 (a) of the Indian Railways Act, IX of 1890.

It is, that he can be convicted only of an attempt under Section 110 and 111, Indian Penal Code. The conviction under Section 112 of the Railways Act was confirmed.

APPEAL from the order of the Court of Sessions of the Coimbatore Division, in Case No. 125 of the Calendar for 1910.

The Appellant was unrepresented.

Govinda
Sawmy
Naidu
v
Emperor

The Public Prosecutor (C F Napier) for the Crown

The Court delivered the following

JUDGMENT —The appellant has been convicted of cheating by personation (Section 419, Indian Penal Code) and of an offence under Section 112(a) of the Railways Act. It is not denied that he travelled by the South Indian Railway from Trichinopoly to Podanur without a ticket and that on arrival at Podanur he presented a forged Railway Pass made out in the name of the "servant of Mr Brown, Assistant Auditor"—a description which did not apply and never had applied to him. The appellant in his appeal petition admits all this, and merely pleads that he was induced by deceitful friends to buy the pass for a less sum than the fare would have amounted to.

In our opinion the conviction under Section 419 Indian Penal Code, must be changed to one of attempt only. There is no evidence to prove that the appellant at any time showed the pass to a Ticket Examiner or other Railway Official before the completion of his journey, and his presentation of it, when challenged at Podanur, can only be regarded as a dishonest attempt to induce the Railway Company's servants to omit to collect the fare from him or prosecute him in default. The attempt was not successful. He has been prosecuted and the fare has been ordered to be recovered by the Railway Company out of the fine imposed.

We therefore alter the conviction from one under Section 419, Indian Penal Code, to one under Sections 419 and 511, Indian Penal Code, and reduce the sentence to six months' rigorous imprisonment.

The conviction and sentence under Section 112 of the Railways Act are confirmed.

The Indian Law Reports, Vol. XII. (Calcutta) Series,
Page 192.

CRIMINAL REVISION.

Before Mr. Justice Wilson and Mr. Justice Ghose.

IN THE MATTER OF THE PETITION OF E. G. BUSKIN.

IN THE MATTER OF THE PETITION OF C. F. THOMAS

E. W. HART,

v.

E. G. BUSKIN *

E. W. HART,

v.

C. F. THOMAS.

Railway Act (IV of 1879), Sections, 17, 31—Passenger not producing season ticket when called upon—Travelling without a ticket—Order for recovery of fare

1895
September, 2.

A passenger who has obtained a monthly ticket is liable to be called upon to produce it at any time on the journey which it covers, and if he does not so produce it, he is liable under Sections, 17 and 31 of the Railway Act to pay the fare for the journey between the stations for which his ticket was issued. The order under Section 31, in case of his refusal to pay it, should be one merely for recovery of the amount due as the fare and not an order to pay such sum or any other sum as if it were a fine.

A passenger who has such a ticket which is still in force and in his possession, cannot be said to be travelling without a ticket within the meaning of Section, 31, merely because he does not happen to have the ticket with him, and therefore cannot produce it when called upon to do so.

In these two cases the petitioners were prosecuted under the Railway Act (IV of 1879) Section 31. Mr Buskin, the petitioner in the first case, was a monthly ticket-holder on the Eastern Bengal State Railway, his ticket entitling him to travel between Barrackpore and Sealdah Stations. He was on 29th June last when tra-

* Criminal Revision Nos 324 and 325 of 1895, against the order of Baboo Roy Ram Senker Sen, Bahadoor Deputy Magistrate of Sealdah dated the 25th July 1895

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v
Thomas

velling to Sealdah, called upon to produce his ticket, but having inadvertently left it behind at his house, he was unable to produce it

The Deputy Magistrate found that he was technically guilty of omitting to show his ticket when called on, and made an order that he should be "fined annas 14, realizable by distress and sale if not paid"

Major C. F. Thomas, the petitioner in the second case, was also a monthly ticket holder, on the same line, between the same stations, and on the 3rd July, was found travelling without a ticket. He had his ticket when coming to Sealdah in the morning but had left it at his office, and when asked to produce it on the return journey could not do so. In this case the Deputy Magistrate inflicted a "nominal fine of one anna"

The defendants in both cases petitioned the High Court to have the order of the Deputy Magistrate set aside

Mr Hill for the Petitioners.

Section 31 of Act IV of 1879 deals with cases of passengers who, without desiring to defraud, are found travelling without tickets. Now the wording of the Magistrate's order shows that he treated the matter as a criminal one, inasmuch as the petitioners have been fined in one case fourteen annas and in the other one anna. I submit that the petitioners could not be prosecuted criminally, the matter before the Court was a matter of civil liability with the provision that the debts due from the petitioners might be recovered by distress or warrant. This is clear from Section 32 which differs from Section 31. The case of *Tolce Bibee v Abdool Khan*(1) points out that a proceeding of the nature of this case is not a criminal one. Under Section 31 there is an implied pre-existing liability that the passenger will pay the fare, but till conviction there is no pre-existing liability to pay a fine. The punishment of fine throughout the Act is kept entirely distinct from the payment of fares.

As to whether a matter is to be considered a criminal or civil proceeding, see *Queen v Fletcher*(2) and *Mellor v Denham*(3). I submit the proceedings under Section 31 are civil proceedings.

(WILSON, J.—We need not trouble you further on that point)

(1) 1 L. R. 5 Cal. 130

(2) L. R. 2 Q. B. D. 43

(3) L. R. 5 Q. B. D. 167

Hart
v
Buskin
Hart
v
Thomas
—

As regards the demand made to Buskin to pay his fare, that I submit was not enough, a specific amount should have been demanded. Suppose, for instance, Buskin had been unable to prove that he had started from Barrackpore, then if the matter was a civil one, the Railway Company, knowing where the train had started from, would have to make a demand of a specific sum. As to this point see *Brown v. Great Eastern Railway Company* (1). With regard to the reasonableness of a bye law which requires a passenger to show his ticket when required, see *Saunders v. South Eastern Railway Company* (2). With regard to the case of Major Thomas, the Magistrate had no power to fine him one anna, he might have declared him liable to a payment of fourteen annas, but he has not done so. I submit that the cases have been treated criminally, and for that reason, if for no other, the orders must be quashed. Could the petitioners, however, be charged with offences under Section 31? Section 31 refers to Section 17, and that latter section refers to the question of the creation of the contract. I submit the liability of the petitioners is one arising out of the contract created by Section 17.

(WILSON, J.—“Travelling without a ticket” in Section 31 must mean travelling without having taken a ticket.)

Yes, tickets are taken from the passengers to Calcutta at Barrackpore, and if Section 31 were not read so, those passengers could be proceeded against as having travelled without tickets. There is no such liability arising out of the second part of Section 31 which refers to passengers ‘having such a ticket and not showing it,’ those words have the meaning of a contumacious refusal to show a ticket. As to this see *Dearden v. Townsend* (3).

Mr. Bonnerjee, *contra*, contended that in substance the order of the Magistrate was correct, and that, although he had under a mistake made use of the word “fine,” yet it was clear that the matter was intended to be treated civilly.

The following judgment was delivered by the Court (WILSON and GHOSE, J. J.):

WILSON, J.—The facts of this case are these. The petitioner Mr. Buskin was the holder of a monthly ticket entitling him to travel on the Eastern Bengal State Railway between Barrackpore and Sealdah. On the morning of the 29th June last he travelled

(1) L R 2 Q B D 406. (2) L R 5 Q B D 46 (461)

(3) L R 1 Q B 10

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v
Buskin,
Hart
v
Thomas

by a train from Barrackpore to Sealdah. Being asked while in the train by a Ticket Collector in the service of the Railway Administration to show his ticket, he was unable to do so, having accidentally left it at his house in Barrackpore. The Ticket Collector asked him to pay his fare and he refused. The fare from Barrackpore to Sealdah was fourteen annas. The ticket-collector knew that Mr. Buskin held a monthly ticket.

Application was made to the Police Magistrate of Sealdah by the Station Master of Sealdah for a summons against Mr. Buskin, in respect of a charge of having travelled without a ticket, and when asked to pay his fare refusing to do so, Sections 17 and 31 of the Indian Railway Act (IV of 1879) being referred to. After some intermediate proceedings, on the 3rd July a summons was issued against Mr. Buskin, requiring him to attend on the 10th July, and answer a complaint charging him with having travelled without a ticket and refusing to pay his fare when asked to do so, and further with not showing his ticket and giving it up when demanded. Mr. Buskin appeared, and after some adjournments the matter was finally disposed of on the 25th July. The Magistrate having found that Mr. Buskin was unable to show his ticket on the occasion in question, said "The defendant is, therefore, technically guilty of the omission as laid down in the Act and is fined annas 14 realizable by distress and sale if not paid."

We are asked to set aside this order.

Upon the main question, we think the Magistrate is right, that is to say, we think Mr. Buskin was bound to pay the fare from Barrackpore to Sealdah amounting to fourteen annas.

By Section 17 of the Railway Act (IV of 1879) "Every person desirous of travelling on a railway shall, upon payment of his fare, be furnished with a ticket specifying in English and the principal vernacular language of the district in which the ticket is issued the class of carriage for which, and the place from and the place to which the fare has been paid, and the amount of such fare, and every passenger shall, when required, show his ticket to any railway servant duly authorized to examine the same, and shall deliver up the same to any railway servant duly authorized to collect tickets." By Section 31 "Any passenger travelling on a railway without a proper ticket, or having such a ticket and not showing or delivering up the same when so required by Section 17, shall be liable to pay the fare of the class in which he is found travelling from the place whence the train on which he

started, unless he can prove that he has travelled a less distance only, in which case he shall be liable to pay the fare of the class aforesaid only from the place whence he has travelled. Every such fare shall on application by a railway servant to a Magistrate, and on proof of the passenger's liability, be recoverable from such person as if it were a fine, and shall, when recovered, be paid to the Railway Administration.

Under those sections the Railway Administration is to furnish every passenger with a proper ticket, no passenger is to travel without such a ticket, every passenger is to show or deliver up his ticket when called upon, and any passenger who fails in either of these points is liable to pay the ordinary fare for his journey, or if he cannot show where he got into the train the ordinary fare from the starting point of the train.

We do not think Mr Buskin's case falls within the provision as to travelling without a ticket. We do not think that a passenger who has been duly furnished with a proper ticket, which is still in force and still in his possession, can be said to be travelling without a ticket, while making a journey covered by that ticket. But Mr Buskin does seem to us to have failed to show his ticket within the meaning of the Act. There is no distinction drawn between one kind of ticket and another. I very passenger, whether a season ticket-holder or not, may be called upon to show his ticket and if he is so called upon, and has not got his ticket with him to show, he may be required to pay the ordinary fare. We are of opinion that, having regard to the language and extent of Section 17 of the Act, Section 31 should be read thus: Any passenger travelling on a railway without being furnished with a proper ticket, or having been furnished with such a ticket and not showing or delivering up the same when so required under Section 17, shall be liable, &c, &c. The Magistrate was therefore right in holding that Mr Buskin was liable to pay fourteen annas, the fare from Barrickpore to Serdali.

But the form of the order as described in the Judgment by which Mr Buskin is to be fined fourteen annas is wholly wrong. Many sections of the Railway Act deal with frauds by passengers and other acts of wilful wrong and these sections say that the offender is to be punished with a fine. But Section 31, dealing with innocent persons who may, like Mr Buskin find themselves in the wrong, by mere accident has nothing to do with punishment or penalty or fine. It simply makes a fare

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—

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recoverable, and recoverable in a summary way. If any final order is drawn up in this case it must order payment of fourteen annas as the fare from Barrackpore to Sealdah. In substance, however, the order of the Magistrate is correct.

The case of *Hart v Thomas* is similar to *Mr Buskin's* in every respect except one, but that one is very material. The Magistrate has not awarded the amount of fare which alone he could do under the section, but has imposed an arbitrary fine of one anna. The order is therefore wrong in substance and must be set aside.

In the Chief Court of the Punjab.

CRIMINAL REVISION.

Before The Hon'ble Mr H. A. B. Rattigan, Judge.

DURGA DAS, CONVICT, PETITIONER

v

THE KING EMPEROR OF INDIA, RESPONDENT

CASE No 245 OF 1908

Booking Clerk—Cheating a passenger

A booking clerk who cheated a passenger of the value of one ticket out of the money paid for six third class tickets was convicted and sentenced to undergo rigorous imprisonment for 3 years including three months solitary confinement. On appeal the sentence was reduced to six months rigorous imprisonment including solitary confinement for one month.

PETITION under Section 439 of the Cr P Code for revision of the order of Lt-Col C M DALLAS, Political Agent, Phulkian States and Bahawalpur, exercising the powers of a Sessions Judge at Patiala dated 18th December 1907, affirming that of Capt J C COLDRUP, District Magistrate, exercising enhanced powers under Section 30 of the Cr P Code, dated 31st October 1907, convicting the petitioner.

Charge.—Under Sections 120/511 and 409 of the I P C
SENTENCE.—‘Three years’ rigorous imprisonment, including three months’ solitary confinement under each Section, the sentences to run concurrently.

1908
June 1

Petitioner —By Mr *Bodhray*, Advocate

Respondent —By Mr *Turner*, Government Advocate

Durga Das

¹
King
Emperor

JUDGMENT —The petitioner has been convicted by Capt J C COIDSTREAM, a Magistrate of the first class, exercising powers under Section 30 of the Cr P Code, of two offences—(1) under Sections 420/511, I P C, and (2) under Section 409, I P C—and has been sentenced in respect of each offence to 3 years' rigorous imprisonment (including 3 months solitary confinement) the sentences to run concurrently. This conviction and these sentences were maintained on appeal by the Political Agent to the Phulkian State and Bahawalpur, in his capacity as Sessions Judge, in respect of offences committed (as these offences are alleged to have been committed) within the territories of those States. The Sessions Judge, however, was of opinion that as regards the first offence, the conviction ought to have been for the substantive offence and not for the mere attempt to commit it.

The case for the prosecution, briefly stated, is as follows —

On the 6th August last, the complainant, Har Nand, appeared at the booking office of the N W R station at Jhind, and asked for 6 tickets to Hardwar, and in payment therefor tendered Rs 18, the price of a single ticket for that journey (3rd class) being Rs 2-15. The booking clerk was the accused, Durga Das, and it is alleged that the latter gave complainant only 5 tickets and 5 annas change, whereas complainant, if he actually paid Rs 18 should have received 6 tickets and 6 annas change. Complainant, it is said, expostulated with the accused and pointed out that a mistake had been made whereupon accused abused the complainant and told him that he had got all that he was entitled to get. The complainant went off and reported the matter to the Station Master Mr Glavin, and the Traffic Inspector, Mr Brocken, and the latter accompanied by some other persons proceeded to the booking office and examined the cash in the till. This they found to be Rs 3 in excess. It is alleged that in order to account for this excess the accused subsequently with drew 4 intermediate class tickets from Jhind to Delhi and gave them to a friend of his, Narinjan Das to take to Delhi by a later train with instructions to deliver them up as being tickets which had been issued to passenger but had been dropped on the Jhind station platform. Narinjan Das was charged with, and found guilty of offences under Sections 409/409 and 411, and did not appeal.

Durga Das
v
King
Emperor

Such then is the story for the prosecution, and I am asked to interfere on revision with the conviction of Durga Das on the following grounds —

(1) That in any case the conviction under Sections 420/511 is wrong, inasmuch as the accused had actually received the money from the complainant before there was any attempt on his part to cheat. In my opinion this contention is well founded and the learned Government Advocate practically admitted that the conviction of an attempt to commit the offence punishable under Section 420 could not be supported upon the present facts. At the same time I see no reason why accused should not upon the facts as alleged by the prosecution be convicted of an attempt to cheat within the meanings of Sections 415, 417, I P C, when he informed the complainant that the latter had received all that he was entitled to, he attempted to deceive the latter and to induce him to go away under the impression that he was only entitled to 5 tickets and 5 annas change. The substantive offence of cheating was not committed because the accused did not succeed in deceiving the complainant, but the fact remains that he attempted to cheat him. I therefore alter the first charge to one under Sections 417/511, and as the accused is in no way prejudiced by this alteration, I further alter the conviction upon this head to one under those Sections and sentence him (in lieu of the sentence under Sections 420, 511 which I hereby set aside) to six months' rigorous imprisonment (including one month's solitary confinement).

(2) that in any event accused did not commit even the offence punishable under Section 417, Indian Penal Code because he did not know that the complainant had paid him Rs. 18, his belief being that he had been paid only Rs. 15. But upon this point both the Magistrate and the Sessions Judge are agreed that accused's professed ignorance is not established and that it is on the other hand proved, that he was actually paid Rs. 18, and that he well knew that complainant had given him this amount. With this concurrent finding for which there is ample evidence in the statements of complainant and of the witness, Parmar, I do not think I should, even if I were so disposed (even if I were so disposed) in interfering on the revision.

Mr. Bodhray who argued the case for the accused with great ability contended that before the offence of cheating can be established, it must be shown that accused knew that complainant

Durga Das
King
Emperor
—

ant had given him Rs 18, and that it was not enough to show that he subsequently discovered that that sum had been paid to him. I quite agree, but I cannot see how this argument helps the accused in face of the finding of the Courts below that accused well knew that he had been paid Rs 18 at the time when he informed complainant that he (the complainant) had been given all he was entitled to. This is a finding of fact which (as above remarked) is binding on me as a Court of revision.

But quite apart from that objection I confess I do not see how the conviction for cheating can be upset in face of the further finding of the Courts that the accused deliberately attempted to make up the excess by utilising for his own purposes the 4 intermediate class tickets. His story that these 4 tickets were actually issued to the 4 persons whom he called as witnesses has been disbelieved (and I think on very good grounds) by the Magistrate and the Sessions Judge, and I cannot possibly hold, counter to their findings that the evidence of Raw Nath is false. If this evidence is true, the accused clearly committed both the offence of cheating and also the offence punishable under Section 409, Indian Penal Code. In reply to this part of the case, Mr Bodhray argued that even if accused had swindled complainant out of Rs 3 and even if the prosecution story as to the four intermediate tickets being taken to Delhi by Nuanjan Das was true, still no offence under Section 409, Indian Penal Code, was committed by accused, because he had not misappropriated these 4 tickets but had paid for them with the Rs 3, which he had cheated the complainant of, the argument being that as long as Government was paid for these tickets as it was by accused allowing the Rs 3 which he had obtained from complainant to remain in the till, it was immaterial that accused had paid for them with money which he had stolen from another. Unfortunately, for this argument it is entirely opposed to the explanation given by the accused. He does not pretend for a moment that he bought those 4 tickets for himself. On the contrary he asserts, and has called evidence to prove, that 4 passengers actually purchased those tickets of him. This evidence has been disbelieved by the Courts below but in face of it it is idle for accused's Counsel to argue that accused actually purchased the tickets for himself and that therefore no offence under Section 409, Indian Penal Code, was committed by him.

Durga Das
v
King
Emperor

Such then is the story for the prosecution, and I am asked to interfere on revision with the conviction of Durga Das on the following grounds —

(1) That in any case the conviction under Sections 420/311 is wrong, inasmuch as the accused had actually received the money from the complainant before there was any attempt on his part to cheat. In my opinion this contention is well founded and the learned Government Advocate practically admitted that the conviction of an attempt to commit the offence punishable under Section 420 could not be supported upon the present facts. At the same time I see no reason why accused should not upon the facts as alleged by the prosecution be convicted of an attempt to cheat within the meanings of Sections 415, 417, I P C, when he informed the complainant that the latter had received all that he was entitled to, he attempted to deceive the latter and to induce him to go away under the impression that he was only entitled to 5 tickets and 5 rans change. The substantive offence of cheating was not committed because the accused did not *succeed* in deceiving the complainant, but the fact remains that he *attempted* to cheat him. I therefore alter the first charge to one under Sections 417/511, and as the accused is in no way prejudiced by this alteration, I further alter the conviction upon this head to one under those Sections and sentence him (in lieu of the sentence under Sections 420, 511 which I hereby set aside) to six months' rigorous imprisonment (including one month's solitary confinement).

(2) that in any event accused did not commit even the offence punishable under Section 417, Indian Penal Code because he did not *know* that the complainant had paid him Rs. 18, his belief being that he had been paid only Rs. 15. But upon this point both the Magistrate and the Sessions Judge agreed that accused's professed ignorance is not established and that it is on the other hand proved, that he was actually paid Rs. 18, and that he well knew that complainant had given him this amount. With this concurrent finding for which there is ample evidence in the statements of complainant and of the witness, Parma, I do not think I should, be justified (even if I were so disposed) in interfering on the revision.

Mr. Bodhray who argued the case for the accused with great ability contended that before the offence of cheating is established, it must be shown that accused knew that complainant

ant had given him Rs 18, and that it was not enough to show that he subsequently discovered that that sum had been paid to him. I quite agree but I cannot see how this argument helps the accused in face of the finding of the Courts below that accused well knew that he had been paid Rs 18 at the time when he informed complainant that he (the complainant) had been given all he was entitled to. This is a finding of fact which (as above remarked) is binding on me as a Court of revision.

But quite apart from that objection I confess I do not see how the conviction for cheating can be upset in face of the further finding of the Courts that the accused deliberately attempted to make up the excess by utilising for his own purposes the 4 intermediate class tickets. His story that these 4 tickets were actually issued to the 4 persons whom he called as witnesses has been disbelieved (and I think on very good grounds) by the Magistrate and the Sessions Judge and I cannot possibly hold, counter to their findings, that the evidence of Raw Nath is false. If this evidence is true, the accused clearly committed both the offence of cheating and also the offence punishable under Section 409 Indian Penal Code. In reply to this part of the case Mr Bodhnaj argued that even if accused had swindled complainant out of Rs 3 and even if the prosecution story as to the four intermediate tickets being taken to Delhi by Nuranjan Das was true, still no offence under Section 409, Indian Penal Code, was committed by accused, because he had not misappropriated these 4 tickets but had paid for them with the Rs 3 which he had cheated the complainant of, the argument being that as long as Government was paid for these tickets, as it was by accused allowing the Rs 3 which he had obtained from complainant to remain in the till, it was immaterial that accused had paid for them with money which he had stolen from another. Unfortunately, for this argument it is entirely opposed to the explanation given by the accused. He does not pretend for a moment that he bought those 4 tickets for himself. On the contrary he asserts, and has called evidence to prove, that 4 passengers actually purchased those tickets of him. This evidence has been disbelieved by the Courts below but in face of it, it is idle for accused's Counsel to argue that accused actually purchased the tickets for himself and that therefore no offence under Section 409, Indian Penal Code, was committed by him.

Durga Das
v
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Emperor

I have given every consideration to the legal aspect of the questions involved, but I can find no ground to justify interference on my part except as to the conviction under Sections 420/511, Indian Penal Code for the reasons given I alter that conviction to one under Sections 417/511, Indian Penal Code, and the sentence thereunder I direct to be of 6 months' rigorous imprisonment (one month's solitary confinement) this sentence to run concurrently with the sentence under Section 409, Indian Penal Code, imposed by the Lower Courts which I maintain

With this modification, I uphold the orders of the Sessions Judge and reject the present petition

In the Chief Court of the Punjab.

CRIMINAL REVISION

Before the Hon'ble Mr. Justice Oleris

THE CROWN

v.

HARI SINGH AND OTHERS (ACCUSED)

CRIMINAL REVISION No 1463 of 1909

1910
May, 14

*Indian Railways Act, IX of 1890—Sections 102, 100 (2) and 103 (c)—
Obstructing passengers from entering into compartment not full—
Assault—Criminal force*

A passenger, who was formerly an Assistant Station Master was travelling in an intermediate class carriage with a third class ticket. He obstructed other passengers from entering into his carriage alleging that it was already overcrowded and remonstrated with the accused Ticket Collectors and a Police constable who were attempting to get the passengers. But the accused urged that there was sufficient room in the compartment and the complainant had no right to obstruct them. Then an altercation took place. The complainant charged the accused with the offence of assault and using criminal force, while the accused alleged that the complainant was the aggressor. The accused were convicted and sentenced to pay a fine of Rs. 10 each.

On a Revision Petition presented by the Legal Remembrancer to the Chief Court.

Held that the complainant had only a third class ticket and even if the compartment was full he had no right to be there and prevent passengers with intermediate tickets from entering into the carriage.

and that the Railway servants were justified in using as much force as it was necessary to eject him from the carriage and that the conviction could not stand in the circumstance that the conduct of the complainant in resisting the entry of the passengers was the beginning of the trouble

The Crown
v
Hari Singh

CASE reported by H. A. ROSE, Esq., Sessions Judge, Ambala, Division, with his No 2527 G of 1st December 1909

Broadway Assistant Legal Remembrancer for Crown

Teak Chand, for the Accused

The facts of this case are as follows —

One Narain Das, formerly an Assistant Station Master at Muzaffarnagar, was travelling by the Hardwar passenger train on 9th April 1909. The train reached Ambala Station at about 7 A.M. The accused (1 to 3 ticket collectors on the North Western Railway not on duty and No 4 belonging to the Railway Police), attempted to seat some passengers in the intermediate class compartment in which Narain Das, complainant, was travelling. The complainant remonstrated that the carriage was already overcrowded and obstructed the entry of other passengers. The accused on the other hand urged that there was sufficient room in the compartment and that the complainant had no right to resist them. On this an altercation took place. The complainant charged the accused with using force and assaulting him, while the accused asserted that the complainant was the aggressor. The complainant also asserted loss of 20 sovereigns, 3 currency notes of Rs. 20 each and 5 or 6 Rupees. The evidence also shows that the complainant was in possession of only a third class ticket though he was seated in an intermediate class compartment, the entry into which by other passengers holding intermediate class tickets he resisted.

The accused, on conviction by LALA BASHANBAR DAYAL, exercising the powers of a Magistrate of the 1st class, in the Ambala District, was sentenced by order dated 6th August 1909 under Section 352 of the Indian Penal Code to a fine of Rs. 10 each. The proceedings are forwarded for revision on the following grounds —

This is a test case and must clearly be submitted to the Chief Court for a ruling on the points raised in the learned Assistant Legal Remembrancer's petition for revision.

The convictions appear to me untenable. Complainant had only a third class ticket and even if the intermediate compartment had been already full he at least had no right to be in

The Crown
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it or to prevent passengers with intermediate tickets from being put into it

On the facts as found by the Magistrate, I think petitioners committed no offence. The complainant might not be guilty of an assault on a Railway official in the execution of his duty if the said officials were off duty at the time, but I cannot think the mere fact that the petitioners were off duty justified complainant in resisting their attempt to put into the carriage other passengers for whom there was room and who held tickets

The case is an important one from the point of view of the Railway Administration and if the convictions are upheld the Railway Act may have to be amended. It would be intolerable if passengers could forcibly resist the entry into a partially empty carriage of passengers at least equally entitled to travel in it.

The fines are said to have been paid. The Magistrate has been directed to suspend payment of the Rs. 25 compensation to complainant pending order of the Chief Court.

The order of the learned Judge was as follows —

CHEVIL, J. — The complainant in this case was travelling in an intermediate compartment. When at Ambala Cantonment Station the ticket collectors wanted to put some more people into the carriage, complainant objected, and tried to prevent more passengers from entering. What followed is not so clear as it might be. Either complainant got out or was forcibly dragged out and a scuffle took place between him and the ticket collectors and complainant was handed over to the Police. The Magistrate having convicted 3 ticket collectors and two constables of an assault and inflicted a sentence of fine, this application for revision has been made.

The Magistrate finds on the evidence that the carriage had not got its full authorized number of passengers. He also finds, so I understand, that complainant resisted the entry of more passengers. He says, the complainant no doubt objected to the coming in of more passengers, and probably he also stood near the door. Then in my opinion he committed an offence falling under Section 109 (a) and also under Section 120 (c) of the Railway Act, and was liable to removal not only from the carriage but also from the Railway by any Railway servant. To keep persons who had paid for their tickets and wanted to enter the

carriage waiting on the platform was clearly interfering with their comfort, and I certainly think, having regard to the way in which the term "passenger" is used in various sections of the Act (e.g., Sections 102, 103 and 109) that a person who is a ticket holder is regarded as a "passenger" even before he has actually boarded the train. And such turbulent conduct was also interfering with the comfort of peaceable passengers already seated in the carriage. So it follows that if the complainant was forcibly ejected from the carriage, the Railway servants were within their rights. It is of course, obvious that in any such case the removal of the offender must not be caused by any more force than is actually necessary. In the present case I am not at all prepared to hold that any unnecessary force or violence was used. The evidence on both sides is not above suspicion of bias, but what appears clear is that no one suffered any hurt and I think that nothing more than a mere scuffle occurred. Bearing in mind that complainant's own conduct in forcibly resisting the entry of more passengers was the beginning of the trouble, I do not see how on the evidence it can reasonably be held to be proved that the petitioners were the aggressors or that they used unnecessary violence and so I am of opinion that the conviction cannot stand.

In conclusion I note that the facts that the complainant was formerly an Assistant Station Master and that on this occasion he was travelling in an intermediate carriage with a third class ticket, and that he has embroidered his complaint with a story of robbery, which appears to be utterly false, are not at all creditable to him.

The conviction and sentence are set aside and the fines will be refunded.

In the Chief Court of the Punjab

CRIMINAL REVISION

Before Sir William Clark, Kt., Chief Judge

THE CROWN

v.

NUR MUHAMMAD, Accused *

1905
April, 15*Railways Act (IX of 1890) Section 118 (2)—Travelling on foot board of Railway carriage—Passenger*

A person without ticket standing on the foot board of a train after it had started is a passenger within the meaning of Section 118 (2) of Act IX of 1890 and he has committed an offence under that section

The facts of this case are as follows —

On the 19th November 1904 the accused travelled on the foot board of a first class carriage in the train leaving Gurdaspur for Amritsar. He was talking something to the Civil Surgeon Gurdaspur, who was sitting in the 1st class compartment. He went on standing till he reached 400 yards from the station, where he jumped down and escaped rather badly. Thus he committed an offence punishable under Section 118 (2) of Railway Act

The accused, on conviction by *Lala Labhu Ram, M.A.*, Extra Assistant Commissioner exercising the powers of a Magistrate of the 1st class in the Gurdaspur District, was sentenced, by order, dated 9th December 1904 under Section 118 (2) of the Railway Act (IX of 1890) to pay a fine of Rs. 25 or in default one month's simple imprisonment

The proceedings are forwarded for orders on the following grounds —

In the absence of any authority for holding the contrary, I should imagine the word "passenger" includes a person who goes to the station to see another person off and violates Railway

* Case (80 of 1905) reported by C. W. LORSON, Esquire District Magistrate Gurdaspur with his No. 59 of 11th January 1905 (See Section 434 of the Criminal Procedure Code)

Regulations But there is no definition of "passenger" in the Act and the point being a doubtful one, I refer it to the Chief Court for orders If the conviction be not upheld the result will be that the station authorities will lose all control over such persons.

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v
Nur
Muhammad

ORDER OF THE CHIEF COURT

Mr. Gobind Ram, Advocate for Accused

CLARK, C J — I have no doubt Nur Muhammad was a passenger by the train, he no doubt had no ticket and was a trespassing passenger, but by remaining on the foot-board after the train had started, he made himself a passenger.

Fine not too heavy.

Petition rejected

In the Chief Court of the Punjab.

CRIMINAL REVISION.

Before Mr. Justice Read.

CROWN THROUGH STATION MASTER THANESAR (COMPLAINANT)

v.

PARAS RAM (PETITIONER)

CRIMINAL REVISION No 318 OF 1903

Person sending his luggage by a passenger—Attempt to defraud Railway Company—Bye law—Power of Railway Servants to enquire into the ownership of luggage

1903
July, 3.

The accused sent his luggage by a passenger in a train in which he did not travel He was convicted under a bye law of the Railway Company for evading payment of fare due to them

On appeal the conviction was set aside and it was held that every passenger was entitled to carry a certain quantity of luggage, that there was no rule providing that every passenger should carry his own luggage and that the servants of the Railway Company were not empowered to enquire into the ownership of luggage which passengers take with them when travelling

CASE reported by T J KENNEDY, Esq, Sessions Judge, Ambala Division, on 16th March 1903

Crown
v
Paras Ram

The facts of this case were as follows —

The applicant for revision, Paras Ram, entrusted some of his luggage (clothing and other personal effects) at Ajodhya to a friend, Kirpa Ram, who was going to Amballa as he (Paras Ram) was not returning home direct. At Thanesar it was found that all the property booked by Kirpa Ram did not belong to him, but a part of it belonged to Paras Ram. Paras Ram who does not deny the facts, was prosecuted under Section 417, Indian Penal Code, was acquitted on this charge, but convicted of attempting to defraud the Railway Company.

The accused, on conviction by Sheikh Rukh-ud Din exercising the powers of a Magistrate of the first class in the Karnal District was sentenced, by order, dated 16th February 1903, under Section 8 of the Bye laws under the Railways Act, to a fine of Rs 5.

The proceedings were forwarded for revision on the following grounds —

(1) There was no attempt to defraud the Railway Company by endeavouring to evade payment of his full fare by the applicant. He did not travel himself nor pay any fare on the occasion on which the luggage was carried.

(2) There is no provision of the law, nor any Railway rule proscribing that passengers must only carry with them their own property. Rule 91 of Luggage Rates and Rules of East Indian Railway contemplates Commercial Travellers carrying with them samples of their employers' goods. Excess luggage was paid for by Kirpa Ram and he has not been convicted of any offence, so the presumption is that whatever luggage was carried was paid for.

(3) I recommend that the fine imposed on the applicant, who apparently is a respectable Banya and says he pays Rs 25 income tax, be remitted.

Note—Bye-law 8, under which the applicant has been convicted, runs as follows —

“Every person attempting to defraud the Railway Company by, in any manner, endeavouring to evade payment of his full fare, is liable to a fine of Rs 100.”

The Judgment of the Chief Court was delivered by 15th July 1903.

REID, J.—The petitioner has been fined Rs 5 under Bye law 8 of the East Indian Railway Company for sending his luggage by Kirpa Ram, a passenger in a train in which he was not himself travelling. The learned Sessions Judge of Amballa, has sent the case up on the revision side, and has found that Kirpa Ram paid for over weight luggage. Rule 76 at page 41 of the East Indian Railway Coaching Tariff for the 1st quarter of 1902 runs as follows —“Luggage includes wearing apparel and effects required for the personal use of passengers. Persons tendering amongst their luggage articles not properly classifiable as luggage do so at their own risk, (a) all passengers' luggage is weighed and the following quantities allowed to be taken free of charge both on the outward and return journey

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—

For each first class passenger 1½ manods

| | | | |
|---|--------------|---|----------|
| „ | second class | „ | 30 seers |
| „ | Intermediate | „ | 20 seers |
| „ | third class | „ | 15 seers |

“Half the above quantities are allowed for a child's half ticket according to class”

Bye-law 8 runs as follows —“Every person attempting to defraud the Railway Company by, in any manner, endeavouring to evade payment of his full fare is liable to a fine of Rs 100”

The gentleman, who represented the East India Railway Company at the hearing, contended that, inasmuch as tickets are not transferable, each passenger can carry with him his own property only, and that the allowance of luggage for a ticket is limited to the personal property of the person who has paid for a ticket. He admitted that a person who took a ticket for himself and three tickets for his servants, could have the luggage of the four weighed together, and that the aggregate allowed on the four tickets would be carried free, provided that the articles weighed belonged to the taker of the ticket and his servants, irrespective of the weight of the articles belonging to each.

I can find nothing in Rule 76 in any way limiting a person taking a ticket to the conveyance of his own personal property. The first part of the rule merely defines the words “luggage” and the distinction drawn is between articles “properly classifiable” and articles “not properly classifiable” as “luggage”.

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v
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"Personal use of passengers" cannot, in my opinion be interpreted as "personal use of the passenger taking the ticket and of no one else" No other rule has been cited

The case for the Railway Company presupposes that the petitioner had travelled or intended to travel by train and that he evaded payment for over weight luggage by sending part of his luggage by Kurpa Ram Bye-law 8 deals only with endeavours to evade payment of "full fare" and these words are in my opinion, limited to full payment for the conveyance of the passenger from a specified place to a specified place, and in the class of carriage in which he travels

Wharton's Law Lexicon defines "fare" as "the money paid for a passenger either by land or by water"

In Stroud's Judicial Dictionary "His fare" in 8, Vict, Cap 20, Section 103, is defined as 'the fare by the train, and for the class of carriage in which the passenger travels"

Wehster's Dictionary defines "fare" as "the price of a passage or going, the sum paid or due for conveying a person by land or water"

The fact that a passenger is entitled to the conveyance of a certain quantity of luggage without payment does not in, my opinion, make the amount paid for luggage in excess of that quantity part of his fare The payment is apart from the fare and the fact that no luggage is conveyed for a passenger does not entitle him to a reduction of the fare paid for conveyance of his person

Bye law 8 is, therefore, inapplicable to the facts of this case

The duty of the servants of the Railway Company does not in my opinion, extend to an enquiry into the ownership of the articles which a passenger seeks to have conveyed with him

I set aside the conviction and sentence

The fine, if realised will be refunded

Application allowed

The Indian Law Reports, Vol. XXIV. (Bombay) Series,
Page 293.

CRIMINAL REVISION.

Before Sir L. H. Jenkins, Chief Justice, Mr. Justice Candy
and Mr. Justice Ranade.

In Re DADABHAI JAMSEDJI *

Indian Railways Act (IX of 1880), Section 110—"Compartment —
Meaning of the word,

1899
October, 6.

Per JENKINS CJ and CANDY, J.—Good sense requires that to the word "compartment" in certain sections of the Indian Railways Act (IX of 1890) the quality of complete separation should be attributed, and it is with that force that it is used in Section 110.

Per RANADE, J.—The word "compartment" is used in Section 110 of Act IX of 1890 in the same sense in which it is used throughout the Act and does not necessarily mean a completely partitioned division.

This was an application under Section 435 of the Code of Criminal Procedure (Act V of 1898).

A complaint was lodged before S B SPENCER, Acting Fourth Presidency Magistrate, under Section 110(1) of the Indian Railways Act (IX of 1890), charging the accused with smoking in a non-smoking compartment of a second class railway carriage without the consent of the complainant who was a fellow passenger with him in the same compartment.

The accused was further charged with insulting the complainant and hurting his religious feelings under Section 298 and 504 of the Indian Penal Code.

The Magistrate discharged the accused on all the charges, holding that the accused and the complainant, though they were fellow passengers, were not in the same compartment within the meaning of Section 110 of the Indian Railways Act (IX of 1890).

* Criminal Revision No 169 of 1899

(1) Section 110 clause I of Act IX of 1890 provides as follows — "If a person without the consent of his fellow passengers, if any, in the same compartment, smokes in any compartment except a compartment specially provided for the purpose he shall be punished with fine which may extend to twenty rupees."

In Re
Dadabhai
Jamsedji

Against this order of discharge the complainant applied to the High Court under its criminal revisional jurisdiction

Macpherson (with him *R. B. Paymaster*) for complainant

There was no appearance for the accused

JENKINS, C J — In this case a rule has been granted calling on the accused to show cause why the order of the Magistrate should not be set aside

It seems that the complainant and the accused were travelling in the same carriage on the B B and C I Railway and that the accused smoked without the complainant's consent. For this he has been prosecuted under Section 110 of the Indian Railways Act, 1890.

That sub section is in those words — (His Lordship read the section and continued) The case was heard before Mr SPENCER, who held that the complainant and accused, though they may have been fellow passengers, were not in the same compartment and discharged the accused. On this an application was made to this Court, and the rule to which I have referred was granted by PARSONS and RANADE, JJ, who at the same time called for a report. In compliance with this Mr SPENCER has furnished us with a very careful and clear statement of the reasons which induced him to decide as he did. From his report and from what has been stated before us it seems that the portion of the carriage in which the complainant and accused were travelling was separated from the rest of the carriage by a complete partition, and that this portion was itself cut off into two sections, the dividing line between them being a partition about three feet high which served as a common back for seats in each section. This is shown by the diagram attached to Mr SPENCER's report. Now this three feet partition manifestly would not screen passengers in one of these two sections from the sight of those in the other, nor would it in any way interrupt the passage of smoke from the one section to the other. Therefore it is difficult to regard such a division as a compartment that would comply with the provisions of the Legislature requiring the reservation for the exclusive use of females of one compartment at least of the lowest class of carriage forming part of the train and that it should be furnished with a closet. When one bears in mind the customs intended to be respected by this provision it would be impossible to suppose that a section such as I have indicated could be taken to be a compartment within the meaning of Section 64.

I now pass to consider whether the complainant can be deemed to have been in different compartments for the purpose of Section 110

*In Re
Dadabhai
Jai sedji.*

It appears to me to be obvious that the purpose of the section is to secure that no one shall smoke in a railway carriage so as to be an annoyance to any fellow passenger. But I have already shown that the partition between the two sections of the carriage in question in no manner helped to avert this annoyance.

It requires no great effort of imagination to see that a smoker may cause even greater annoyance to those who may be seated in the adjoining section even than to those travelling in the same one as himself. Under these circumstances is there anything which compels me to ascribe to the word 'compartment' a meaning which would result in my having to hold that the complainant and the accused were in separate compartments?

If I turn to the dictionaries I find myself under no such obligation, but I concede that this can be taken as no way conclusive as to the meaning of the word in this Act or perhaps I should say in this section.

Mr SPENCER has pointed out with perfect truth that the Act contains no definition of the word, but he would find a clue to its meaning in the 63rd Section of the Act coupled with the practice of the Companies. I allude to their practice of exhibiting inside or outside of each section, though divided from its neighbour only by a partial partition, the maximum number of passengers which may be carried in it.

But there are two objections to this method of reasoning, each of which seems to me to be equally destructive. In the first place it treats the B B and C I Railway Company as the infallible interpreter of this Act, and next it attributes to the Company an interpretation which does not necessarily follow from the premises.

Because they notify how many can be seated in each section, it by no means follows that they say each section is a compartment, nor would their practice otherwise be a failure to comply with the provisions of the Act, for the maximum permissible for the compartment would be the sum of the maximum permissible for each section of the compartment.

It did at one time seem to me that Section 109 might support the view that each section though divided by a partial partition was a compartment within the meaning of the Act, but on the

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Dadabhai
Jamsedji
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whole I think it does not. The truth is that the word 'compartment' is not used throughout the Act with the same precise force, and whereas certain provisions of the Act would be satisfied if there be a partial partition, there are other provisions in which it appears to me that good sense requires that we should attribute to compartment the quality of complete separation, and it is with that force that in my opinion it is used in Section 110. It results, then, from this that in my judgment the complainant and accused were in different parts of the same compartment and that consequently the accused was not entitled to smoke without the complainant's consent.

I pass to consider whether the offence was of so trivial a nature that it falls within Section 95 of the Indian Penal Code.

I think it cannot be so treated. To a smoker it may perhaps appear too trivial to be an offence to smoke even in a place where it is forbidden and despite the protest of one whose consent is necessary. Still that is not the view of the Legislature, for it has provided otherwise, and I, therefore, think the case should, in my opinion, go back to the Magistrate to be tried. As to the other charge, I would not disturb the conclusion of the Magistrate, who is eminently qualified to form an opinion on such a subject.

RANADE, J. — This was an application for the revision of an order of discharge passed by the Fourth Presidency Magistrate in a complaint brought by the applicant under Sections 298 and 504 of the Indian Penal Code, 1860. A further charge was added at the instance of the complainant's pleader under Section 110 of the Indian Railways Act. The latter charge was dismissed on the ground that the compartment in which the complainant was travelling was not the same as that in which the accused was seated and that even if accused had smoked in that compartment, he committed no offence, and that under the circumstances no other offence was disclosed. The applicant seeks a revision of the order of discharge on the ground (1) that the Magistrate was in error in holding that the complainant was sitting in a different compartment and (2) that even if there was no offence under the Railways Act, the Magistrate ought to have inquired into the complaint under Sections 298 and 504, in respect of which it was not necessary that the complainant and the accused should be sitting in the same compartment.

It is clear that in so far as the offence under Section 110 of the Railways Act is concerned, the question turns upon the defini-

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tion of the word "compartment" Section 110 provides that if any person, without the consent of his fellow passenger, if any in the same compartment, smokes in any compartment except a compartment specially provided for that purpose, he shall be punished with fine. The accused must, therefore be shown to have been sitting in the same compartment when he smoked to the annoyance of the complainant. The Magistrate held on the evidence, that the accused was sitting in a separate compartment. Mr Macpherson, who appeared as Counsel for the complainant contended that the Magistrate was in error in his interpretation of the words "same compartment" in Section 110. He contended that a compartment implies that the separating partition should be a complete partition, which was admittedly not the case in the division separating the place where the complainant was sitting from the place where the accused is alleged to have been smoking. Section 64 was referred to as showing that under its provision has to be made of one compartment for the exclusive use of females, and it was suggested that for such a purpose, the separating partition must be complete. This is, however, only an inference. In these carriages the height of the half shut up backs would be about four feet and the protection intended for the females is thus practically ensured in the half shut up compartment, and such compartments are so used occasionally. The use of the word "compartment" in the other sections shows clearly that the separating partition of compartments might be half as in the present case. Section 63, for instance, requires that the number of passengers to be carried shall be exhibited outside or inside each compartment. The words "to seat ten persons" are admittedly written in each of the half of a division which makes a compartment, whether the compartment is shut out completely or otherwise. The word occurs in a similar connection in Section 93. Section 95 refers to Section 64 noticed above. Section 102 has reference to Section 63, and it punishes railway servants who compel passengers to enter compartments in which a maximum number of passengers are seated. This obviously does not refer to completely partitioned divisions only, but intends half shut out compartments as well. Sections 109 and 119 use the word "compartment" similarly.

Reading all the sections together it is clear that the word "compartment" must be understood as having been used in the same sense throughout, and Section 69 does not necessarily suggest the word was used in different senses in different places.

*In Re
Dadabhai
Jamsedji*

The Magistrate's interpretation of the word "compartment" was, therefore, correct, and though the place in which complainant was sitting was not completely partitioned off from the place where accused was smoking, it cannot be said that they were sitting in the same compartment under Section 110. The complaint under the Railway Act was, therefore, very properly dismissed.

As regards the offence under the Indian Penal Code, the Magistrate's report shows that he dismissed that complaint under Section 95 of the Code, as the matter complained of was too trivial to constitute an offence.

I would dismiss the application, and also the companion case No. 168.

The Judges having differed the case was by order of the Chief Justice referred to Mr. Justice Candy for opinion under Section 44 of the Criminal Procedure Code (Act V of 1893), who recorded the following judgment:—

9th October, 1899. CANDY, J.—This case has been referred to me under Section 129 of the Criminal Procedure Code (Act V of 1893). I have not thought it fit to direct any further hearing.

On the case as laid before me I deliver my opinion that the view taken by the learned Chief Justice is correct and that the complainant and the accused were "in the same compartment" as provided by section 110 of the Indian Railways Act, 1880.

There is no definition in the Act of the word "compartment." It is possible that it may be used in different senses in various sections of the Act. In the Oxford New Dictionary "compartment" is "a division separated by partitions; a part partitioned off." In each of the second class carriages of the B. B. & C. I. Railway used between Bandra and Bombay there are (as shown in the plan attached to Mr. Spencer's report) three main compartments. They are divisions separated from each other by partitions right up to the roof of the carriage. Each division is thus completely screened off from its adjoining division. Each division is thus a compartment. But each of such divisions is further sub-divided by a partition which is about three feet high. Each sub-division or section is in itself a compartment, for it is a part of the original compartment, which is partitioned off and it has its own door for entrance and egress. For the purpose of exhibiting the maximum number of passengers for each compartment (Sections 63, 93, 102 and 109) the Railway Administra-

tion treat each section or sub-division as a "compartment." They may be perfectly right in so doing—it is not inconsistent with the language of the section. But if they follow the same line with regard to Sections 64, 95 and 119 (reservation of compartments for females), or 110 (smoking) then their action is not consistent with the intention of the Legislature. A thing is not within the statute unless it is within the intention of the statute. Obviously the intention of the Legislature is that in certain cases there shall be a compartment reserved for the exclusive use of females, so that they may have privacy and be unmolested by males. A section or sub-division of a compartment, as I have described above, is certainly not such a compartment. So, too, with smoking—it is obvious that in a full compartment of twenty persons, if one or more of the passengers in section or sub-division A can smoke without regard to the assent or dissent of the passengers in section or sub-division B, then the provisions of Section 110 are a farce. We are not compelled so to read the statute. The case will accordingly go back to the Magistrate with the direction set out by the Chief Justice, viz., that the order of the Magistrate be reversed, and the case sent back for trial on the charge under Section 110 of the Railways Act of 1890. The finding of the Magistrate on the charges under Sections 298 and 504 of the Indian Penal Code in Application No. 169 of 1899, and under Sections 109 and 298 of the Indian Penal Code in Application No. 168 of 1899 is not disturbed.

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In the Chief Court of the Punjab

CRIMINAL REVISION.

Before Barkley and Spitta, JJ

HARYA, ACCUSED, PETITIONER

THE IMPRESS, RESPONDENT

CASE No. 228 OF 1885

Indian Railways Act IV of 1879 Sections 1 and 90—False declaration of goods—Demand for declaration necessary

1885
May, 2

The accused made a false declaration of the weight of his goods which he entrusted to the Railway for dispatch. He was convicted under Section 29 of Act IV of 1879. But, on appeal the conviction was set aside.

Harya
v
Empress

inasmuch as no demand was made by the servant of the Railway who booked the consignment to declare the weight of the goods as required by Section 15 of the Railways Act IV of 1879

PETITION for revision under Section 439 of Act X of 1882 of the order of T O WILKINSON, Esquire, Sessions Judge, Sialkot Dt, 19th January 1885

Harya—Petitioner

Sinclair,—Junior Government Advocate, for Respondent

The facts of the case sufficiently appear from the following Judgment of the Court, delivered by—

BARKLEY, J.—The petitioner was convicted of an offence under Section 29 of the Indian Railways Act (IV of 1879), in that he gave a false account of some goods despatched by him for the Gujranwala Railway Station, on demand of the account prescribed by Section 15 of that Act. On appeal to the Sessions Judge he found that ‘as a matter of fact, accused attempted to send a much larger quantity of goods than that represented, and that,’ he said “is the offence made punishable, if it be done with the intention to defraud.”

The Sessions Judge apparently did not observe that Sec 29 provides only for offences committed by a person required under Section 15, to give an account of the quantity or description of any property, and that the duty imposed by Section 15 is limited to the case of a demand being made by any Railway servant appointed in this behalf by the Railway administration. It is only on such demand being made that the owner or person in care of the goods is required to deliver an exact account of the quantity and description under his signature. In the present case there is no evidence that any such demand was made by any Railway servant whatever. Nagina Singh did not see the accused at all, but received the form from a Railway servant named Bolaki. Bolaki does not say that he demanded any account of the quantity of the goods, or that he had been authorised to make this demand. He simply filled up the form from information which, he says, was furnished to him by the accused, who asked him to do so. The form, moreover, was not signed by the accused, who merely entered the total weight in Hindi in the column headed *soudere weight*. This entry appears to be the only statement in writing which can be said to have been made by him, the form filled in by Bolaki not bearing his signature but as it is not proved to have been made on a demand under Section 15, it will not support the conviction.

We therefore set aside the conviction and sentence, and order the fine, if paid, to be refunded

We observe that an offence under Section 29 of the Act not being cognizable by the police (see Section 49), any complaint should have been made to a Magistrate and not to the police, and it was improper for the Magistrate, on receiving a report from the police that the charge was not cognizable by them, to order the police to enquire into the case and send it up for trial. The complainant should have been told that if he desired to prosecute, he must complain in Court

Haryana
Press

In the Chief Court of the Punjab

CRIMINAL REVISION *

Before Mr Justice Chatterji, C I E.

KAMR UD DIN, PETITIONER,

v

THE CROWN, RESPONDENT

Penal Code (Act XLV of 1860) Sections 304 A and 338—Causing death by rash and negligent act—Railways Act (IX of 1890), Section 107—False declaration of Goods—Fireworks declared as locks—Explosion of fire works causing death of a coolie

1903
July, 17

The accused sent two boxes to Delhi Railway Station on the L I Railway by means of two coolies, and declared their contents as "iron locks" whereas the boxes contained "fireworks" while the boxes were being loaded into a railway wagon one box exploded and one coolie engaged in the loading was killed and another seriously injured, the railway wagon also sustained damage

Held, that if no explosion had happened the accused could have been convicted under Section 107 of the Indian Railway Act, 1890, that the accused's inadvertence to the results of concealing the true character of the contents of the boxes, and his knowledge of the dangerous nature of the Goods which must be inevitably presumed, coupled with the consequences thereof constituted an offence under Section 304-A and Section 338 of the Indian Penal Code

Petition under Section 439 of the Criminal Procedure Code for revision of the order of S Clifford, Esquire, Sessions Judge, Delhi Division, dated the 13th September 1901, affirming the order of

Kamr ud d n O F Lumsden, Esquire, District Magistrate, Delhi, dated 26th
 The Crown August 1904, convicting the petitioner

Messrs Grey and Artel, Advocates, for Petitioner
 The Government Advocate, for Respondent

JUDGMENT CHATTERJI, J.—The accused is said to have sent two boxes to the East Indian Railway at Delhi Station containing fireworks falsely declaring them to contain iron locks with the result that in loading, one of the boxes exploded killing one coolie and seriously injuring another engaged in the work and damaging the Railway wagon in which it was placed, and has been convicted under Section 304 A and 338, Indian Penal Code, and sentenced to two years' rigorous imprisonment and Rs 1,000 fine

The present application for revision challenges the findings of the two lower Courts on facts as well as law and both questions have been argued at length by Counsel before me

On the facts I have no difficulty in agreeing with the Sessions Judge and the District Magistrate that the accused knowingly sent the boxes through two coolies to the Railway and that they were not taken by mistake by the coolies instead of two other boxes containing locks which were lying at the same place. I accept without hesitation the statement of the coolies that the accused himself pointed out the boxes to them and disbelieve the story for the defence that the accused did not go himself but sent the coolies with the key of the room in which the boxes were lying in order to bring them, as it is unsupported by reliable evidence and most improbable in itself

If nothing else had happened the accused could have been convicted under Section 107 of the Indian Railways Act, for making a false declaration in respect of the two boxes consigned. But the essence of the offence here is that the act of the accused in not declaring the true nature of the articles contained in the box which exploded, was a rash and negligent act as the Railway officials in consequence of it did not take the precautions they would have taken had they known that the box contained explosives and the box was put down in the Railway wagon with some violence with the results already mentioned. The true test of culpability is, whether the act of the accused is directly connected with the consequences that ensued. Of this there can be no doubt whatever. Suppose, for argument's sake the coolies by whom the box was sent to the Station, in ignorance of the true

nature of its contents and misled by the accused's statement that they contained iron locks, had dumped it on the Goods platform and an explosion had taken place and one of them had been killed, I do not see how the arguments employed could have prevailed against a conviction. It does not make any real difference that the consequences of the act happened to a second batch of coolies to whom the goods were handed over by the Railway clerk who booked them misled by the accused's false declaration. There is no remoteness or indirectness in this consequence, but it is mainly the outcome of the accused's act "Act" in the Indian Penal Code, includes a mission, and the omission to state the true nature of the articles which is involved in the false statement about them fully satisfies the requirements of Section 304 A.

Kannad-din
The Crown

After reading the authorities cited by Counsel I can find nothing in them to make the section inapplicable to the accused. He no doubt never intended to cause death or knew that his act was likely to cause death. In that case he would have been guilty of culpable homicide. But his inadvertence to the results of concealing the true character of the contents of the box, which was a failure of duty to the public at large, and his knowledge of their dangerous nature, which must be inevitably presumed, coupled with the consequences thereof, constitute a complete offence under the section. The scientific definition of culpable rashness and culpable negligence given by Mr Justice HOLLOWAY in *Regina v Nidamarli Nagabhushanam*,⁽¹⁾ which has been generally accepted ever since, leave nothing for me to say on this head. *Queen Empress v Nand Kishore*,⁽²⁾ *Regina v Crouse* ⁽³⁾ are cases very much in point to bring home the guilt of causing death to the accused. So also *Queen-Empress v Bhutan* ⁽⁴⁾ and *the Queen v Williamson* ⁽⁵⁾

Mr Grey argued that the Railway coolie who threw down the box carelessly in the Railway wagon was guilty of contributory negligence which the accused could not have foreseen and that this throwing was the cause of death. But the carelessness would not have had the very unusual consequence of a fatal explosion had the box contained what it was described to contain, viz, iron locks and the coolie was misled by accused's illegal omission not to take the care he would have taken had the truth been known. Thus the accused's act or omission was the

(1) 7 Mad H C Rej., 119

(2) 1 L. R. 6 All. 43

(3) 9 C. & L., 123

(4) 1 L. R., 16 All., 472

(5) 1 Cox, C. C. 97

Kamr ud-din
v
The Crown
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main cause of the death, viz, the placing of dangerous explosives in the box and the omission to declare their true nature while making a false statement about it. Besides it is a rule of criminal law that in cases of this kind it is no defence that the deceased was guilty of contributory negligence, *III Russell*, (6th Edition), 201, *Regina v Keu*,⁽¹⁾ *Regina v Longbottom and another* ⁽²⁾ I refer to these authorities as Mr Grey largely relied on English cases to support his contention.

The omission of the accused is illegal not merely because of the provisions of the Indian Railways Act but as a breach of civil duty.

Regina v. Bennett⁽³⁾ and *Regina v. Pococke*,⁽⁴⁾ cited by Mr Grey are clearly distinguishable, and cannot in any case be followed in the face of the Indian authorities quoted above.

I hold therefore that the conviction under Section 304 A is correct. The same remarks apply to the charge under Section 333, Indian Penal Code.

Lastly there is the question of punishment. As regards the fine there is no ground for interference and the Sessions Judge has rightly adjudged Rs. 300 to be given to the heirs of the coolie who was killed. As regards the imprisonment it is no doubt severe. In *Queen-Empress v Bhutan*, cited above, only three months' imprisonment was awarded though twenty-five persons were drowned and in *Regina v Longbottom and another*, a case of rash driving, eight months' imprisonment. The accused's act was however a very dangerous one and requires a deterrent punishment. I can hardly think of a case which calls for a severer sentence under Section 304-A or in which the maximum punishment can be more appropriately inflicted than the present one. The practice of sending dangerous explosives by Railway by means of false declarations must be sternly put down. The consequences of the accused's act were deplorable enough but one can conceive that they might have been even more serious. I therefore decline to interfere with the sentence.

I reject the application.

Application dismissed

(1) XII Cox C C 35.

(3) III Cox C C 439.

(2) III Cox C C 439.

(4) 17 Q B 31.

In the High Court of Calcutta

Before Hon'ble Mr Justice O Kinealy and
Hon'ble Mr Justice Banerjee

THE EMPLOYEES

v

(1) BARADA KANT PRAMANIK,

(2) SHIBADAGOTI PRAMANIK

*Trespass on line—Railway Servant—Performance of duty obstructing
—Indian Railways Act IV of 1890 Sections 121 and 122 Indian
Penal Code Section 186*

1896
July, 18

Before a person can be convicted of wilfully obstructing or impeding a Railway servant in the discharge of his duties within the meaning of Section 121 of the Indian Railways Act 1890 or of voluntarily obstructing a public servant in the discharge of his public functions within the meaning of Section 186 of the Indian Penal Code it must be shown that the obstruction or resistance was offered to a Railway or public servant in the discharge of his duties or public functions as authorised by law the mere fact of a Railway servant or public servant believing that he was acting in the discharge of his duties will not be sufficient to make resistance or obstruction to him amount to an offence under those Sections

When the accused had goods in a station of which he was taking delivery, his entry into the station for the purpose of seeing to the removal of such goods from the station cannot be deemed to be unlawful within the meaning of Section 122 of the Indian Railways Act 1890

This is a rule calling upon the Magistrate of the District to show cause why the conviction of the petitioners and sentence passed on them by the Sub-Divisional Magistrate of Ranaghat on the 18th April 1896, should not be set aside

The facts of the case are shortly these —The accused No 1, Barada Kant Pramanik, who is a contractor under the Railway, was taking delivery of some lime through his agent, Shibadagoti Pramanik, the accused No 2, at the Ranaghat Railway Station, on the 18th of March last, when a train in which His Honour the Lieutenant-Governor was travelling was expected to pass through that station. The usual practice being on such occasions to clear the station of outsiders, the Head Constable of the Railway Police ordered the accused No 2, Shibadagoti, who was then seeing the lime removed from the goods siding, to leave the station. Shiba-

The
Empress
v
Pramadgi

dagoti declined to obey the order, and then both he and the Head Constable went to the Station Master. The Station Master ordered Shihadagoti to leave the station. He agreed at first, but subsequently declined to go, and then it appears that he was turned out by a Constable. Thereupon the accused No 1, accompanied by him, came to the station through a side gate the key of which was left with him to enable him to enter the station on business, and they remonstrated with the Head Constable, and some strong language appears to have been used by them towards him.

Upon these facts the Sub Divisional Magistrate of Ranigat has convicted the accused No 1, Barada, of an offence under Section 122 of the Railways Act (IX of 1890) and the accused No 2, Shihadagoti, of an offence under Sections 121 and 122 of the Railways Act, and Section 186 of the Indian Penal Code and sentenced each of the accused to a fine of Rs 30.

Against this conviction and sentence the accused have come up to us and we are asked to interfere on two grounds: *first*, that there is nothing on the record to show that either the Head Constable or the Station Master was authorized to order the accused Shihadagoti to leave the station at a time when he was there engaged in business, and *second*, that there is nothing to show that the entry of the accused was unlawful within the meaning of Section 122 of the Railways Act.

No one appears to show cause, but the learned Sub Divisional Magistrate has submitted an explanation. We have considered the arguments of the learned Counsel for the petitioners and the explanation of the learned Sub Divisional Magistrate, and the conclusion we have arrived at is, that the rule ought to be made absolute.

The learned Sub-Divisional Magistrate in his Judgment states as a ground for convicting the accused under Section 121 of the Railways Act and Section 186 of the Indian Penal Code, this: "The Zemindar was *bona fide* carrying out the orders of his superiors—the Station Master and Deputy Inspector General,—and therefore there is no question regarding the legality of his actions. He was a public servant in the discharge of his duties. It may be quite true that the Zemindar honestly believed that he was acting in the discharge of his duties, but that is not sufficient to warrant a conviction under Section 121 of the Railways Act or Section 186 of the Indian Penal Code. Before a person

can he convicted of wilfully obstructing or impeding a railway servant in the discharge of his duties within the meaning of the first mentioned provision of law or of voluntarily obstructing a public servant in the discharge of his public functions within the meaning of the last mentioned provision it must be shown that the obstruction or resistance was offered to a railway or a public servant in the discharge of his duties or public functions as authorized by law. The mere fact of a public servant or a railway servant believing that he was acting in the discharge of his duties will not be sufficient to make resistance or obstruction to him amount to an offence. Of course if the obstruction or resistance takes the shape of an assault or use of criminal force, that may be an offence by itself, but that is an offence of a different nature, and there is no suggestion here that there was any assault or use of criminal force. That being so, and there being nothing to show that the Head Constable or the Station Master in ordering the accused No. 2, Shihadaguti, to leave the station when he was there on business, was authorized by law in making that order, we are of opinion that the conviction under Section 121 of the Railways Act and Section 186 of the Indian Penal Code cannot stand.

Then, as regards the conviction under Section 122 of the Railways Act the learned Sub Divisional Magistrate is of opinion that the entrance was surreptitious and for an unlawful purpose. He finds, however, that the accused entered the station by a gate the key of which was kept with the accused No. 1. If that was so, one fails to see how the entry could have been surreptitious. It is not denied that the accused No. 1 had his goods there of which he was taking delivery, and the entry of the accused was not therefore, in our opinion, unlawful within the meaning of Section 122 of the Railways Act.

We think it right to add that we do not accept the account of the occurrence given by the complainant as wholly true. We think the evidence of the complainant bears marks of exaggeration.

For these reasons we think the rule must be made absolute, the conviction and sentence set aside, and the fines, if realised, refunded, and we order accordingly.

In the Chief Court of the Punjab

CRIMINAL REVISION

Before Mr Justice C A Roe

RAM NARAIN &c Acc^r ed, PETITIONER^s*

The Indian Law Reports, Vol. XXII. (Bombay) Series,
Page 525.

CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

IMPERATRIX

v.

VANMALI AND OTHERS *

Easement—Entry on land in order to repair—Dominant and servient owners, rights and liabilities of—Indian Easement Act (V of 1882), Section 24 1896
Ill (a)—Right of entry—Indian Railway Act (IX of 1890) Section 122 October, 31

The Rajnagar Spinning, Weaving and Manufacturing Company had a Mill on one side of the B B & C I Railway line and a Ginning Factory on the other. To bring water from the Mill to the Factory a pipe had been laid beneath the railway line and brick reservoirs built at each side to preserve the proper level of the water. Servants of the Company having entered on the railway premises to repair the pipe and reservoirs without having first obtained the permission of the Railway Company, were convicted by a Magistrate under Section 122 of the Indian Railway Act (IX of 1890) of an unlawful entry upon a railway. It was proved that the repairs were necessary.

Held, reversing the convictions and sentences, that, as the pipes and reservoirs belonged to the Spinning and Weaving Company and were kept in repair by them, they, as owners of the dominant tenement, had a right to enter on the premises of the Railway Company, the owners of the servient tenement, to effect any necessary repairs, and that the entry in question, being in the exercise of that right, could not be called unlawful. APPLICATION under the Revisional Jurisdiction of the High Court under Section 435 of the Code of Criminal Procedure (Act X of 1882).

The Rajnagar Spinning, Weaving and Manufacturing Company, Limited, at Ahmedabad had a Spinning and Weaving Mill on one side of the B B. & C I Railway and Ginning Factory on the other, the railway line passing between the two.

The plots on which the Mill, the Factory and the Railway line were situate formed originally one piece of ground owned by one individual, but when the Railway Company acquired the interven-

* Criminal Application for Revision, No. 210 of 1896

The Indian Law Reports, Vol. XXII. (Bombay) Series,
Page 525.

CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

IMPERATRIX *

v.

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APPLICATION under the Revisional Jurisdiction of the High Court under Section 435 of the Code of Criminal Procedure (Act X of 1882).

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The plots on which the Mill, the Factory and the Railway line were situate formed originally one piece of ground owned by one individual, but when the Railway Company acquired the interven-

* Criminal Application for Revision, No 210 of 1896

In the Chief Court of the Punjab.

CRIMINAL REVISION

Before Mr Justice C. A. Roe

RAM NARAIN, &c, ACCUSED, PETITIONERS*

v.

THE EMPRESS, RESPONDENT

1893
January, 19
February 14

Trespass on line—Refusing to desist from—Indian Railways Act IX of 1890
Section 122

Where the accused having legitimate business at a Goods Shed, attempted to cross the line in spite of the prohibition of a Railway servant

Held that they had not committed an offence under Section 122 of the Indian Railways Act, 1890

For petitioner — *Lala Lal Chand*, Pleader

ORDER — The facts found are that accused, who had legitimate business at the Goods Shed, attempted to get there by crossing the line, in spite of the prohibition of a Railway servant

On these facts they have been convicted under Section 122 Act IX of 1890, for unlawful entry on a railway

I doubt if the section is applicable. One would expect to find 'crossing the line' made punishable by some bye-law, say under Section 47 (g), but no such bye-law is quoted

Notice may issue, and the record be sent for

ORDER.

My order of 19th January may be taken as a part of my present order

There is no appearance for the Crown. As I have already stated, I do not think that on the facts found the accused can be convicted under Section 122, Act IX of 1890

I therefore acquit them

* Criminal Revision Case No 56 of 1893 Petition against the order of Mr Justice C. A. Roe. Sent F. POPHAM Young District Magistrate Amritsar, dated 14th October 1893 modifying the order of SARDAR PARTAP SINGH Extra Assistant Commissioner Magistrate 2nd class, Amritsar, dated the 30th August 1892

The Indian Law Reports, Vol. XXII. (Bombay) Series,
Page 525.

CRIMINAL REVISION

Before Mr. Justice Parsons and Mr. Justice Ranade

IMPERATRIX

1.

VANMALI AND OTHERS *

Easement—Entry on land in order to repair—Dominant and servient owners, rights and liabilities of—Indian Easement Act (V of 1882) Section 24 1896
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Held, reversing the convictions and sentences, that, as the pipes and reservoirs belonged to the Spinning and Weaving Company and were kept in repair by them, they, as owners of the dominant tenement, had a right to enter on the premises of the Railway Company, the owners of the servient tenement, to effect any necessary repairs, and that the entry in question, being in the exercise of that right, could not be called unlawful.

APPLICATION under the Revisional Jurisdiction of the High Court under Section 435 of the Code of Criminal Procedure (Act X of 1882).

The Rajnagar Spinning, Weaving and Manufacturing Company, Limited, at Ahmedabad had a Spinning and Weaving Mill on one side of the B B. & C I Railway and Ginning Factory on the other, the railway line passing between the two.

The plots on which the Mill, the Factory and the Railway line were situated formed originally one piece of ground owned by one individual, but when the Railway Company acquired the interven-

* Criminal Application for Revision, No 210 of 1896

Imperial
v
Venmal

ing piece of land for their line, an arrangement was made with the Railway Company that the water should be conveyed from the Mill to the Factory by means of a pipe laid under the railway line, and two tanks were erected, one on either side of the permanent way, within the railway limits, to keep the water on the same level. One of the tanks having got out of order, the servants of the Mill entered the land belonging to the Railway Company and repaired the tank, but without first having asked permission from the railway authorities to do so. Thereupon the railway authorities prosecuted the servants of the Mill under Section 447 of the Indian Penal Code (Act XLV of 1860) and Section 122 of the Indian Railway Act (IX of 1890) before the first class Magistrate of Ahmedabad.

The Magistrate refused to frame any charge under the Penal Code, but convicted the accused under Section 122 of the Railway Act (IX of 1890) and sentenced them to a fine of rupees 4 each.

Against these convictions the Accused applied to the High Court.

Chimanlal Harisal Setalvad for the accused. —The tanks which are in the land belonging to the Railway Company, and to the area which the petitioners entered the land, are admittedly the property of the Mill whose servants the petitioners are. The owners of the tanks have the right to repair them which they have always exercised without obstruction, but they cannot do so without entering upon the land.

The Railway Company is the owner of a servient tenement and cannot complain of the lawful exercise of the rights possessed by the holders of the dominant tenement, viz., the Mill authorities. The position of the tanks precluded any possibility of danger or accident to the working of the railway line, and the Railway Act therefore, has no application in this case. The petitioners were there in the exercise of their right of easement and cannot be convicted as trespassers.—Indian Easement Act (V of 1882) Section 24 and Illustration(a), *Colebeck & Girdlers Company* (2).

Rao Sahob Vankar J. Karkar Government Pleader, for the Crown. —The accused had no right to enter the railway line and commence any work without first having obtained permission from the railway authorities. The railway authorities would

have granted such permission had they been properly approached. The act of the accused was dangerous and might have resulted in loss of life and property. The Easement Act has no application to this case.

PARONS J.—The Magistrate finds that the Company whose servants the accused are, have a Mill on one side of the railway line and a Ginning Factory on the other, and that to bring water from one to the other there is a pipe laid beneath the railway line and brick reservoirs at each side to preserve the proper level of the water. He has convicted the accused under Section 122 of the Indian Railway Act, 1890, because they entered on the railway premises to do some repairs to the pipe and reservoirs without having first obtained the permission of the Railway Company to their entry. But it appears to us that as the pipe and reservoirs belong to the Company, and are kept in repair by them, they, as the dominant owners, would have a right to enter on the premises of the Railway Company, the servient owners, to effect any repairs that might be necessary. See the Indian Easement Act, Section 24, and Illustration (a) and *Colebrook v Girdlers Company* (1). The evidence shows there was such necessity at this time, the flow of the water through the pipe being stopped. An entry in exercise of a right, cannot be called unlawful. We, therefore, reverse the convictions and sentences.

Convictions and sentences reversed

Sutherlands' Weekly Reporter, Vol XXIII. Page 63

CRIMINAL RULINGS.

*Before the Hon'ble Louis S. Jackson and
W. F. McDonell, Judges.*

THE QUEEN

v.

SHADHU CHURN GHOSE *

1875
April, 14

Fence—Fine—Information

No order fining a party for not repairing a fence ought to be passed without an information against him and a hearing

REFERENCE —I have the honour to state I am of opinion that an order of the Assistant Magistrate passed yesterday in the case of *Queen v Shadhu Churn Ghose*, the record of which accompanies this, is illegal, as no previous order to repair that fence had been issued to the East Indian Railway Company, and to request that it may be quashed

I also beg to be informed whether the words 'good and sufficient' in Section 20, Act XVIII of 1854, cannot be predicated of the ordinary iron-wire fence which bounds the East Indian Railway line along most of its length, although it may allow of small animals, if not watched by any one in charge of them, pushing their way through them. It seems to me an important matter that should be settled

Judgment of the High Court.

JACKSON, J —The Railway Company ought not to have been fined without an information against them and a hearing

Nor does it appear that there was any defect in their fence, though it is suggested by Shadhu Churn, the owner of the sheep, *when on his defence*, that, in the place indicated, the earth below the undermost bar of the fence had been washed away. Supposing this to have been proved, as it was not, the

* Reference to the High Court, under Section 226, of the Code of Criminal Procedure, by the Officiating Magistrate of Hooghly

circumstance would have afforded a ground for ordering the Company to repair, and on their failure to comply with such order being proved, the Company might have been fined

The order must be quashed, and the award of the fine by way of compensation was wholly irregular, and as there was no prosecution and no complaint on the part of the owner of the sheep, the fine must, therefore, be repaid to the Company

Queen
Shadi u
Churn
Ghose

The Madras High Court Reports, Vol VIII, Page 1 of Rulings.

APPELLATE SIDE

On the 10th April 1874, prisoner's cow strayed on a railway provided with a fence. On the 13th June following Government published rules under Section 21 of the Railway Act Amendment Act (XXV of 1871) determining what kind of fences should be deemed to be suitable for the exclusion of cattle. On the date of the offence there were no such rules

1875
January 18

No evidence was offered of the state of the fence, and the prisoner was convicted solely on his admission that he was the owner of the cow

Held, that in this case the state of the fences required specific proof, in the absence of which the conviction could not be sustained

UPON reading a letter, dated the 14th December 1874, from the Magistrate of Malabar, referring the proceedings of the 2nd Class Magistrate, Pulghat Talook, in Case No 20 of 1874, as contrary to law —

The High Court made the following

RULING — In this case the defendant was convicted of being the owner of a cow which strayed on a railway provided with fences suitable for the exclusion of cattle, an offence punishable under Section 19 of the Railway Act (Act XVIII of 1854) as amended by Act XXV of 1871. The date of the alleged offence was 10th April 1874. On the 13th June following, Government published rules under Section 21 of the Railway Act Amendment Act (XXV of 1871), determining what kind of fences should be deemed to be suitable for the exclusion of cattle

No evidence was offered as to the state of the fences, and the conviction proceeded solely on the confession of the prisoner that he was the owner of the animal that had strayed upon the railway.

The High Court are of opinion that the conviction cannot be sustained. No rules having been framed, up to the time of the alleged offence, determining the kind of fences to be deemed suitable for the purposes of the section, the state of the fences was, in the particular case, matter requiring specific proof. The conviction must be set aside, and the fine, if levied, refunded.

Ordered accordingly.

**The Indian Law Reports, Vol. XVIII. (Madras) Series,
Page 228**

APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice,
and Mr. Justice Parker.*

QUEEN-EMPRESS

v.

ANDI *

1894
November, 22
and
December, 5

Railways Act—Act IX of 1890, Section 12.—Permitting a cattle to stray upon a Railway—Discretion of Magistrate

When the owner of cattle which have been allowed to stray upon a railway, is prosecuted under Railway Act, 1890, Section 12 (1) the Magistrate is bound to ascertain whether the person charged was himself guilty. **CASE** referred for the orders of the High Court by H. MOORE, Acting District Magistrate of Malabar, under Criminal Procedure Code, Section 438.

The case was stated as follows —

In Civil case No 2063 of 1894, on the file of the Chief Town Sub-Magistrate, one Mutiprambath Andi was prosecuted under Clause (1) of Section 125 of the Indian Railway Act, because his cow trespassed on the Madras Railway, which is provided with fences suitable for the exclusion of cattle. Admittedly a cow belonging to the accused did stray on the railway. The Sub-Magistrate acquitted the accused on the ground that he had appointed a person to be in charge of the cow, and that it was owing to that person's negligence that the cow strayed on the line.

Clause (1) of Section 125 of the Act runs thus —“The owner or person in charge of any cattle straying on a railway provided with fences suitable for the exclusion of cattle shall be punished with fine.” In the present case a cow strayed on a railway properly fenced yet nobody was fined. I submit that if the railway authorities prosecute the owner, the owner must be fined, no matter whether he had placed anybody in charge of the cattle or not. To support this view I would refer to clause (2) of the same section, which leaves it to the railway authorities to decide whether, in the case of cattle being wilfully driven on any railway, the person in charge or the owner shall be punished.

In my opinion, Section 125 of the Act leaves nothing to the discretion of the Magistrate. If an offence has been committed, the Magistrate must find the person prosecuted, whether he be the owner or the person in charge of the cattle.

The Government Pleader and Public Prosecutor (Mr Pouell)
for the Crown

JUDGMENT—Section 125, clause (1) of the Railway Act, makes punishable the negligence of the owner or person in charge of any cattle which stray upon the line. The section recognizes the obligation of the owner to prevent the cattle from straying, while at the same time it provides that the negligence of the person in charge may be punished. There is nothing in the clause to restrict the discretion of the Court in ascertaining upon whom the fault really lies and awarding the punishment accordingly.

The second clause of the same section makes punishable wilful acts of driving or knowingly permitting cattle to be upon a railway line, and provides that, at the option of the Railway Administration, the owner, instead of the person in charge, shall be punishable. This provision is of a very penal character, and it removes the discretion as to the person to be held liable to punishment from the Court to the railway authorities. No such discretion is given to the Railway Administration when the straying of the cattle has been through negligence. There is nothing to restrict the power and duty of the Magistrate to ascertain in such cases whether the person charged has himself been guilty.

In the case referred, we are of opinion that the acquittal of the owner was correct.

Queen
v
Press
v
And
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The Calcutta Weekly Notes, Vol. XI Page 583

CRIMINAL REVISIONAL JURISDICTION

Before Mr. Justice Stephen

CRIMINAL RULE No 278 of 1907.

BASANTA KUMAR BANERJI, PETITIONER

1907
April, 10

In the Railways Act (IX of 1890) Section 47 and rules thereunder—Criminal offences, if created

Neither Section 47 of the Railways Act, nor the rules made by a Railway Company under that Section create any criminal offence.

The section merely gives to the Company power to frame rules and to enforce them by imposing fines on its own officers.

This was a rule granted by HARRINGTON and GEORGE, JJ., against the conviction of and sentence passed on the Petitioner by C H REID, Esq., Sub divisional Magistrate of Ranegunj, on the 8th of October 1906, which conviction and sentence were confirmed on appeal by W. N. DELEVINGNE, Esq., Sessions Judge of Burdwan, on the 30th of December 1906.

The facts of the case material to this report are as follows:—

The petitioner and several other servants of the Indian Railway Company at Asansol formed themselves into a Union and submitted a memorial to the Agent of the Company for the redress of some grievances. On the 3rd September 1906, no reply having been received from the Agent, the Union sent a telegram to the Agent requesting him either to take sympathetic action or to accept the resignation of the petitioner and others with effect from the 5th idem. On the evening of the 4th no reply having till then been received, the petitioner who was an employee in the office of the District Traffic Superintendent went to Mr Roche, the chief clerk of the office, and handed over to him the keys, and other things in his charge. Mr Roche accepted the keys, professed regret at the petitioner's leaving the office and gave him permission to go. Subsequently, on the 7th September, the petitioner was put upon his trial for having committed breach of rules Nos 263 and 264 and for having violated under Section 47 of the Railways Act. He was convicted

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and sentenced to pay a fine of Rs 30 and to forfeit one month's pay under rule No. 269. He appealed to the Sessions Judge who thought that in the absence of any authoritative interpretation of Section 47, he was bound to regard a breach of the rules as a criminal offence and dismissed the appeal. Hence this rule.

Mr A Chaudhuri (with him Babus Sas Sekhar Basu and Aresh Chandra Sen Gupta) for the Petitioner

The Judgment of the Court was as follows :—

The petitioner in this case has been convicted of a breach of the rule made under Section 47 of the Indian Railways Act of 1890 and a rule has been granted on the ground that the rules under which the conviction was held are not the subject for a proceeding in a Criminal Court. It appears to me plain that such is the case. The various offences which are created by the Act are mentioned in Chap IX of the Act. Any other offence created by the Act must be clearly expressed, and it seems clear beyond argument that there are no words in Section 47 creating a criminal offence at all. On looking at the rules made under that section it is further plain that it was never intended that those rules should be enforced by penalty in Criminal Court. Various fines are imposed for misconduct on the part of Railway servants, and these fines are made enforceable by deductions from their pay. This is in accordance with sub-section (2) of Section 47. I have no doubt that the intention of this section was to give the Railway Company power to enforce rules of its own making by imposing fines on its own servants. It was never intended that section 47 or any rule made under that section should create any criminal offence.

The rule is, therefore, made absolute and the conviction and order complained of are set aside. The fine if paid will be remitted to the petitioner.

Rule made absolute

The Madras High Court Reports, Vol. I. Page 193.

ORIGINAL JURISDICTION.

Before Scotland, C. J. and Bittleston, J.

THE QUEEN ON THE PROSECUTION OF THE
MADRAS RAILWAY COMPANY,

v.

MALONY.

THE QUEEN ON THE PROSECUTION OF THE
MADRAS RAILWAY COMPANY,

v.

JONES.

1863 *Guard Drunk on Duty—Jurisdiction*
February, 3.

The drunkenness of a guard or underguard in charge of a railway train or any part thereof is an offence included in Section 35 of Act XVIII of 1862, but the High Court has no jurisdiction to try a prisoner charged with such offence where he was removed from his post at a place outside the local limits, although the train thereupon proceeded with him to Madras.

The prisoner Malony was indicted under the 27th Section of the Indian Railway Act, and tried before BITTLESTON, J., by whom the following case was stated

"James Malony was tried before me at a Criminal Session of the High Court holden on the 6th and four following days of January 1863, upon an indictment which charged that he, on the 1st January at Madras, being a servant of the Madras Railway Company, was in a state of intoxication whilst actually employed upon the Madras Railway in discharge of his duty as a guard in a passenger's train, such duty being one, the negligent performance of which would be likely to endanger the safety of persons travelling on such railway.

"It was proved that the prisoner was a guard in the service of the Madras Railway Company, and that on the 1st January he was the head-guard in charge of a passenger-train from Coimbatore to Madras, that on the arrival of the train at the Arkonm Junction-station about 6 o'clock in the evening of that

day, the prisoner was found in the brake-van in a state of almost helpless intoxication, that he was removed from the train by the Station Master, and detained at that station until the following morning, another guard being sent in charge of the train on its further journey to Madras

"It was also proved that the head-guard in charge has the general control of the whole train starts it when everything is ready, and has charge of the front brake, and that serious accidents might result either from his not applying the brake when necessary or starting the train before everything was ready

"The Arkonam Junction-station is not within the local limits of the ordinary original jurisdiction of the High Court, and the prisoner was proved not to be an European, but nothing further was known by any of the witnesses as to his birth or parentage

"He was committed for trial to the High Court by a Police Magistrate and Justice of the Peace for the town of Madras

"The jury found the prisoner guilty of the offence charged, but upon reference to Act XVIII of 1854, Sections 27 and 80, Act XVIII of 1859, Sections 1 and 2, Act XVIII of 1862, Section 85, and to clauses 21 and 22 of the Letters Patent constituting the High Court, I doubted whether I had jurisdiction to try the case, and reserved that question for the opinion of the High Court

"In the meantime I ordered that the prisoner should be released on entering into his own recognizance in Rs 500, with two sureties in the same amount, for his appearance on 3rd February next to receive judgment if called upon"

In *The Queen on the prosecution of the Madras Railway Company v Jones*, BIRTLESION, J, also stated a similar case, which arose out of an indictment under the 27th Section of the Indian Railway Act. The prisoner here, one Jones, was tried before his Lordship at the first Criminal Sessions for 1863. It was proved that he was an underguard in the service of the Madras Railway Company, and that on the 1st of January 1863 he was employed in that capacity on a passenger-train from Coimbatore to Madras. Upon the arrival of the train at the Arkonam Junction-station, about 6 o'clock P.M., he was drunk, violent and unsteady. To prevent his going on with the train, he was put in charge of a peon, but, as the train was starting, he broke away, jumped into it, and so was taken on to Madras. Two of the passengers who gave evidence of his intoxication at Arkonam

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stated that when the train reached the Perambore Station, the prisoner assisted in giving out the luggage, and then appeared to be steady and sober. It was proved that the under guard has charge of one of the brakes, and that, though the head guard is answerable for starting the train, he is obliged to depend upon his under-guard for ascertaining that everything is secure in the part of the train which is under the more immediate observation of the latter. It was also proved that serious accidents might result from the negligent performance of the under guard's duties.

Jones was stated by one of the witnesses to be an East Indian and there was no other evidence of the prisoner's parentage or place of birth.

No Counsel appeared for either of the prisoners, and the Judgment of the Court was delivered by

SCOTLAND, C J.—The Act No. XVIII of 1862 was passed for the further improvement of the administration of criminal justice by simplifying and facilitating the mode of procedure, and the object of the 35th Section is to remove doubts and inconveniences as regards the exact locality in which offences alleged to have occurred on a journey or voyage have been actually committed or completed. That Section enacts "If any person shall be accused of any offence alleged to have been committed on a journey or on any voyage in British India, such person may be dealt with, tried and punished by any of Her Majesty's Supreme Courts of Judicature, if any part of the journey or voyage shall have been performed within the local limits of the jurisdiction of such Court."

The question which the Court has now to decide is whether the section clearly gives jurisdiction to the High Court to try and convict the parties charged in either of the cases reserved for consideration, and we are of opinion that the section does not admit properly of such a construction. It is not improbable that the offence of drunkenness whilst on duty was not one of the offences contemplated when the section was framed, but the general language of the section is certainly sufficient to include such offence. Then the section applies if the offence of which the person is accused is "alleged to have been committed on a journey or on any voyage." Now, the words "on a journey or on any voyage" must, we think, be read as if the provision had been whilst on journey or voyage or any part of it is being performed by a ship or carriage, without particular reference to the

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terminus, and so read together with the language of the rest of the section, the proper construction and effect of the enactment is that if a person is accused of an offence committed whilst a journey or voyage is going on he may be tried if any of that part of the journey or voyage during which the offence of which the person accused is alleged to have been committed is within the local limits of the Court's jurisdiction. Here the offence was committed by the party accused and was alleged to have been committed on the journey between Coimbatore and Arkonam, and the one prisoner was actually detained at Arkonam and the other was put in charge of the peon to prevent his going farther on the journey, but broke away and got into the train in his then intoxicated state, so that it cannot, we think, be said that any part of the journey on or during which this offence is alleged to have been committed by the accused was performed within the local limits of the Court's jurisdiction. The journey on which the offence is alleged to have been committed ended, so far as regards the party accused, and the offence, at Arkonam.

The very general terms of the section give rise certainly to some doubts and difficulty, and the considerations of convenience and inconvenience as regards the prosecution of offences committed on a journey, which have naturally occurred to us, do not so preponderate either way, as to assist materially in its construction. But looking to what must have been the object and intention of the enactment and giving the ordinary meaning to the language of the section, we think our present construction is the proper and reasonable one.

The Court, therefore, we are of opinion, had no jurisdiction to try the offences charged in these cases, and the convictions must be quashed and the prisoners discharged.

Convictions quashed

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payment of carrying charges, while the same offence was committed by Abdulali at Karachi. Counsel for the petitioners contends that if Abdulali is treated as a principal, he can only be tried at Karachi, where it is contended, the offence of cheating was according to the prosecution complete, but in my view of the interpretation of Section 415 of the Penal Code and Section 179 of the Criminal Procedure Code, this intention has no force.

Under Section 107 of the Penal Code each of the petitioners may be held to have abetted the acts of the other which constitute cheating, and for this reason, and for those already recorded, the trial of the charges under the Penal Code may proceed in the Lahore Court, and I see no reason for holding that it should not proceed in that Court.

As to the charges under the Railways Act (IX of 1900) Ghulamali is not a principal if Abdulali is not an innocent agent, and counsel for the Crown does not suggest that the latter is innocent. Cf *Frost 39 Regina v. Bannen* (1) *Regina v. Toller*, (2) and *Regina v. Bull*, (3). In the last case *TRINDAL, C* and *ANDERSON, B*, held that if the engraver of a plate intended to be used for purposes of forgery, acted innocently and his employer was a principal while, if he acted with guilty knowledge, he was himself the principal.

Had Ghulamali been a principal in the offence committed according to the prosecution at Karachi, under Section 134 of the Railways Act, he may under Section 134 of that Act, be tried at Lahore, where he was when the prosecution was instituted, and even as an abettor by instigation he may be tried at Lahore where the abetment is alleged to have been committed. Illustration (1) to Section 180 Act V 1898, but on the advice of Counsel for the Crown that Abdulali was brought from Karachi to Lahore solely for the purposes of this prosecution, his residence being at Karachi, I cannot hold that Abdulali can be tried at Lahore under Section 134. For the same reason, this Court has not jurisdiction under Section 185 of the Code of Criminal Procedure to decide by which Court the offence in which Abdulali has been charged under the Railways Act shall be tried, Karachi, being outside the local jurisdiction of this Court.

(1) 2 M C C, 309

(2) 1 Cox C C, 84

(3) 1 Cox, C C 214

dismiss the application so far as it concerns the offences charged under the Penal Code, and the offence under the Rail Act against Ghulamali, and I set aside the proceedings against Abdulali under the Railways Act. The record will be returned to the Magistrate.

Application dismissed in part

Ghulamali
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In the High Court of Madras

CRIMINAL APPEAL *

*Before Mr Justice Subramania Iyer and
Mr Justice Miller.*

THE PUBLIC PROSECUTOR, APPELLANT

1

DORAISAWMY MUDALI, ACCUSED

Criminal Procedure Code (1898) Section 531—Offence committed in one District—Magistrate of another District tried by—Not a material irregularity

An offence was committed within the jurisdiction of the Sub-divisional Magistrate of Negapatnam, but it was tried by the Magistrate at Trichinopoly.

Held, that the provisions of Section 531 of the Criminal Procedure Code cured the irregularity.

APPEAL under Section 417 of the Code of Criminal Procedure against the Judgment of acquittal passed on the accused in Criminal Appeal No 3 of 1906 by the Sessions Court of Trichinopoly (Calendar Case No 7 of 1905 on the file of the Assistant 1st Class Magistrate of Trichinopoly).

The Public Prosecutor for the Appellant

K S Gopalaswami Aiyar for the Accused

JUDGMENT.—The Public Prosecutor has argued this case on the footing that the offence was committed within the jurisdiction of the Sub-Divisional Magistrate of Negapatnam. The question for determination is whether the irregularity of this trial by the Trichinopoly Magistrate is cured by the provisions of Section 531, Criminal Procedure Code. The Sessions Judge has held

* Appeal No 182 of 1906

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stated that when the train reached the Perambore Station, the prisoner assisted in giving out the luggage, and then appeared to be steady and sober. It was proved that the under guard has charge of one of the brakes, and that, though the head guard is answerable for starting the train, he is obliged to depend upon his under-guard for ascertaining that everything is secure in the part of the train which is under the more immediate observation of the latter. It was also proved that serious accidents might result from the negligent performance of the under-guard's duties.

Jones was stated by one of the witnesses to be an East Indian and there was no other evidence of the prisoner's parentage or place of birth.

No Counsel appeared for either of the prisoners, and the Judgment of the Court was delivered by

SCOTLAND, C J.—The Act No XVIII of 1862 was passed for *the further improvement of the administration of criminal justice* by simplifying and facilitating the mode of procedure, and the object of the 35th Section is to remove doubts and inconveniences as regards the exact locality in which offences alleged to have occurred on a journey or voyage have been actually committed or completed. That Section enacts "If any person shall be accused of any offence alleged to have been committed on a journey or on any voyage in British India, such person may be dealt with, tried and punished by any of Her Majesty's Supreme Courts of Judicature, if any part of the journey or voyage shall have been performed within the local limits of the jurisdiction of such Court."

The question which the Court has now to decide is whether the section clearly gives jurisdiction to the High Court to try and convict the parties charged in either of the cases reserved for consideration, and we are of opinion that the section does not admit properly of such a construction. It is not improbable that the offence of drunkenness whilst on duty was not one of the offences contemplated when the section was framed. But the general language of the section is certainly sufficient to include such offence. Then the section applies if the offence of which the person is accused is "alleged to have been committed on a journey or on any voyage." Now, the words "on a journey or on any voyage" must, we think, be read as if the provision had been whilst a journey or voyage or any part of it is being performed by a ship or carriage, without particular reference to the

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minns, and so read together with the language of the rest of the section, the proper construction and effect of the enactment is that if a person is accused of an offence committed whilst a journey or voyage is *going on* he may be tried at any of that part of the journey or voyage during which the offence of which the person accused is alleged to have been committed is within the local limits of the Court's jurisdiction. Here the offence was committed by the party accused and was alleged to have been committed on the journey between Coimbatore and Arkonam, and the one prisoner was actually detained at Arkonam and the other was put in charge of the peon to prevent his going further on the journey, but broke away and got into the train in his then intoxicated state, so that it cannot, we think, be said that any part of the journey on or during which this offence is alleged to have been committed by the accused was performed within the local limits of the Court's jurisdiction. The journey at which the offence is alleged to have been committed ended, so far as regards the party accused, and the offence, at Arkonam.

The very general terms of the section give rise certainly to some doubts and difficulty, and the considerations of convenience and inconvenience as regards the prosecution of offences committed on a journey, which have naturally occurred to us, do not so preponderate either way, as to assist materially in its construction. But looking to what must have been the object and intention of the enactment and giving the ordinary meaning to the language of the section, we think our present construction is the proper and reasonable one.

The Court, therefore, we are of opinion, had no jurisdiction to try the offences charged in these cases, and the convictions must be quashed and the prisoners discharged.

Convictions quashed

In the Chief Court of the Punjab.

Before Mr. Justice Reid,

GHULAM ALI AND ANOTHER (ACCUSED), PETITIONERS

v.

QUEEN EMPRESS, RESPONDENT

CASE No 1011 OF 1899.

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Cheating—Indian Penal Code, Section 415—Abetment—Indian Penal Code Section 107—False description of goods—Indian Railways Act, IX of 1890, Section 107—Jurisdiction—Criminal Procedure Code, Sections 178 and 180 and Indian Railways Act, Section 131

Abdulali sent certain goods by Railway from Karachi to Gulamali at Lahore. Under instructions received from the latter, Abdulali falsely described the goods with a view to evade payment of the correct freight charge due to the Railway Administration and to defraud them. For the prosecution it was alleged that Gulamali always charged Abdulali with the freight of the goods sent to Lahore, and in one instance Gulamali paid the freight at Lahore and Abdulali paid in other instances. Both of them were charged for cheating under Section 415 of the Indian Penal Code and Section 107 of the Indian Railways Act IX of 1890. The question arose as to the place of their trial. *Held*, (1) that as to the offence of cheating both the accused might be tried under Section 179 of the Criminal Procedure Code at Lahore, the head quarters of the Railway, (2) that under Section 107 of the Penal Code each of the accused might be held to have abetted the acts of the other which constituted cheating and their trial might proceed in Lahore Court, (3) that the offence of cheating was committed by Gulamali at Lahore and by Abdulali at Karachi. (4) Lastly that, as regards the alleged offence under Section 107 of the Railways Act Gulamali might be tried at Lahore under Section 137 of the Railways Act or under Section 180 Illustration (a) of the Criminal Procedure Code for that Abdulali who had been taken to Lahore in connection with this case could not be tried there.

PETITION for revision of the order of A. M. Srow, F. J., Magistrate, 1st class, Lahore, dated 3rd July 1899.

Grey,—for Petitioners.

Robinson,—Government Advocate, for Respondent.

The Judgment of the learned Judge was as follows—

REID, J.—The case for the prosecution is that Gulamali at Lahore, wrote to Abdulali at Karachi, instructing him to send certain goods from Karachi to Lahore by the North-Western

Railway under false descriptions, with the object of inducing the Railway Administration to carry the goods to, and to deliver them at, Lahore, at a lower rate than would have been charged had the goods been correctly described, and that Ghulamali took delivery at Lahore of goods sent by Abdulali from Karachi in consequence of these instructions without paying the difference between the rate charged and the correct rate and thereby defrauded the Railway Administration of the amount by which the correct rate exceeded the rate charged. Part of the case for the prosecution is that Ghulamali always charged Abdulali with freight of the goods despatched to Lahore, and it is admitted that in at least one instance freight on the goods consigned was paid by Ghulamali at Lahore, while in other instances it was paid by Abdulali at Karachi.

The question for consideration is whether, under these circumstances, Ghulamali and Abdulali, or either of them can be tried at Lahore, for offences under the Railways Act and for cheating or abetment thereof.

The authorities relied on by Counsel for the Crown and for the petitioners, respectively, are *Queen Empress v O'Brien*,⁽¹⁾ and in the matter of *Bichstranund Das v Bhaghut Perai* ⁽²⁾

The latter authority is only quoted in support of the contention that Section 182 of the Code of Criminal Procedure is inapplicable, and need not be considered in my view of the law, applicable to the charges under the Penal Code.

The offence of cheating as defined in Section 415 of the Penal Code, comprises the causing or the likelihood of causing, damage in property to the person deceived, and the Allahabad case cited is authority for holding that Section 179 of the Code of Criminal Procedure confers on the Lahore Court jurisdiction, by reason of the loss in freight being caused to the Railway Administration at Lahore, where its head-quarters are.

In this view of the law both Ghulamali and Abdulali can be tried at Lahore. Apart from this, the offence of cheating if the facts alleged by the prosecution be established, about which I offer no opinion, was committed by Ghulamali at Lahore, where the Railway Administration was induced by his dishonest concealment of the fact that the goods consigned had been misdescribed to deliver the same to him without receiving full

(1) I L R. 19 All 3

(2) I L R., 16 Cal 657

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payment of carrying charges, while the same offence was committed by Abdulali at Karachi. Counsel for the petitioners contends that if Abdulali is treated as a principal, he can only be tried at Karachi, where it is contended, the offence of cheating was according to the prosecution complete, but in my view of the interpretation of Section 415 of the Penal Code and Section 179 of the Criminal Procedure Code, this intention has no force.

Under Section 107 of the Penal Code each of the petitioners may be held to have abetted the acts of the other which constitute cheating, and for this reason, and for those already recorded, the trial of the charges under the Penal Code may proceed in the Lahore Court, and I see no reason for holding that they should not proceed in that Court.

As to the charges under the Railways Act (IX of 1890) Ghulamali is not a principal if Abdulali is not an innocent agent, and counsel for the Crown does not suggest that the latter is innocent. Cf *Frost 39 Regina v. Bannen*(1) *Regina v. Valler*,(2) and *Regina v. Bull* (3). In the last case LINDAL, C J and ANDERSON, B, hold that if the engraver of a plate intended to be used for purposes of forgery, acted innocently, his employer was a principal while, if he acted with guilty knowledge, he was himself the principal.

Had Ghulamali been a principal in the offence committed according to the prosecution at Karachi, under Section 107 of the Railways Act, he may under Section 134 of that Act, be tried at Lahore, where he was when the prosecution was instituted, and even as an abettor by instigation he may be tried at Lahore where the abetment is alleged to have been committed, under illustration (a) to Section 180 Act V 1898, but on the admission of Counsel for the Crown that Abdulali was brought from Karachi to Lahore solely for the purposes of this prosecution his residence being at Karachi, I cannot hold that Abdulali can be tried at Lahore under Section 134. For the same reason the Court has not jurisdiction under Section 180 of the Code of Criminal Procedure to decide by which Court the offence with which Abdulali has been charged under the Railways Act shall be tried, Karachi, being outside the local jurisdiction of this Court.

(1) 2 M C C., 309

(2) 1 Cox C C., 84.

(3) 1 Cox C C. 241.

I dismiss the application so far as it concerns the offences charged under the Penal Code, and the offence under the Railway Act against Ghulamali, and I set aside the proceedings against Abdullah under the Railway Act. The record will be returned to the Magistrate.

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Application dismissed in part

In the High Court of Madras

CRIMINAL APPEAL *

*Before Mr Justice Subramania Iyer and
Mr Justice Miller*

THE PUBLIC PROSECUTOR, APPELLANT

1

DORAISAWMY MUDALI, ACCUSED

Criminal Procedure Code (1898) Section 531—Offence committed in one District—Magistrate of another District tried by—Not a material irregularity

An offence was committed within the jurisdiction of the Sub-divisional Magistrate of Negapatnam but it was tried by the Magistrate at Trichinopoly.

Held that the provisions of Section 531 of the Criminal Procedure Code cured the irregularity.

APPEAL under Section 417 of the Code of Criminal Procedure against the Judgment of acquittal passed on the accused in Criminal Appeal No. 3 of 1906 by the Sessions Court of Trichinopoly (Calendar Case No. 7 of 1905 on the file of the Assistant 1st Class Magistrate of Trichinopoly).

The Public Prosecutor for the Appellant

K. S. Gopalaratnam Aiyar for the Accused

JUDGMENT.—The Public Prosecutor has argued this case on the footing that the offence was committed within the jurisdiction of the Sub-Divisional Magistrate of Negapatnam. The question for our determination is whether the irregularity of this trial by the Trichinopoly Magistrate is cured by the provisions of Section 531, Criminal Procedure Code. The Sessions Judge has held

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that the section covers only cases where the offence committed within the jurisdiction of a Court is tried by that Court outside the limits of the local area of its jurisdiction. We are unable to see anything in the language of Section 531 to confine its operation to that limited class of cases. Stress has been laid on behalf of the accused, upon the language of Sections 177, 179, 180, 181 and 183, Criminal Procedure Code. These sections no doubt define the Courts which ordinarily have jurisdiction to try offences. They should, however, be read with Section 531 and the manifest intention of that section is to provide against the contingency of a finding, sentence or order regularly passed by a Court in the case of an offence committed outside its local area being set aside when no failure of justice has taken place.

The authorities to which our attention was drawn by the Public Prosecutor are clearly in favor of this view. *Queen v. Piran* (1) was a case under the Code of 1872. There it was assumed that a trial by a Court of an offence over which it had no local jurisdiction and which was committed within the local jurisdiction of another Court within the same province would be sustained under section 73 of that Code.

Bapu Daldi v. Queen, (2) proceeds upon the same presumption. In *Queen Empress v. Abul Reddi*, (3) and *Rayan Kull v. Emperor*, (4) it was held that a committal by a Magistrate not having local jurisdiction to commit was within Section 531.

Queen Empress v. Ingle, (5) is to the same effect. The hesitation expressed in that case by the learned Judge was apparently due to this perception of the possibility of a failure of justice in the event of a conviction.

We are therefore unable to agree with the view of the Sessions Judge. We set aside his order quashing the conviction and direct that the appeal be restored to the file and disposed of according to law.

Acquittal set aside

(1) 13 B. L. 1, App. 4. (2) 1 L. R., 5 Mad. 25. (3) 1 L. R. 17 Mad. 422.
(4) 1 L. R., 26 Mad. 640. (5) 1 L. R., 16 B. = 20.

In the Chief Court of the Punjab.

CRIMINAL APPELLATE

Before Mr. Justice Stogdon and Mr Justice Chatterjee

QUEEN EMPRESS, APPELLANT,

v.

ZAHARIA AND ANOTHER (ACCUSED), RESPONDANTS

CASE No 138 of 1898

Offer of bribe to a Railway servant—Public Servant—Section 161, Clauses 2 and 3 Indian Penal Code—Railway Act, IX of 1890, Section 137

1898
May, 8

A Chief Goods Clerk suspected certain frauds in the Goods office and made a report of the same to his superior officer. He was shortly after transferred to another station and made further reports bearing upon the subject. He was deputed to assist the Police in their investigation. The Police accompanied by him went to the shop of the accused and seized their account books. The accused offered a bribe of Rs 500 to the Goods Clerk to close the enquiry and to return the books unchecked. The accused were arrested by the Police while in the act of handing a moiety of the money and taken to the District Magistrate. The Magistrate tried the accused under Section 161/116 for offering bribe to a public servant and sentenced them to three months rigorous imprisonment and Rs 100 fine each.

On appeal the Sessions Judge held the Goods Clerk was not a Railway servant, as defined in section 3 (7) of the Indian Railways Act, IX of 1890, and was not therefore a public servant under Chapter IX of the Indian Penal Code. He therefore reversed the conviction of the accused and acquitted them.

On further appeal to the Chief Court by the Crown to set aside the acquittals,

Held that the District Magistrate was wrong in having charged the accused under the Second Clause of Section 161 Indian Penal Code, inasmuch as the Goods Clerk was not in the discharge of his functions and could not show any favour and that the accused should have been charged under the Third Clause of the Section, as the Goods Clerk was in a position to report to the Police stating that there was nothing disclosed in the accused's books on comparison with the Railway records and thus help the accused in getting the case dismissed and the books returned.

Held, also, that the Goods Clerk was a Railway servant under Section 137 of the Indian Railways Act IX of 1890 and was a public servant for the purposes of Chapter IX of the Indian Penal Code, inasmuch as he was

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that the section covers only cases where the offence committed within the jurisdiction of a Court is tried by that Court outside the limits of the local area of its jurisdiction. We are unable to see anything in the language of Section 531 to confine its operation to that limited class of cases. Stress has been laid on behalf of the accused, upon the language of Sections 177, 179, 180, 181 and 183, Criminal Procedure Code. These sections no doubt define the Courts which ordinarily have jurisdiction to try offences. They should, however, be read with Section 531 and the manifest intention of that section is to provide against the contingency of a finding, sentence or order regularly passed by a Court in the case of an offence committed outside its local area being set aside when no failure of justice has taken place.

The authorities to which our attention was drawn by the Public Prosecutor are clearly in favor of this view. *Queen v Piran* (1) was a case under the Code of 1872. There it was assumed that a trial by a Court of an offence over which it had no local jurisdiction and which was committed within the local jurisdiction of another Court within the same province would be sustained under section 73 of that Code.

Bapu Daldi v Queen, (2) proceeds upon the same assumption. In *Queen Empress v Abli Reddi*, (3) and *Rayan Kulti v Emperor*, (4) it was held that a committal by a Magistrate not having local jurisdiction to commit was within Section 531.

Queen Empress v Ingle, (5) is to the same effect. The hesitation expressed in that case by the learned Judge was apparently due to this perception of the possibility of a failure of justice in the event of a conviction.

We are therefore unable to agree with the view of the Senior Judge. We set aside his order quashing the conviction and direct that the appeal be restored to the file and disposed of according to law.

Acquittal set aside

(1) 13 B I R, App 4 (-) 1 L R 531 at 75 (3) 1 L R 171 at 422
(4) 1 L R 1, 20 Mad 640 (5) 1 L R, 16 B at 20

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in the service at the time the bribe was offered although he was employed temporarily on other duty

Under the circumstances the acquittal was set aside and the conviction by the Magistrate was restored

APPEAL from the order of S CLIFFORD, Esq, Sessions Judge Delhi, dated 30th October 1897.

Sinclair, Government Advocate, for Appellant

Madan Gopaul, for Respondent

THE JUDGMENT of the Court was delivered by CHATTERJEE, J.—
The case for the prosecution is briefly as follows—Mr Harris was the Chief Goods Clerk of the East Indian Railway at the Delhi Station. He suspected certain frauds in the Goods Office and made a report to that effect to his superiors. He was shortly after transferred to Fardla, where he made a further report, and was then deputed to assist in the discovery and prosecution of the culprits. The proceedings began with a report by Mr Fitzpatrick, Inspector of Government Railway Police, at the instance of the District Traffic Superintendent, Fardla on which cognizance was taken of the case by the District Magistrate of Delhi, and the matter referred for inquiry to the Police. It was on 11th June 1897. On the same day Mr Harris accompanied by the Police, went to the shop of Chum Ram Ramdani where they seized the shop books. The accused Jogdishan then made an offer to Mr Harris to close the inquiry, and that very night definitely offered Rs 500 for the same purpose and the return of the books. On the following morning the two accused repeated the offer in this way that Rs 250 were to be paid down, and Rs 250 on the return of the books uncheckered. Mr Harris, who was all along in communication with the Police contrived to have witnesses to overhear the conversation and asked the accused to bring the money. They did so, and were arrested by the Police while in the act of handing it to Mr Harris, and taken to the District Magistrate.

The above facts have been held to be proved by the District Magistrate who convicted the accused under Sections 161/111 and sentenced them to three months' rigorous imprisonment and Rs 100 fine each. He appears to hold that the accused intended that Mr Harris should show them the favour that a khal for in the discharge of his official functions as a railway and therefore, as a public servant—a matter covered by the second Clause of Section 161 of the Indian Penal Code. He was

opinion that Mr Harris in the discharge of his new functions continued to be such servant, though he was not doing his proper work. There was also a charge under Section 214 of the Indian Penal Code, but the District Magistrate acquitted the accused of it, and there is no appeal on that question.

On appeal the Sessions Judge held, that Mr Harris, while employed to help the Police in the prosecution or in the inquiry relating to the frauds in the Goods Office, was not a Railway servant as defined in Section 3 (7) of the Railway Act, 1890, and was therefore not a public servant for the purposes of Chapter IX, of the Indian Penal Code. He, accordingly, reversed the conviction, and acquitted the accused. From this acquittal the present appeal has been lodged by the Crown.

In our opinion the District Magistrate appears to be wrong in thinking that the offence is covered by the Second Clause of Section 161, Indian Penal Code. As a matter of fact, Mr. Harris had at the time no official functions in the discharge of which he could have shown the favour, in consideration of which the bribe was offered. He might possibly have done so, had he continued in his original post, and the case had not gone to Court, by hushing up the inquiry, or by reporting to his superiors that the books of the Railway disclosed no fraud. But at the moment the bribe was offered, the inquiry was a criminal one in the hands of the Police by order of a Magistrate, and it was not possible for Mr Harris to do the accused the required favour in the discharge of his official functions, and the accused cannot be assumed to have offered a bribe for an obviously impossible consideration. Mr Harris was not authorized by law or by his superiors to drop the prosecution, or to return the books of the accused, if he thought proper. The whole matter was in the hands of the District Magistrate and the Police.

It appears to us, however, that the facts of the case, if established, are covered by the Third Clause of Section 161. The accused thought Mr Harris alone possessed the technical knowledge necessary to bring home the suspected fraud to them from the records of the Goods Office of Delhi, and this appears to be practically the case. If he represented to the Police that there was nothing disclosed in the accused's books, on comparison with the Railway records, to prove anything against them, he would probably succeed in persuading them to make a report to that effect to the Magistrate under Section 202 of the Criminal

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Procedure Code, and to get the case dismissed and the books returned. This was the service which Mr Harris could do to the accused, and the Police Inspector in charge of the inquiry was undoubtedly a public servant acting as such. The words of the clause appear clearly to admit of this construction, and to include a service of the nature mentioned above within its scope. *Queen v. Kalucharan Serishtadar* (1) is a case in point. Illustration (c) which is probably meant to exemplify an offence falling under the clause, is not quite opposite to the present case, but it is of course not exhaustive.

The question, then, is whether Mr Harris was a public servant while looking after the investigation. It is admitted by the Sessions Judge that he was a Railway servant within the meaning of Section 3 (7) of the Railway Act, as he is clearly employed by a Railway Administration in connection with the service of a Railway. Clause (2) defines a Railway, which includes, *pari passu* (c), all offices &c, constructed for purposes of or in connection with, a railway. A Goods Clerk is clearly a Railway servant, and under Section 137 of the Act, Sub-section (1), is a public servant also for purposes of Chapter IX of the Indian Penal Code. Assuming that the work on which Mr Harris was employed at the time the bribe was offered to him was an employment in connection with the service of a Railway, did he on that account cease to be a Railway servant or a public servant? The offence may be committed by, or in respect of one who is not even a public servant, or, one expecting to be such. The section does not appear to contemplate that at the time of the bribe taking the accused person should be acting discharging functions which constitute him a public servant. It is sufficient if he is a public servant, and his act falls under one of the three clauses specified in the section. If it were otherwise, the Munsiff in illustration (a) might escape with impunity if he happened to be on leave when he took the bribe. Mr Harris had not severed his connection with the Railway, and he was still a Goods Clerk, though at the moment he was temporarily deputed to do different work. We are of opinion that Railway servants proper, as long as they do not cease to be such continue to be public servants for purposes of Chapter IX Indian Penal Code, whatever functions they may be temporarily discharging at the time the offence by, or in respect of them is committed.

The learned Sessions Judge's view is based exclusively on the nature of Mr Harris' service at the time the bribe was offered, and has no reference to the nature of the act he was expected to perform in consideration of it. We are of opinion that this view is erroneous. The acquittal must therefore be set aside.

The Sessions Judge has come to no finding on the evidence, as he held the prosecution to be legally unsustainable. We have gone through the record, and are of opinion that the facts found by the District Magistrate are established by the evidence. There is no reason to disbelieve the statements of the witnesses, and the fact that Rs 250 were actually seized, and were produced in Court, affords the strongest corroboration of their testimony. It is impossible to believe that the case was concocted against the accused in this form. The plea of the accused Zaharia that Mr Harris, in consequence of his imperfect acquaintance with Urdu, misunderstood the accused's overtures cannot be accepted. Such a misunderstanding was practically impossible, and the payment of the money is not rationally accounted for in the story told by the accused. There are two witnesses, viz, Lachman Singh and Syad ud-din to two of the interviews, and there is no possibility of their having misunderstood the character of the accused's offer. The denial of Jogdhan of all complicity in the offence is not worth consideration. We therefore restore the conviction.

As regards the sentence, the accused were two days in Jail, and we consider it unnecessary to send them back to it. But the fine must be a substantial one, so as to be felt by the persons at whose instance the accused presumably committed the offence.

We accept the appeal, reverse the acquittal of the accused, and convict them under Section 161/116, Indian Penal Code, and sentence them to two days' rigorous imprisonment (which they have already undergone) and Rs 200 fine each, with three months' rigorous imprisonment in case of default of payment.

Appeal allowed.

The Indian Law Reports, Vol. XXX (Bombay) Series,
Page 348.

CRIMINAL REVISION.

Before Sir Laurence Jenkins, K.C.I.D., Chief Justice,
and Mr. Justice Russell.

EMPEROR

v.

HUSSEIN NOOR MAHOMED AND OTHERS *

1903
December, 5

*Bombay Prevention of Gambling Act (Bom Act IV of 1887) Section 12 (1)—
Gambling in a railway carriage—Through special train—Public place
—Railway track—Public having no right of access except passengers*

The accused were convicted under Section 12 of the Bombay Prevention of Gambling Act (Bom Act IV of 1887) as persons found playing for money in a railway carriage forming part of a through special train running between Poona and Bombay, while the train stopped for engine purposes only at the Reversing Station (on the Dore Ghats between Karjat and Khandala Stations) of the Great Indian Peninsula Railway.

Held, reversing the conviction, that a railway carriage forming part of a through special train is not a public place under Section 12 of the Bombay Prevention of Gambling Act (Bom Act IV of 1887)

* Criminal Application for Revision No 217 of 1903

(1) Section 12 of the Bombay Prevention of Gambling Act (IV of 1887) —

12 A Police officer may apprehend without warrant—

(a) any person found playing for money or other valuable thing with cards, dice, counters or other instruments of gaming used in playing any game not being a game of mere skill, in any public street, place or thoroughfare;

(b) any person setting any birds or animals to fight in any public street, place or thoroughfare;

(c) any person there present aiding and abetting such public fighting of birds and animals.

Any such person shall, on conviction, be punished with fine which may extend to fifty rupees or with imprisonment which may extend to one month.

Any such Police officer may seize all birds and animals and instruments of gaming found in such public street, place or thoroughfare or on the person of those whom he shall so arrest, and the Magistrate may, on conviction of the offender, order such instruments to be forthwith destroyed and such birds and animals to be sold and the proceeds forfeited.

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Per JENKINS C J —The word 'place' [in Section 12 of the Bombay Prevention of Gambling Act (Bom Act IV of 1887)] is I think qualified by the word "public" and having regard to its context and its position in that context, it must, in my opinion mean a place of the same general character as a road or thoroughfare. I am unable to regard the railway carriage in which the accused were as possessing such characteristics of or bearing such a general resemblance to a street or thoroughfare as to justify us in holding that it was a public place within the meaning of Section 12 of the Act, with which alone we are concerned.

Per RUSSELL, J —The adjective 'public' [in Section 12 of the Bombay Prevention of Gambling Act (Bom Act IV of 1887)] applies to all the three nouns street, place or thoroughfare and it is clear that the railway line certainly cannot be described as a public street or thoroughfare inasmuch as it is not and cannot be used by the public in the same way as they are in the habit of using 'public street and thoroughfares'.

CRIMINAL application for revision of convictions and sentences recorded by K. V. JOSHI, First class Magistrate of Maval at Vadgaon in the Poona District, in Case No. 221 of 1905.

On the 2nd September 1905 the accused were travelling in a Second Class Railway carriage of a through special train running from Poona to Bombay. The train ran direct to Bombay and took no passengers at any intermediate stations between Poona and Bombay. During the season of the races at Poona, the Great Indian Peninsula Railway Company started such trains from Bombay to Poona if a sufficient number of passengers offered beforehand to travel by them. The train in which the accused were travelling stopped for the purposes of the engine only at the Reversing station in the Bore Ghauts between Kaijat and Khandala Stations and while this train was standing the police raided the carriage in which the accused were travelling and found them sitting round a piece of cloth bearing various devices thereon as heart, anchor, crown, &c, and engaged in what is known as the heart, anchor and crown game with dice and money. It was a game of chance and not a game of skill. The accused were thereupon arrested and tried by the First Class Magistrate of Maval in the Poona District. The Magistrate found that the place where the accused were playing was a "public place" within the meaning of Section 12 of the Bombay Prevention of Gambling Act (Bom Act IV of 1887) and on the 5th October 1905 convicted and sentenced accused No. 8 to rigorous imprisonment for one month because he was considered to be the ring-leader and accused Nos. 1—6 to pay a fine of Rs. 40 each. Accused No. 7 was acquitted. The following

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are the reasons given by the Magistrate for holding that the carriage in which the accused were travelling was a "public place" —

The accused are said to have been found gambling in a railway carriage of the race special second class which ran * * from Poona to Bombay. The question for determination is therefore whether such a carriage comes within the meaning of the words "public street, place or thoroughfare." There are no definitions given in the Act of these expressions nor are there Indian rulings to guide this Court in determining the above question. Certainly a railway carriage will not be a public street or thoroughfare. But it is to be seen whether it can be a public place or not. The English case *Langrish v Archer* (10 Q B D 41) is I think on all fours with this case though the latter has some special circumstances attending it. In that case it was held that a railway carriage while travelling on its journey is within the definition of "an open and public place to which the public have or are permitted to have access" in the Section (1 of the Vagrant Act, Amendment Act, 1873, 36 and 37 Vic, c 36). Though we have not got the same words in our Section 12 of the Gambling Act the expression "public street, place or thoroughfare" carries I think the same meaning. It is contended on behalf of the defence that the conviction in that case was secured because there were in that case the additional words "any open place to which the public have or are permitted to have access." But from the opinions given by some of the Judges in that case about the case of *Ex parte Freestone* which was decided before the additional words were inserted I think that this contention does not hold good. Lord Coleridge C. J. said "In *Ex parte Freestone* where it was held that a conviction upon 5 Geo IV, c 81 for playing in a railway carriage must be set aside because it was not shown affirmatively that the carriage was being used for the conveyance of passengers, there is a strong intimation of opinion that if the evidence had been forthcoming the conviction would have been sustained." Another Judge, STEPHEN J gives his opinion in the following words "I am of the same opinion. Although it was not actually decided in *Ex parte Freestone* that a railway carriage while in the act of conveying passengers was an open and public place within 5 Geo IV, c 81, it may be inferred that if the facts had raised the question, the Court would have decided in the affirmative."

It is further contended on behalf of the defence that the train in which the accused travelled was a race special, and that as passengers were not allowed to get in at intermediate stations between Bombay and Poona but between Poona and Bombay the carriages of that train would come within the meaning of the words "public place." Mr. Marshall the Traffic Manager of the G. I. P. Railway Company, was examined as to the rules and orders in connection with the running of Race Specials. He produced no oral or written documents; it appears that these trains at Harjat, Poverising and Loukola are for the use of the only and that they are not to stop at any intermediate stations but to set down passengers. Had it been possible to run these trains

stoppages for engine purposes they would have run between Bombay and Poona as ordinary trains run between two stopping stations where passengers are picked up and set down. Such being the case the argument for the defence that public had no access to the race specials is of no significance. Like ordinary trains the public have access to these race specials both at Bombay and Poona. At the former for second class race specials sufficient passengers have to offer the day before the train is due to run. At the latter passengers were booked on payment of single journey fare provided there is room. It is nowhere ordered that a particular class of passengers are to travel by these trains. Any man can join it at Bombay if he offers the day before and any man can get into it at Poona if there is room available. The collection of forming oneself at Bombay the day before the train is due to run is imposed only in order that the Railway authorities may know beforehand whether there are sufficient passengers to run a train. In these circumstances I do not think that the race specials differ in any way from the ordinary trains in point of access to the public.

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Against the said convictions and sentences the accused applied to the High Court under its criminal revisional jurisdiction urging *inter alia* that Section 12 of the Bombay Prevention of Gambling Act (Bomb Act IV of 1887) was not applicable, that the Magistrate erred in holding that the Railway carriage in which the accused were travelling was a "public place" within the meaning of the section notwithstanding the fact that the carriage was attached to the Poona race express which admitted no passengers on its journey between Bombay and Poona and *vice versa* and that the Magistrate was wrong in holding that the said Act applied to the spot where the accused were arrested. The application was admitted and a notice was issued to the District Magistrate of Poona intimating that the High Court had decided to hear the application on the date mentioned in the notice or thereafter.

Branson (with I. Oliveira) appeared for the Applicants (accused) — *The main question is whether the carriage in which the accused were travelling was a public place within the meaning of Section 12 of the Bombay Prevention of Gambling Act.* The expression in the section is "public street place or thoroughfare" taking into consideration the position of the terms "street" in the expression and the adjective public preceding the three terms 'street place or thoroughfare' we contend that the term 'place' means a public place such as a street or a thoroughfare, Maxwell on Statutes 3d edition p. 461. The meaning put by the Magistrate on the term "place" cannot be sustained. The Magistrate has expressed his opinion that a

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railway carriage is not a public street or a thoroughfare. If how can a railway carriage to which the public in general have no access be a public place within Section 12 of the Act? Further the Act being penal its sections must be very strictly construed. The Magistrate failed to do so and has given to the section a wider scope by drawing upon Section 3 of the Vagrant Amendment Act, 36 and 37 Vic c 3. The words of that section are wider than those of Section 12 of the Bombay Prevention of Gambling Act. The Magistrate was not justified in importing the words of the English statute in the Gambling Act.

If a railway carriage attached to an ordinary train is not a public place within the meaning of Section 12, much less will be so a carriage attached to a race special which took only a limited number of passengers and did not stop at any intermediate station between Poona and Bombay. Such a train having once started the public can have no access to it.

Rao Bahadur V J Kirtikar, Government Pleader, appeared for the Crown.—The expression “public street, place or thoroughfare” in Section 12 of the Bombay Prevention of Gambling Act is wide enough to include a railway carriage on the line. The railway line is, according to the scope of Section 12 of the Act a thoroughfare. The Act makes gambling in a public place or thoroughfare penal. Therefore the conclusion arrived at by the Magistrate was correct. The carriage in which the accused travelled was not reserved for the party of players. There were other persons in the carriage who did not take any part in the play.

JENKINS, C J.—The accused in this case have been convicted as being persons found playing for money against the provisions of Section 12 of the Bombay Prevention of Gambling Act 1847 in a railway carriage forming part of a through special train running between Poona and Bombay.

The only question is whether it was in a public place that the accused were so playing. This depends on the meaning the word “place” has in Section 12 of the Act. The word “place” I think, qualified by the word “public,” and having regard to the context and its position in that context, it must in my opinion mean a place of the same general character as a road or thoroughfare, else it was pointless to use the words street or thoroughfare as they are there used. To the Railway track as such the public have no right of access except as passengers in the Company's

train. Therefore I need not seriously consider the suggestion that the accused were found playing in a public place, because the carriage in which they were playing was on the railway track. To support the conviction it must be shown that the railway carriage was a public place of the same general character as a public street or thoroughfare. I would be slow to place on the section an interpretation that would curtail its legitimate scope, but I am unable to regard the railway carriage, in which the accused were, as possessing such characteristics of, or bearing such a general resemblance to, a street or thoroughfare as to justify us in holding that it was a public place within the meaning of Section 12 of the Act, with which alone we are concerned.

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The conviction and sentence must therefore be set aside and the fine, if paid, refunded.

RUSSELL, J.—In this case the accused were charged and convicted of the offence of gambling in a Special Race Train on the way from Poona to Bombay on the 2nd day of September 1903. The train was a second class one and the Police made their raid on it at what is well known as the "Reversing Station" between Khandala and Karjat. The game they were playing was one known as Heart, Crown and Anchor and it was not disputed before us that they were gambling.

The only question is, were the accused gambling in "a public street, place or thoroughfare" within the meaning of Section 12 of the Bombay Gambling Act?

In the Court below and before us the case was argued as if the only point was whether the carriage in which the accused were comes within those words in the section. But it appears to me that there are two questions involved.

(1) Was that part of the railway line on which the train was where the accused were arrested, "a public street, &c."

(2) Was the carriage in which the accused were playing "a public street, place or thoroughfare?"

I propose to deal with these two points in their order.

If either of these questions is answered in the negative the conviction is bad and must be set aside.

1. In my opinion Mr. Branson was correct in saying that the adjective "public" applies to all the three nouns street, place or thoroughfare and it is clear that the railway line certainly cannot

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be described as a "public street or thoroughfare" inasmuch as it is not and cannot be used by the public in the same way as they are in the habit of using "public streets" and "thoroughfares."

Railway Act IX of 1890, Section 122, provides *inter alia* "if a person unlawfully enters upon a railway, he shall be punished with fine which may extend to Rs 20," and "unlawfully" seems to mean without the leave of the Railway Administration see the second clause of this section. Section 125 provides a penalty when the owner or person in charge of any cattle permits the entry on a railway provided with fences suitable for exclusion of cattle. Section 13 provides for the railway administration putting up (a) boundary marks or fence, (b) works in the nature of a screen near to or adjoining the side of any public road for the purpose of preventing danger to passengers on the road by reason of horses or other animals being frightened by the sight or noise of the rolling stock moving on the railway, (c) provides for the erection of suitable gates, chains, bars, stiles or handrails where a railway crosses a public road or the level, and (d) provides for the employment of persons to open or shut such gates, chains or bars. These provisions, in my opinion, clearly show that the Legislature did not intend the premises of a railway to be public and therefore it is impossible to describe the railway line and the ground adjoining it between the places as either a public street or thoroughfare. This view is borne out by the case of *Imperialist Vanmali and others* (1), where a Company which owned a Mill on the one side of the B B and C I Ry and a Ginning factory on the other, and whose servants had entered on the railway premises without permission of the Railway Company to repair a pipe (which had been laid beneath the railway line) and reservoirs (built on each side to preserve the proper level of water), and it was held by this Court that as the pipes and reservoirs belonged to the Mill Company and were kept in repair by the latter, the owners of the dominant tenement, had a right to enter on the premises of the Railway Company, the owners of the servient tenement, and effect any necessary repairs, and that the entry in question being in the exercise of that right, could not be called unlawful. The Magistrate in this case had convicted the accused under Section 122 of the Railway Act (IX of 1890) and sentenced him to a fine of four annas each. PARSONS, J., in delivering the judgment, observed "But it appears to us that as the pipe and

reservoirs belong to the (Mill) Company and are kept in repair by them, they, as the dominant owners, would have a right to enter on the premises of the Railway Company, the servient owners, to effect any repairs that might be necessary. See the Indian Easement Act, Section 24, and illustration (a) and *Colebeck v Girdler's Company*(1). The evidence shows that there was such necessity at this time the flow of the water through the pipe being stopped. An entry in exercise of a right cannot be called unlawful. From this case it follows that an entry upon railway premises not in exercise of a right or by permission of the railway administration would be unlawful compare *Foulger v Steadman*(2), where a car driver was held not justified in refusing to leave the Railway Company's premises when requested on behalf of the Company to do so although he believed himself entitled to remain thereon because other drivers did so on payment of certain sums to the Railway Company.

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It would be impossible for the Railway Company to work its lines were we to hold that the public should have access to them inside the fences without the permission of the Company. The place at which the accused were caught gambling, viz, the Reversing station (at which from the evidence it is clear the train stopped for engine purposes only) was not a place generally accessible to the public who would not have any right without the permission of the Railway Company to be on the line at all.

2 The next point to consider is whether the Race Train in which the accused were caught at the Reversing station was a "public place."

Looking at all the circumstances under which the train was being run and the evidence of Mr. Maule I am of opinion that it was not. It was a *special* train not found to run unless a sufficient number of passengers applied, it took no passengers in between Poona and Bombay and I cannot think that it would be described as a train for the "public" carriage of passengers. At the same time a good deal of the evidence that was given was irrelevant, the point to be decided being whether the train at that place i.e. the Reversing station could be called a "public place." What it might be at other places between Poona and Bombay seems to my mind irrelevant.

Several cases were referred to in course of the argument. The first was *Langrish v Archer*(3) where it was held that the railway

(1) (1876) 1 Q. B. D. 34.

(2) (1857) L. R. 6 Q. B. 65.

(3) (1882) 10 Q. B. D. 41.

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carriage while travelling on its journey was an "open and public place" or "in open and public place to which the public have or are permitted to have access"

Now if the words in the statute before us were the same as in that, of course the accused would have been rightly convicted but in the statute there referred to (36 and 37 Vic, c 38) the words used are "open place to which the public have or are permitted to have access" The Judgment of Lord Coleridge shows that if these words had not been used the decision would have been the other way

In *Ex parte Ireson* (1) the prohibition (St 5 Geo IV, c 63 s 4) was from playing or betting "in any street road highway or in any other open or public place" and the conviction alleged that the defendants played in an open and public place to wit a third class carriage used on the L B and S C Railway It was held that the conviction could not be supported as it did not appear that the carriage was then used for the conveying of passengers There, ALDERSON B says "These convictions ought to be framed strictly within the words of the Act, the object of which was to prevent nuisances and gambling in the public highways" It was also held that it was consistent with the conviction that the offence might have taken place in the third class carriage which although occasionally used on the Railway was then shunted away in the yard There however the words used "other open and public place," appear to me to distinguish that case from the present one

In *Emperor v Jusab Ally* (2) Mr Justice BARRY who delivered the Judgment says at page 389, referring to 36 and 37, Vic, c 38 and S 12 of the Bombay Gambling Act "In these two enactments, however, the offence is, not that the individual members are making a profit at all, but simply that they are carrying on their gambling with such publicity that the ordinary passer by cannot well avoid seeing it and being enticed—if his inclination, be that way—to join in or follow the bad example openly placed in his way In the one case comparative privacy for profit in the other the bad public example and accessibility to the public, would seem to constitute the gravamen of the offence Thus the very fact that special accommodation and privacy had been furnished, which would be essential in a case under Section 4 of the Bombay Gambling Act would be a ground for excluding the

(1) (1856) 25 L J M C 121

(2) (1905) I L R, 29 Bom 335; 7 Bom L R 333

also from the purview of Section 12. If people *gratuitously* allow gambling on their private premises, the law does not interfere with them, presumably because in that case they have no special inducement to tempt outsiders to join them. The law does interfere, however, if whether for private gain or not, they exposed temptation where the general public have a right to come."

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In *Khudai Sikkh and others v The King Emperor*(1) it was held that the word 'place' as used in Section 11 of the Gambling Act (Bengal Code, 2 of 1867) must be a public place and was *ejusdem generis* with the other words in the section, public market, fair, street or thoroughfare. Consequently a *thakurbari* surrounded by a high compound wall is not a public place as contemplated by that section. In that case the learned Judge says—"The place must be of the same character as public market, fair, street or thoroughfare. Now the gambling in this case took place within a *Thakurbari* surrounded by a high compound wall. It is not a place where any member of the public is entitled to go. The Sub-Divisional Magistrate, who convicted the accused, has held that it is a public place because anybody and everybody was allowed to go in and come out. The ground, as stated by the Magistrate, cannot be supported. Though in a *Thakurbari* belonging to a Hindu anybody and everybody would be allowed to go in, yet the owner of the *Thakurbari* is entitled to prevent any particular individual going in if he so chooses and as a matter of fact men who are not Hindus are not allowed to go into a *Thakurbari*. See *Shri Durga Prasad v The Emperor*(2). I am therefore of opinion, taking the object of the section before us to be what Mr. Justice Begg says it is, the mischief aimed at by that Section cannot possibly be said to have arisen in the present case. The second class carriage in a special train in which the accused were plying cannot in my opinion be considered to be a "public place" within the meaning of the Act. To get to that carriage, it would be necessary to trespass upon the line unless the person so doing had permission from the Railway Company to cross the line. It is well known that persons standing on the line could not possibly see into the carriages in which these people were gambling.

Under these circumstances I am of opinion that to call or describe either the railway line at the spot in question or the carriage

(1) (1901) 6 Cal W N 33

(2) (1904) 5 Cal W N 59.

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in which the accused were playing as coming within any of the terms, "public street, place or thoroughfare" would be to place a wrong interpretation upon those words

For these reasons I am of opinion that the conviction recorded and sentence passed upon the accused must be set aside Fine, if paid, to be refunded

Conviction and sentence reversed.

**The Indian Law Reports, Vol. XXXIV. (Bombay)
Series, 252.**

APPELLATE CRIMINAL.

*Before Sir Basil Scott, Kt., Chief Justice, and
Mr. Justice Batchelor.*

MUNICIPAL COMMISSIONER OF BOMBAY,

COMPLAINANT

v.

THE AGENT, G. I. P. RAILWAY COMPANY, ACCUSED *

1909
August, 4

Indian Railways Act (IX of 1890), Section 7—City of Bombay Municipal Act (Bom Act III of 1888), Section 394—Use by Railway Company of its premises for storing timber—License from the Municipal Commissioner for the use not necessary

The Agent of the C I P Railway Company having been charged in the Presidency Magistrate's Court, at the instance of the Bombay Municipality under Section 394 (1) (d) of the City of Bombay Municipal Act (Bom Act III of 1888) with having used the Company's premises for storing timber without a license granted by the Municipal Commissioner the Presidency Magistrate recorded evidence and referred the following question under Section 432 of the Criminal Procedure Code (Act V of 1898) —

"Do the statutory powers given to the Railway Company (Section 7 of the Indian Railways Act IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner, to use premises in such a manner as is necessary for the convenient making, altering, repairing and using the Railway?"

Held that no such license was necessary. Section 7 (1) of the Indian Railways Act (IX of 1890) authorizes the Railway Administration to do all acts necessary for the convenient making maintaining altering repairing and using the Railway notwithstanding anything in any other enactment for the time being in force. Municipal Commissioner of Bombay v G I P Ry

The storing of timber was necessary for the convenient making etc., of the Railway line

Under Section 7, Sub section 2 of the Indian Railways Act (IX of 1890) the Governor General in Council and not the Municipal Commissioner has the control of the Railway Administration in the exercise of its powers under Sub section 1

REFERENCE by A H S ASTON, Chief Presidency Magistrate of Bombay, under Section 432 of the Criminal Procedure Code (Act V of 1898)

The accused, the Agent of G I P Railway Company, was charged under Section 394 (1) (d) of the City of Bombay Municipal Act (Bom Act III of 1888) with having on or about the 25th March 1909 used certain premises, namely, two plots of ground, the property of the G I P Railway Company at Bombay, for the purpose of storing timber without a license granted by the Municipal Commissioner of Bombay

The timber in question consisted of about 15,000 Railway sleepers and it was admitted that no license was obtained and that the sleepers were timber and they were stored. The accused, however, contended on the strength of the ruling in *Emperor v Wallace Flour Mill Company*(1) that as the Railway Company was not trading in timber and as the purpose for which the premises were used was entirely accessory and necessary for their business, the real purpose was not in fact to store

The evidence recorded by the Magistrate also showed that the G I P Railway Company for some years past had "stacked" sleepers on the said premises for the use of their whole line. The maximum of the sleepers stacked was estimated at about 36,600 sleepers and the minimum at about 7,000 and 8,000.

Under these circumstances the Chief Presidency Magistrate referred the following questions to the High Court for an authoritative decision under Section 432 of the Criminal Procedure Code (Act V of 1898) —

1 Does the fact that the Railway are not trading in timber and that the purpose for which the premises are used is necessary for the con-

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 venient carrying on of their business as a Railway over their whole system
 negative the intention to store within the meaning of Section 324 (1) (d)
 of the City of Bombay Municipal Act?

2 Do the statutory powers given to the Railway Company (Section 7 of the Indian Railways Act, IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner to use premises in such a manner as is necessary for the convenient making altering repairing and using the Railway?

3 Is the fee payable for a license contemplated by Section 324 (1) (d) of the Municipal Act a tax within the meaning of Section 135 of the Indian Railways Act, IX of 1890?

4 Is the Government of India Notification No 9977, dated the 29th November 1907, a valid notification within the meaning of Section 13 (1) of the Indian Railways Act and does it render the Railway Company liable to pay the license fee in question?

5 Can an obligation to obtain a license be separated from a liability to pay the fee?

6 Do license fees come within the Notification?

In making the reference the Magistrate observed as follows—

In this connection it may be pointed out that the Railway system worked by the G. I. P. Railway is about 2,000 miles in extent and sleepers were stacked for the use of the whole system. Mr BARRY, J in *Emperor v Wallace Flour Mill Company* (1) laid down the principle that an intention to store is negatived if the quantity retained is only reasonably sufficient for the varying exigencies of consumption but it does not follow that the intention would be negatived if a Company having mills at various parts of India were to accumulate in one place a quantity sufficient for the varying exigencies of consumption of all its mills. In the case of *Emperor v. Wallace Mill Flour Company* (2) the supply of oil in hand would only have sufficed for about 12 days use in the largest mill in the present case the 15,000 sleepers which were stacked by the Railway would have sufficed according to the consumption in 1908 for about five months use over the whole area worked by the Railway and according to the same rate the quantity of sleepers actually received and stacked in 1908 would have sufficed for nearly two years use. It is true that the average for 1907 and 1908 together works out a somewhat higher rate of consumption viz 39,739, but this is counterbalanced by the fact that on the 1st January, 1908 there was a balance in hand of about 8,000 sleepers.

It is however contended by Mr Yorke Smith that the statutory powers given to the Railway Company (Section 7 of the Indian Railways Act IX of 1890) preclude the Municipal Commissioner from insisting on a license.

Under Section 7, Clause (f) statutory powers have been conferred on the Railway to "do all other acts necessary for making, maintaining, altering or repairing and using the Railway," and in my opinion on the evidence it is necessary for the convenient making maintaining altering

or repairing the Railway, that the Railway Company should be at liberty to store the Railway sleepers on the premises in question from time to time. As the sleepers are obtained by shiploads from Australia, it inevitably follows that at certain periods there is a large accession to the stock

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Mr. Crawford however contends that even if the need for storing is conceded the obligation to obtain a license from the Commissioner is not thereby extinguished.

The Railway have a right to store subject to the necessity of obtaining a license. But the necessity of obtaining a license restricts to that extent the statutory powers conferred by the Railway Act and implies a power in the Municipal Commissioner of refusing to grant a license and I am of opinion on reading the authorities relied on by the defendant, *London and Brighton Railway Company v. Truman*⁽¹⁾, *City and South London Railway Company v. London County Council*⁽²⁾, *London County Council v. School Board for London*⁽³⁾, *Dunley v. North Eastern Railway Company*⁽⁴⁾, that such a power is inconsistent with the statutory powers given to the Railway.

I think Mr. Yorke Smith is also right in his contention that license fee is a tax within the meaning of Section 130 of the Railway Act and that the notification by the Government of India Department of Commerce and Industry, No. 4077 dated 26th November 1907, which is relied on as rendering the Railway Administration liable to pay the tax, is not such a notification as was intended by the Section and inoperative. The case of the *Brewers and Malsters Association of Ontario v. Attorney General for Ontario*⁽⁵⁾ and Section 1(p) of the City of Bombay Municipal Act 1888, have been cited with reference to the first contention while with reference to the second contention the validity of the notification has been attacked firstly on the ground that its wording shows that the discretion necessary in framing a notification under the Section has not been exercised, the *Queen v. Bommaya*⁽⁶⁾, *Macbeth v. Ashley*⁽⁷⁾, *Sharp v. Wakefield*⁽⁸⁾, *Sprigg v. Siquan*⁽⁹⁾, Maxwell on Interpretation of Statutes (3rd Ed. pp. 175 to 177) and secondly, on the ground that the notification is not consistent with the Act under which it purports to have been made, *Macbeth v. Ashley*⁽⁷⁾ and *Ry m. Chetty v. Sheshayya*⁽¹⁰⁾. If the wording of the notification is considered, I think it can be reasonably contended that the notification is so worded as to affect not only existing but even future Railway Administration, not only existing but also future taxes and that its effect is virtually to repeal the provisions of the Section from which it derives its authority."

The reference was heard by SCOTT, C. J. and BATHUR, J. Cohen (instructed by Crawford, Brown and Co.) for the Municipal Commissioner.

(1) (1885) 11 App. Cas. 43

(3) (1892) 2 Q. B. 606

(5) (1897) 1 C., 231

(7) (1874) L. R., 2 S. & D. 332, 337.

(9) (1897) 1 C., 238

(7) (1891) 2 Q. B., 513

(4) (1896) 1 Ch. 48

(6) (1882) 5 Mad., 26.

(8) (1891) 1 A. C., 173, 174

(10) (1895) 18 Ma. 1, 236 at p. 245.

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Robertson (instructed by *Little and Co*) for the Railway Company.

Scott, C. J—The Agent of the G. I. P. Railway Company was charged in the Presidency Magistrate's Court under Section 394 (1) (d) of the City of Bombay Municipal Act with having used certain premises for the purpose of storing timber without a license granted by the Municipal Commissioner.

The Chief Presidency Magistrate having taken evidence has referred for the opinion of this Court certain questions specified at the end of the case stated by him.

The first question is, in our opinion, one of fact and not of law, and, therefore, cannot be stated under Section 432 of the Criminal Procedure Code, under which this reference is made.

As regards the other questions, if the second question is answered in the affirmative no answer need be given to the remaining questions, for the case will in that event have to be decided in favour of the Respondents.

The second question is in these terms

"Do the statutory powers given to the Railway Company (Section 7 of the Indian Railways Act, IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner to use premises in such a manner as is necessary for the convenient making, altering, repairing and using the Railway?"

Section 7 of the Indian Railways Act, IX of 1890, to the provisions of which the G. I. P. Railway is subject, provides as follows—

(1) "Subject to the provisions of this Act and in the case of immovable property not belonging to the Railway administration, to the provisions of any enactment for the time being in force for the acquisition of land for public purposes and for companies, and subject also, in the case of a Railway Company, to the provisions of any contract between the Company and the Government, a Railway administration may for the purpose of constructing a Railway or the accommodation or other work connected therewith and notwithstanding anything in any other enactment for the time being in force"

(f) Do all other acts necessary for making, maintaining altering or repairing and using the railway

(2) "The exercise of the powers conferred on a Railway administration by Sub-section (1) shall be subject to the control of the Governor General in Council"

In stating the case the Magistrate finds as a fact on the evidence that it is necessary for the convenient making, maintaining,

altering or repairing the Railway that the Railway Company should be at liberty to store Railway sleepers on the premises in question from time to time and that as the sleepers are obtained by ship-loads from Australia it inevitably follows that at certain periods there is a large accession to the stock. Upon this finding it would appear *prima facie* that the Railway Administration is authorized to store Railway sleepers upon premises in question notwithstanding anything in any other enactment for the time being in force.

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It is, however, argued on behalf of the Municipal Commissioner that notwithstanding the statutory authority and notwithstanding the finding of the Magistrate is still necessary for the Railway Company to obtain a license under Section 394 of the Bombay Act, III of 1888, for storing sleepers upon the premises.

It will be convenient at this point to set out the portions of the Sections of the Municipal Act, which have been referred to in argument —

Section 394 (1) (b) and (d) provide —

(1) "No person shall use any premises for any of the purposes herein below mentioned, without, or otherwise than in conformity with the terms of, a license granted by the Commissioner in this behalf, namely—

(b) any purpose which is, in the opinion of the Commissioner, dangerous to life, health or property, or likely to cause a nuisance—

(d) storing for other than domestic use or selling timber, firewood, charcoal, coal, coke, ashes, hay, grass, straw or any other combustible thing"

Section 479 (1) provides —

(d) "Whenever it is provided in this Act that a license or a written permission may be given for any purpose such license or written permission shall specify the period for which, and the restrictions and conditions subject to which, the same is granted and shall be given under the signature of the Commissioner or of a Municipal officer empowered under Section 68 to grant the same."

Section 479 (3) provides.—

"Subject to the provisions of clause (1) of Section 40, any license or written permission granted under this Act may at any time be suspended or revoked by the Commissioner if any of its restrictions or conditions is infringed or evaded by the person to whom the same has been granted, or if the said person is convicted of an infringement of any of the provisions of this Act or of any regulation or by law made hereunder in any matter to which such license or permission relates."

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It is not disputed that the unimpaired provisions of Section 394 would empower the Commissioner to refuse in his discretion to grant a license. This view has the authority of a ruling of this Court in its favour: see *Haji Ismail v. Municipal Commissioner of Bombay* (1).

It was at first contended by Counsel for the Commissioner that the power of refusal extended to such a case as the present but being pressed by the words of Section 7 of the Railways Act "notwithstanding anything in any other enactment for the time being in force," and by the consideration that such a contention if upheld would give to the Commissioner, under Section 394 (b), the power, if he thought fit, to prohibit the working of the railway in parts of the city, he modified and reduced the argument to this, that although by reason of the terms of Section 7 of the Railways Act the Commissioner could not prohibit the use of any premises, the use of which was authorized by the terms of Section 7, yet he still had reserved to him under Section 394 (1) (d) a power of regulating the method in which the Railway Company should store the timber upon its premises even though such storing was authorized by Section 7 (1) (f), and authorities were cited to the Court in support of the general proposition that an implied repeal of one Act by a later Act will not be inferred if it is possible even partially to harmonise the provisions of the two Acts. While we recognise this as a general rule of construction, we do not think that there is any scope for its application in the present case, in the first place, it would involve in almost complete rewriting of Section 394, put of it being left to stand, another part being restricted without any precise guidance as to the limits of the restriction and yet another part being altogether deleted. It seems to us very doubtful whether such a recasting of the Section would be warranted by any recognised principles of construction. In the second place we have not only the provision that the words of Section 7 shall be read notwithstanding anything in any other enactment for the time being in force, but we have an express declaration in Sub-section (2) of the authority which shall have control of the Railway Administration in the exercise of its powers under Sub-section (1). That authority is the Governor-General in Council and not the Municipal Commissioner.

The provisions of the Railways Act to which we have referred provide, we think, for an undivided and exclusive control of Railway Administrations by the Supreme Government.

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Considerations of convenience and the safety of the public and security of property have been pressed upon us in argument. But we do not think there is any practical force in any of these suggestions, for, if the Municipal Commissioner is really of opinion that the Railway Company is exercising its statutory powers in a manner inconsistent with the health of the inhabitants of Bombay or the safety of property therein, it is always open to him to make a representation to that effect to the Governor-General in Council in order that the state of affairs complained of may be inquired into, and if necessary remedied by the proper authority.

For these reasons we answer the second question in the affirmative and we return the case to the Presidency Magistrate to be disposed of in accordance with this finding.

Order Accordingly.

The Indian Law Reports, Vol. XXVI. (Bombay) Series,
Page 609.

CRIMINAL REFERENCE.

Before Mr. Justice Candy and Mr. Justice Croule.

CAWASJI MERWANJI SHROFF, COMPLAINANT,

v.

THE GREAT INDIAN PENINSULA RAILWAY
COMPANY, ACCUSED *

Animals—Cruelty to animals—Prevention of Cruelty to Animals Act (Act XI of 1890), Section 3—Police Bombay Town (Act XLVIII of 1860) Section 21—Railway Company—Master and servant—Criminal liability of master for his servant's acts—Goods yard of a railway—Public place

1902
April 14

The G. I. P. Railway Company carried twenty seven head of cattle from Talegaon to Bombay. These cattle were put in one truck by their

* Criminal Reference No. 24 of 1902

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2 Is Wadi Bunder Goods station a place accessible to the public within the meaning of Section 3 of Act VI of 1890, when the Company's orders are that men on business alone should be admitted there?

Branson and Jinnah, with Little & Co, for the Railway Company —An accused person cannot be criminally punished unless the *mens rea* is proved, nor can he be found guilty of a crime committed by his servant *Elliot v. Osborne*,⁽¹⁾ *Suen v. Sanders*,⁽²⁾ *Brown v. Foot*,⁽³⁾ *Massey v. Morriss*,⁽⁴⁾ *Derbyshire v. Houlston*,⁽⁵⁾ *Coppen v. Moore* (No 2),⁽⁶⁾ *Chisholm v. Doulton*,⁽⁷⁾ *Chund Churn v. Empress* (8) A Railway Company cannot, therefore, be penally liable for the acts of its servants, and the first question ought, therefore, to be answered in favour of the Railway Company

As to the second question, we submit that the Company's Goods yard at Wadi Bunder is a public place *Langrish v. Archer*,⁽⁹⁾ *Case v. Storey* (10)

Young, with Roughton and Byrne, for the Complainant —On the first question our contention is that the Company is responsible for the acts of its servants Smith on Master and Servant, page 309, Mayne, Criminal Law of India, 2nd Edition, page 252 In the present case the Railway Company has delegated to its servants (i.e., the Station Master and Goods Clerk at Talegaon Railway Station) the responsibility of deciding how many cattle could be put in a truck without any infringement of the law and if these servants make a mistake the Company is liable see Smith on Master and Servant, page 310, Maxwell on Interpretation of Statutes, pages 144 and 145, *Re v. Medley*,⁽¹¹⁾ *Re v. Marsh* (12)

CANDY, J —The Second Presidency Magistrate has, under Section 432, Criminal Procedure Code, referred two questions of law under the following circumstances He has found as a fact that, in January last, twenty seven head of cattle were carried by the G I P Railway from Talegaon (Poona District) to Bombay in such a manner as to subject the animals to unnecessary pain or suffering

- (1) (1891) 65 L J 378
- (3) (1892) 66 L J 649
- (5) (1897) 1 Q B 772
- (7) (1889) 22 Q B D, 736
- (9) (1882) 10 Q B D, 44
- (11) (1834) 6 C & P 293

- (2) (1891) 50 L J (M C) 6"
- (4) (1894) 2 Q B 419
- (6) (1898) 2 Q B 300
- (8) (1883) 9 Cal, 849
- (10) (1893) L R 4 Ex, 319
- (12) (1824) 2 B & C 71"

The information was laid by the Secretary and Treasurer of the Society for the Prevention of Cruelty to Animals under Section 21 of Act XLVIII of 1860, and Section 3 (b) of Act XI of 1890. The Magistrate found that there could be no conviction under Section 21 of Act XLVIII of 1860, because the cattle were put in the truck at Talegaon by the owner of the cattle under the supervision of the Goods Clerk, and the Company could not be liable for the acts of its servants when done in spite of a circular issued by the Traffic Manager to Station Masters to prevent the overloading of cattle, and contrary to the express directions it contained. The Magistrate, therefore, held that unless it could be established that the Company either encouraged the overloading of the truck, or knew that it was probable that the truck would be overloaded, no *mens rea* could be established. The Magistrate proceeded —

Looking at the wording of Section 21, it appears to be the intention of the Legislature to make the individual who actually abuses or ill treats an animal liable, and separate provision has been made for the punishment of abettors in the latter part of the same section. Section 3 (7) of Act XI of 1890 is, however, altogether different. A person includes a Company or Corporation, and the only question that the Court has to consider is who carried the cattle.

Then after quoting the case of *Re v. Maughlin* mentioned in *Myne's Criminal Law*, the Magistrate concluded

It is clear, therefore, that under the second section no *mens rea* need be established, and the second point must be decided against the Railway Company.

The third point before the Magistrate was whether the Goods yard at Wadi Bunder is such a place as is mentioned in Section 3 of Act XI of 1890. Section 3 relates to cruelty in public places. The Magistrate decided this point in the affirmative. But his Judgment was contingent on the opinion of the High Court on the following two points:

1st. Is the Company liable under the above circumstances for the acts of the owner of the cattle and the Goods Clerk at Talegaon under Section 3 (b) of Act XI of 1890, though they may have no knowledge as to how the animals were carried?

2nd. Is the Wadi Bunder Goods station a place accessible to the public, where the Company's orders with it men on business alone should be admitted there?

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On the second point we stated our opinion in the affirmative at the close of the hearing. There is clearly a distinction in the Act between private places for entering which a warrant would be necessary (see Sections 4, 5 and 6), and public places (see Sections 3 and 7). The Goods yard is, no doubt, a public place. The public may have a limited right of access, but, as a fact, no one is prevented from going inside the yard (compare the case of *Ex parte Kippins*(1)).

The point is, however, more difficult, and we took time to consider what our opinion should be. At the outset we may remark that by the terms of the reference we consider that our opinion must be confined to the question set out by the Magistrate, which is briefly whether the Railway Company is criminally liable under Section 3 (b) of Act XI of 1890, "though they may have no knowledge as to how the animals were carried." We express no opinion as to whether "cruelty" was legally established in this case, or as to whether there is anything repugnant in the Act to the word "person" including a corporation like the Railway Company. The Magistrate has formed an opinion on these points without seeking our advice. Also we must take it that the Magistrate has found as a fact that the Company did take action to prevent improper loading of cattle on its trucks. We cannot, therefore, accede to the argument of Mr. Young for the prosecutor, that the Company must, in the eyes of the law be taken to have *mens rea* because it had delegated to its servants the responsibility of deciding how many cattle can be put into a truck without cruelty. The reason given by the Railway official in his evidence for not making a hard and fast rule is apparently a sensible one. No doubt there are cases in which a master may be penally responsible for the act of his servant unless he can show that what was done was in contravention of his orders. In the present case we take it that the cattle were put into truck at Palegaon in such a manner as to subject the animals to unnecessary pain or suffering "in spite of the circular and contrary to the express direction it contained." There thus being an absence of *mens rea*, direct or implied, the question is can the carriers of the cattle be convicted under Section 3 (b) of Act XI of 1890. The Company were the carriers, there can be no doubt about

that And the Magistrate has found as a fact that the cattle were carried in such a manner as to subject the animals to unnecessary pain and suffering, owing to the fact that the owner of the cattle and the Goods Clerk at Talegion put too many cattle into one truck.

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With a view to assisting the Court in forming an opinion on this point the learned Counsel have quoted many cases. We do not think it necessary to go through these in detail. The principle which must govern the point will be found in such text books as Maxwell on the Interpretation of Statutes (3rd Edition) and Mayne's Criminal Law of India (2nd Edition), in which reference to many of the cases quoted will be found. Speaking generally, the principle is that a man cannot be convicted of a criminal offence unless he has a guilty mind. But in many cases knowledge (*scienter*, *mens rea*) is not necessary and the true test is to look at the object of the Act and to see how far knowledge is of the essence of the offence created. Act XI of 1890 was passed because it was deemed expedient to make "further provision for the prevention of cruelty to animals." But there is no indication in the Act that any part of the further provision was to create an offence apart from any knowledge on the part of the offender. The object of the Act, apparent on the face of it, was to consolidate and bring into one enactment the provisions of various local Acts, and to remove the anomaly in the general provision of the law (Section 31 of Act V of 1861) which was confined to roads or streets in towns, and to acts which caused obstruction, inconvenience, &c., to residents and passengers.

The first penal Section is Section 3. Clause (a) is apparently with some slight variation taken from Section 21 of Act XI VIII of 1860 (which with certain unreppealed sections of Act VIII of 1856 formed the Police Act of the Presidency Towns), and it was apparently based on Section 2 of the English Act for the prevention of cruelty to animals (Stat 12 and 13 Vic c 92).

The Presidency Magistrate held that looking to the wording of Section 21 of the Police Act it appears to be the intention of the Legislature to make the individual who actually ill-treats an animal liable. This is apparently a correct view and there is no reason why it should not be equally good for clause (a) of Section 3 of Act XI of 1890. The words "causing or procuring" is not inserted in clause (a), because by the present definition of

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"offence" (which was not law in 1860) in Section 40 of the Penal Code, this is covered by "abetment" The words of Section 2 of 12 and 13 Vic c 92, touch only the person who actually does the act of cruelty see *Pouell v Knight*(1) and *Elliot v Osborne*(2)

The same rule would hold good with reference to clause (a) of Section 3 of Act XI of 1890, which was not made applicable to Bombay, because the corresponding Section 21 of Act XLVIII of 1860 is applicable

Then we come to clause (b) of Section 3 of Act XI of 1890 That is apparently taken from Section 12 of the English Act (12 and 13 Vic c 92), the wording of which is "if any person shall convey or carry or cause to be conveyed or carried in or upon any vehicle any animal, &c" The words of the Indian Act are "binds or carries any animal, &c" The addition of the word "binds" and the omission of all mention of "vehicle" at first sight seem to show that the framers of the Indian Act had primarily in his mind the notoriously cruel manner in which birds are sometimes tied up and carried But he may have purposely used the general expression "binds or carries" in order to include any kind of carrying, whether by hand or conveying in or on a vehicle There is, however, no indication that as regards this "cruelty" he wished to draw a distinction between clauses (a) and (b) and to make a carrier penally liable under clause (b), though the cruelty was practised contrary to his explicit directions Similarly clause (c) of Section 3 seems to be aimed at the individual who actually offers, exposes, &c Mr Young argued that as regards the former part of this clause *scienter* would be immaterial, because by the words "which he has reason to believe" in the latter part *scienter* would be material We do not agree with this argument We do not think that a clause can be so split up, and that without express words the Legislature must be taken to have intended to make penally liable a person, who technically through his servants is in possession "of live animal which is suffering pain, &c," though he may be ignorant of the fact, and the servants in so doing may have acted contrary to his explicit instructions

Sections 4 and 5 are obviously aimed at the individual who does the cruel act It was contended that because in the latter part of clause (1) of Section 6 and in Section 7 the words

(1) (1878) 38 L T N S 607

(2) (1891) 65 L T N S 378

"permits" or "wilfully permits" are found, therefore in the sections in which those words are not found *scienter* is unnecessary. We cannot agree with this contention. Take Section 4: suppose the owner of a large dairy, in which one of the employers, in the course of his employment, performs the operation called *phuka*, the servant would be liable under Section 4, but would the master also be liable? Our conclusion from a general consideration of the Act is that it is aimed at the individual who actually practises the cruelty, and that it was not intended by the Legislature to make a master penally liable for the act of his servant done in the course of the servant's employment, and certainly not when the act is done contrary to the orders of the master. Whether a corporation like the G. I. P. Railway Company would be liable under Section 3 (b), if it were proved that the Company had been negligent and had actually connived at the act of the servant, is a question which does not arise in the present case. But having regard to the circumstances and facts found by the Presidency Magistrate, we think that our opinion on the first point should be in the negative. Such an opinion does not render the act ineffective for its avowed purposes. The very Judgment on which the Presidency Magistrate relied (*Rea v. Marsh*(1)) in a passage quoted by Mr. Mayne but not copied by the Magistrate shows that the defence in the present case might be good. And as BAILEY J. said in the same case, "unless this enactment the party charged must show a degree of ignorance sufficient to excuse him." In short, the Judgments clearly import that if the defendant could have satisfied the jury of his ignorance it would have been a defence though the word "knowingly" was not in the statute so J. R. BRIT, J., in *Queen v. Prince* (2).

Thus, the case relied on by the Presidency Magistrate is really against the view which he took. We direct the record and proceedings to be returned, with our opinion on the first point in the negative, on the second point in the affirmative.

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v
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In the Court of the Judicial Commissioner of Oudh

CRIMINAL APPLICATION

Before Mr. Spankie

AMINCHAND, APPLICANT

v

KING EMPEROR

*Forgery—Forged certificate using for purpose of obtaining employment—
Penal Code Sections 468 and 471*

1902
February, 24

The prisoner applied for an appointment in the District Traffic Superintendent's Office at Lucknow and produced a certificate purported to have been granted by the General Traffic Manager G I P Railway. He was convicted and sentenced to 2 years rigorous imprisonment under Sections 468 and 471 of Indian Penal Code. On appeal the conviction was upheld on the ground that the prisoner used the document fraudulently knowing that it was forged.

For APPLICANT —Mr Ali Ausat

For CROWN —The Government Pleader

SPANKIE, A J C —This is an application by Aminchand for the revision of the order of the City Magistrate convicting him of dishonestly using as genuine a forged document knowing it to be forged, and sentencing him under Sections 471 and 468, Indian Penal Code, to two years' imprisonment and of the Appellate order of the Sessions Judge confirming the conviction and sentence.

The facts are that on the 11th July 1900 the prisoner went to the office of the District Traffic Superintendent, Oudh and Rohilkhand Railway, at Lucknow, in search of employment and interviewed the Chief Clerk, Jain Narain. On being asked his business he produced a certificate purporting to be signed by Mr A Muirhead, General Traffic Manager, G I P Railway Company. The certificate is to the effect that the prisoner had served on that line as Station Master on Rs 80 for a month a certain period, during which he had served in a satisfactory manner. This document is dated the 30th June 1900. Jain Narain took the document into the room of the District Traffic Superintendent,

Mr J R Muirhead, where he was sitting with Mr Freeland, Assistant Traffic Superintendent Mr J R Muirhead at once thought that the document was not genuine, and he suggested that employment should be given to the prisoner while the document was sent to Bombay for verification. Accordingly Jain Narain directed the prisoner to put in a written application for employment. The prisoner at once wrote out such an application and handed it in together with a second certificate of service. In the application reference is made to this certificate but not to the one which the prisoner first produced. This last mentioned certificate is a forgery. After the prisoner handed in the application he left the office, and did not return to it.

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v
King
Emperor

It appears that after the prisoner had claimed to be tried the Magistrate did not require him to state whether he wished to cross examine any of the witnesses for the prosecution whose evidence had been taken. Subsequently the prisoner applied to have Mr J R Muirhead and Jain Narain re-summoned for cross examination, and the Magistrate refused to re-summon them. The Sessions Judge was of opinion that the prisoner had the right to have those witnesses re-summoned for purposes of cross examination and that the prisoner must be allowed the right of cross examination. He therefore with reference to the provisions of Section 428, Code of Criminal Procedure directed that this additional evidence should be taken by the Magistrate.

It was first contended that it was not intended that Section 428, Criminal Procedure Code, should be used in the way the Sessions Judge used it, and that the Sessions Judge should have set aside the conviction and acquitted the prisoner. When the Court intimated that, even if it came to the conclusion that the Sessions Judge should have set aside the conviction, instead of applying the provisions of Section 428, it did not see its way to acquitting the prisoner, but would order a new trial, the learned Counsel for the prisoner stated that in that case he would not press the contention further.

It was also contended for the prisoner that he did not use the forged certificate, within the meaning of Section 471 Indian Penal Code. It is clear from the facts found that the prisoner asked the Chief Clerk for employment on the Oudh and Rohil khand Railway, producing when he did so the forged document that his act involved the representation that the document was genuine, and that his intention was to obtain by means of the

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document employment on the Railway. Looking at what he did, and at what his intention was, I think that he used the document within the meaning of the section. I think that it is of no importance whether the chief clerk could or could not give him an appointment or whether he and his superiors thought that the document was genuine or not, or whether the prisoner used the document when he applied in writing for employment. Supposing that he did not use the document when he made his written application, he had already made a use of it. It is clear that the prisoner used the document fraudulently and that he knew that it was forged.

I am not disposed to reduce the sentence, as the prisoner made baseless charges against the honesty of the chief clerk.

I dismiss the application.

APPENDIX A.

Select Judgments of Subordinate Courts.

Case No 1

In the Court of the Civil Judge, Cooch Behar State.

APPEAL No 109 of 1898-99

TARA CHAND OSWAL (Plaintiff), Appellant

v

MANAGLR, E B S RAILWAY (Defendant), Respondent

Railway Company liability of—Short delivery of goods—Risk Note Form A—Act VIII of 1859 and Act XIV of 1882—Notice

1899
Sept, 15

In a suit against the defendant for compensation for short delivery of goods the Appellate Court reversing the Judgment of the lower Court held that Act XIV of 1882 which requires two months' notice, is not in force in Cooch Behar and that the execution of Risk Note on Form A does not absolve a Railway Administration from liability for loss of goods.

The plaintiff sued the defendant for short delivery of goods consigned to him on a challan (Ext 1) which accompanied the consignment and a short goods certificate (Ext 5) granted to the plaintiff by Mr Higman, Traffic Inspector.

The defendant pleaded a special contract (Ext B) exempting him from liability and want of two months' notice. He also stated that the challan was false.

The lower Court held that two months' notice has not been served on the defendant and that the special contract (Ext B) absolved the defendant from liability and dismissed the suit.

It is urged in this appeal that two months' notice was not necessary and that Ext B has not been proved and does not exempt the defendant from liability.

JUDGMENT.—Act XIV of 1882 is not in force in Cooch Behar. Under Act VIII of 1859, which is in force, no notice is necessary.

The evidence adduced to prove the Risk Note (Ext B) is not quite satisfactory. But granting that it is so I do not see how this note which is on Form A can exempt the defendant from liability for actual loss of goods. Such a note absolves a Railway Company from

Tara Chand
Gawal
v
E B S Ry

all responsibility for the condition in which the goods may be delivered to the consignee and from any loss arising from the same. But it does not absolve the Company from liability for shortage.

The challan (Ext 1) filed by the plaintiff is proved by his witness Shukul Chand Misser. The fact that 3 pieces of cloth were found in the bundle booked in excess of the challan does not prove that the challan is false or unreliable. There is nothing to shew that these pieces were put in the bundle by the plaintiff or his men.

I set aside the orders of the lower Court and decree the plaintiff's suit with costs in both Courts. Interest at 6 per cent per annum.

Case No 2

In the Court of Civil Judge, Bilaspur.

APPEAL No 66 of 1901

AGENT, BENGAL NAGPUR RAILWAY (DEFENDANT)

APPELLANT

v

JAGANATH RAMACHANDRA (PLAINTIFF) RESPONDENT

1902
March 10

Railway Company, liability of—Loss of goods during transit—Risk Note Form B—Plea of ignorance of its contents

In a suit against a Railway Company for compensation for loss of a portion of goods entrusted to them for conveyance the lower Court held that the loss during transit was not covered by the Risk Note and decreed the plaintiff's claim. On appeal, the lower Court Judgment was reversed on the ground that the Risk Note Form B covered the case in which the goods were lost during transit and that the loss referred to in the Risk Note included leakage. It was held also that the contention of the plaintiff that they did not understand the contents of the agreement which they had signed will not protect them from the operation of the agreement.

JUDGMENT—This is a suit brought by the respondents for recovery of compensation for the loss of part of their goods during transit by the Railway Company.

The goods were consigned under the low rate rules by which the plaintiffs had exonerated the Railway Company from responsibility.

Note—Risk Note, Forms B & H have been revised and sanctioned by the Government General in Council for adoption on all lines of Railway with effect from 1st April 1907. They are set out in full in Appendix C.

for any loss, destruction or deterioration caused to the goods from any cause whatsoever. The defendant Railway Company pleaded the Risk Note in their favour and alleged that they were not liable under it.

B N Ry
J. Ganath
Rama
chandra

The lower Court has held that the loss of goods during transit was not covered by the Risk Note and hence decreed the plaintiffs' claim.

The defendant appeals to this Court

The Risk Note in Form B which has been signed by the plaintiffs or their agent runs as follows —

That we, the consignors, in consideration of such lower charge, agree and undertake to hold the said Railway Administration and all other Railway Administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively, over whose railways or by or through whose transport agency or agencies the said goods or animals may be carried in transit from Chapa Station to Howrah Station harmless and free from all responsibility for any loss, destruction or deterioration of or damage to, the said consignment from any cause whatever before, during and after transit over the said Railway. This form in English, Ext P 2, contains a Hindi Translation of the agreement which too is signed by the plaintiff. The plaintiff says that by the agreement it was meant that the Railway Company was held not liable for leakage, &c., but was liable for loss of part of the goods consigned.

The said agreement in my opinion is wide enough and exempts the Railway Company from any loss caused to the goods by any cause whatsoever (I L R, 10 Calcutta, 210)

The present case is clearly covered by the agreement and the Railway Company cannot be made liable for the loss caused to the plaintiffs. It was further contended by the plaintiffs that they had not understood the contents of the agreement signed by them. The agreement is written in Hindi and is signed by the plaintiff. If the plaintiff choose to sign agreements without seeing the contents of the papers which they sign, no one but themselves should be blamed for their negligence in so doing. This excuse cannot prevent the operation of the agreement against them.

The Railway Company is under no obligation to explain the effect of their rules to anyone unless asked for. In this case plaintiffs have not proved that they were trusted by any one on behalf of the Railway Company in understanding the true effects of the Risk Note.

In my opinion the lower Court was wrong in not discharging the defendant from liability to the plaintiffs for the loss caused to their goods in transit by reason of the Risk Note. The appeal is therefore admitted and the plaintiff's suit is dismissed. As regards

B N Ry
Jaganath
Rama
chandra.

costs, I think that the parties shall bear their own costs of suit and appeal for the reason that the plaintiff foolishly and without properly understanding the contents of the Risk Note, signed it and consigned their goods under the agreement discharging the Railway Company from all liabilities

Case No. 3.

In the Court of Addl. Sub-Judge, Cuttack.

MONETARY APPEAL No 88 OF 1903

GOVIND RAM BHAGAT AND ANOTHER (PLAINTIFFS), APPELLANTS

v.

BENGAL NAGPUR RAILWAY CO (DEFENDANTS), RESPONDENT

1903
January, 4

Railway Company liability of—Loss of Goods—Risk Note, Form B—Guarantee of—Authority of agent to sign

Where the question was whether the Risk Note signed by the person who delivered the goods of the plaintiffs to the defendant Company for despatch was genuine and valid, it was held that as a lower rate of tariff was levied on such risk notes and a receipt granted by the defendant Company under that lower tariff was accepted by the said person on behalf of the plaintiffs, the Risk Note was binding upon them

JUDGMENT—The main question argued in appeal by the learned pleader for the plaintiffs' appellants is that the Risk Note Exhibit B relied upon by the respondent Company is not a genuine document and that it did not bind the consignor of the goods and secondly that the respondent Company, having failed to prove the said agreement contained in the said Risk Note, are liable to the plaintiffs' claim

Having heard both sides and gone through the evidence, I agree with the lower Court in finding that the said Risk Note was substantially signed by Brindaban who delivered the goods to the defendant Company under a lower rate of tariff levied on such risk notes and that the consignors accepted the railway receipts or the bill of lading (Exhibit C) under that lower tariff. Looking carefully at the Risk Note, it seems to me that, although some irregularity is apparent on its face regarding the mode in which it was signed in Uriya language by Brindaban, yet it is undoubted on the evidence

Note—Risk Note, Forms B & H, have been revised and sanctioned by the Governor General in Council for adoption on all lines of the Railway with effect from 1st April 1907. They are set out in full in Appendix C

of the receiving clerk of the defendant Company, viz, Gyanoda Prasad Roy, that it was signed by Brindabon for and on behalf of the consignors, Jewan Lal Laksh Mis of No 50 Dicer Potty, Barrabazar, Calcutta. That Brindabon had authority to deliver the goods to the defendant Company for consignment and to sign the Risk Note 1 x B appears to be undoubted. That being so, the plaintiffs cannot make the defendant Company liable and the suit was rightly dismissed.

Govind Ram
Bhagat
v
B N Ry
—

This appeal fails and is dismissed. As the plaintiffs appellants have not yet received the money paid, I do not think it proper or equitable to award to the respondents costs of this appeal.

I may take the liberty to suggest to the B N Railway Administration the necessity of inserting a printed note somewhere in the railway receipts or bill of lading in cases where goods are consigned under a risk note in form B, stating that the rate of tariff mentioned below was charged as per Risk Note Form B of the consignor, such would obviate all difficulties of proving the risk note where it is denied.

Case No. 4

In the Court of Small Causes at Secunderabad

Suit No. 675 of 1905

IMAMBHAN Plaintiff

v

The AGENT AND MANAGER, N G S RAILWAY Defendant

Railway Company liability of—Risk Note Form X—Effect of wrongful delivery

1905
December 13

In a suit against a Railway Company for wrongful delivery of goods entrusted to them for despatch it was held that the Risk Note (Form X) executed by the consignor absolving the defendant Company from all liability for loss included also exonerate it, delivery to a wrong person.

JUDGMENT.—The plaintiff in this case bought woollen fabrics of the value of Government Rs. 150 from one Gokulchand of Amritsar. A parcel weighing 34 seers containing the above mentioned fabrics was despatched from Amritsar to Indore on N G S Railway. The plaintiff applied at the Indore Station for its delivery and he was shown a parcel weighing only 5 seers. The plaintiff declined to receive it as being short of weight. About a month after another parcel arrived

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v
N G S Ry

at the Indore Station and it was shown to the plaintiff but it weighed only 22 seers and so plaintiff refused to receive it also. Thereupon the Station Master of Indore opened the parcel in the presence of Panch and it was found to contain articles not ordered by the plaintiff and not mentioned in the way bill. The plaintiff therefore claims his original parcel weighing 34 seers or its value, Government Rs 150 with Government Rs 7 14 0, paid by him on account of Railway freight and demurrage from the N G S Railway. For the Railway Company it is contended that when goods exceeding Rs 100 in value which require insurance are consigned without paying the insurance charges, the consignor has to execute a Risk Note (Form A), that the goods under consideration were of such a description and that the consignor had executed a Risk Note, which absolves the Railway Company from all responsibility for any loss. The plaintiff contends that the goods were not lost but merely exchanged, that is to say, they were delivered to a wrong person and that the circumstances under which the goods disappeared are not such as to amount to loss within the meaning of the Risk Note. The point for decision, therefore, is whether the exchange is a loss. I think it is and I therefore do allow the plaintiff's claim for the value of the parcel.

As regards the Railway freight and demurrage, the plaintiff should apply to the Railway Company for its refund. I cannot deal with it in this suit. Parties to pay their own costs.

Case No 5

In the Court of Munsif at Kurseong

Suit No 38 of 1906

CHANDURAM KESURAM AGARWALLA AND OTHERS,

PLAINTIFFS

v

D H RAILWAY Co, Ltd, DEFENDANTS

Railway Company liability of—Loss of goods—Risk Note Form A—Collision of goods

The plaintiff's agent consigned two bundles of goods for despatch from Calcutta to Kurseong. On arrival at the destination some of the articles contained in one of the bundles were found missing. Thereupon the plaintiff sued the defendant Company for compensation for the value of the goods lost. The suit was dismissed on the ground that the defendant Company is absolved from liability by the Risk Note Form A which the plaintiff's agent had executed.

1906
May, 23

It was held that the fact the articles were lost is in itself sufficient to show that the package was liable to damage, that the plaintiffs agent was not bound to sign the Risk Note and, if he had done it he was bound by its terms

Chandaram
K Agarwalla
v
D H Ry

THE present claim is for compensation for articles lost from a bundle sent by plaintiffs' agent from Cileutta and delivered at Kurseong. The facts of the case are admitted. The goods were sent under a Risk Note "A" signed by the plaintiffs' agent. Two bundles were despatched under this note and both were received by plaintiffs at Kurseong on December 13th, 1905 but from one of them goods to value of Rs 82 8 were missing. It is admitted that the bundle was bound in gunny cloth bound with iron belts. The issue is (1) whether the defendant Company is absolved from liability by the Risk Note, (2) if not to what amount of relief the plaintiffs are entitled.

The Risk Note is as follows —

"Whereas the consignment of—tendered by me as per forwarding order No. of the this date for despatch by the Port Trust Railway or their transport agents or carriers to station for which I have received railway receipt No. of same date is in bad condition and liable to damage, leakage, wastage in transit as follows —

I, the undersigned, do hereby agree and undertake to hold the said Railway Administration and all other Railway Administrations or Companies working in connection therewith and also all other transport agents or carriers employed by them respectively over whose Railways or by or through whose transport agency the said goods may be carried in transit from station to station, harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same.

This last sentence means any loss arising from the condition in which the goods may be delivered to consignee.

Under Section 72 of the Indian Railways Act 1890 the responsibility of the Railway is that of a bailee and no agreement can limit that responsibility unless it be an agreement in writing signed by or on behalf of person sending the goods and in a form approved by the Governor General in Council.

The Risk Note was admittedly signed by the plaintiffs' agent and it is in a form which was approved by Governor General in Council in Gazette No. 12, dated 19th March 1895.

It is urged for defendant that in view of this Section 72 of Act IX of 1890, has been complied with and that the Railway Company is exempt from liability.

Chandaram
v
A. Agarwalla
D H Ry

Moheswar Dass v Carter, 10 Calcutta, page 210, has been cited

It seems to be an exactly parallel case and the ruling laid down there should hold in this case

For the plaintiffs it is urged that the condition of the packages was not bad and not such as to make the goods liable to damage in transit and that therefore a Risk Note "A" should not have been given

It is urged that the Railway Company had no right to apply a Risk Note "A" to such a package and that therefore the Railway must be held liable *Jalim Singh Kotary v Secretary of State for India*, 31 Calcutta, page 951, has been cited in this connection. This was a case in which the Railway Company made certain rules in which it was laid down that they accepted no liability until a receipt had been given to consignor and in the carrying out of which they delayed to give the receipt

It was held that there were rules inconsistent with the Railways Act and that under Section 47 of that Act they were bad in law and the Railway responsible. This does not appear to bear on the present case. It is not urged that Risk Note "A" in any way violates the spirit of the Railways Act or that under Section 47 it should be set aside. All that has been urged is that the goods were packed in such a way that the damage was not likely to occur

To this there are two obvious and conclusive objections

(1) The fact that the articles were lost is in itself sufficient to show that the package was liable to damage

(2) The plaintiffs' agent was not obliged to sign the Risk Note if he thought it was not suitable

As he did sign that agreement he must be held by it. The Railway Company have done all that is required of them by Section 72 of Act IX of 1890 and by the Risk Note are clearly not liable for the loss of the articles

The suit is dismissed with costs

Case No. 6.

In the Court of the Munsif of Bankura—1st Court.

S C C. Suit No 302,231 of 1906

UMA CHURAN PIRI AND ANOTHER, PLAINTIFFS

vs

AGENT OF THE BENGAL NAGPUR RAILWAY COMPANY,

DEFENDANT

Railway Company liability of—Short delivery of goods—Risk Note

1906
July, 19

In a suit for short delivery of goods booked at the owner's risk, it was dismissed on the ground that the defendant Company were absolved from liability by the terms of the Risk Note Form A

Particulars of demand, &c

| | Rs | A | P. |
|---------------------------------|----|----|----|
| Price of 37 seers of Bell metal | 27 | 10 | 0 |
| Interest | 1 | 6 | 10 |
| | — | — | — |
| Total | 29 | 2 | 10 |

JUDGMENT—Points for determination —

- 1 Whether the consignor executed Risk Note in form A ?
- 2 Whether the shortage was due to want of proper care and caution on the part of the defendant Company ?

FINDING—The defendant Company have produced the Risk Note in Form A. They have also proved by the examination of the receiving clerk at Armenian Ghat that it was duly signed by the person who consigned the goods. The plaintiff did not examine the consignor to rebut this evidence although he is alive. This point is accordingly answered in the affirmative. The plaintiff has not produced the damaged bag and I have no means of ascertaining whether it was cut open at the rupture or it was due to some other cause. The second question is accordingly answered in the negative. The suit is therefore dismissed but having regard to the fact that the shortage is admitted by the Company, I would not make the plaintiff liable for the defendant's costs.

Note—Risk Note Forms B & H have been revised and sanctioned by the Governor General in Council for adoption on all lines of Railway with effect from 1st April 1907. They are set out in full in Appendix C.

Case No. 7.

In the Court of the Munsif of Bankura—1st Court

S C C Suit No 303/212 of 1906

UMA CHURAN PIRI AND ANOTHER, PLAINTIFFS

v

AGENT OF THE BENGAL NAGPUR RAILWAY COMPANY,

DEFENDANT

*Railway Company liability of—Short delivery of goods—Risk Note*1906
July, 19

Where a claim was made for short delivery of goods booked at owner's risk the suit was dismissed as it was proved that the Risk Notes were duly signed by the person who consigned them

Particulars of demand, &c

| | Rs | A | P |
|--------------------------------|----|----|----|
| Price of Bell metal (22 seers) | 16 | 8 | 0 |
| Interest | 1 | 11 | 10 |
| Total | 18 | 3 | 10 |

JUDGMENT—Points for determination—

1 Whether the consignor executed Risk Notes in Forms A and B?

2 Whether the shortage was due to want of proper care and caution on the part of the defendant Company?

FINDING—The defendant Company have produced the Risk Notes in Forms A and B. They have also proved by the evidence of the booking clerk of the station where the goods were received that the notes were duly signed by the person who consigned them. The plaintiff has not examined any of the Gamastas of the consignor (who is said to be dead now) to prove that the signature on the notes are not his. I accordingly answer the first question in the affirmative. As regards the second question, the plaintiff has not produced the damaged bag and I am accordingly unable to ascertain how it was damaged. This question is therefore answered in the negative. The suit is accordingly dismissed. But having regard to the fact that the shortage is admitted by the Company, I will not make the plaintiff liable for the defendant's costs.

Note—Risk Note Forms B & H have been revised and sanctioned by the General Manager for a long time on all lines of railway with effect from 1st April 1907. They are set out in full in Appendix C.

Case No 8.

In the Court of Munsiff at Hinganghat.

Case No 763 1906

JAI NARAYAN, PLAINTIFF

v

G I P RAILWAY COMPANY, DEFENDANT

CLAIM for Rs. 33 9 6

*Railway Company, liability of—Damage to goods—Risk Note Form A*1906
December, 10

The plaintiff sued the Railway Company for damage caused to his goods while they were in their custody. *It is* that the goods in question were in wet condition when tendered for despatch and that the Risk Note in Form A executed by the sender absolved the Railway Company from liability.

JUDGMENT—The plaintiff alleged that on 17 3 06 his "Arihya" at Raipur consigned 35 bags of rice, weighing 104 maunds 10 seers to the G I P Railway Company to be carried from Raipur station to Hinganghat station that the bags in question were dry and in good condition when they were tendered for despatch, that they were consigned in the plaintiff's name, that when the goods arrived at Hinganghat station they were found wet, that the plaintiff declined to take delivery and informed the Station Master of Hinganghat that he (plaintiff) would bring a civil suit for damages, that the plaintiff sent a notice, that consequently the Traffic Superintendent of Bhusawal came to Hinganghat station and called the plaintiff, that in the presence of many people the said Superintendent agreed on 24-3 1906 to pay Rs. 30, as damages to the plaintiff in one month, that the defendant not having paid the amount, notice was again given, that the defendant did not pay anything, that hence the plaintiff brought the suit for Rs. 33 9 6 for principal and interest plus notice expense. The allegations in the defendant's written statement were these. That the suit was bad for want of notice to the agent under Sections 77 and 110 of the Indian Railways Act IX of 1890 that the sender executed a risk note on form A freeing the defendant from all responsibility for loss or damage to the goods in question and therefore the defendant was not liable for the plaintiff's claim that the goods in question were in wet condition when tendered for despatch at the sending station that the defendant denied the settlement by Traffic Inspector, as alleged in plaint, that the defendant denied the

Jai Narayan
G f P Ry

plaintiff's claim in toto, that, save as aforesaid, the defendant denied all statements contained in the plaint and put the plaintiff to the proof of the damages claimed and prayed that the suit might be dismissed with costs. The plaintiff rejoined that no Risk Note was executed by the consignor or any person on his behalf, and that there was no mention of it in the receipt.

On these allegations, the following issues were framed for enquiry —

1 Whether the sender executed a Risk Note on Form A freeing the defendant from all liability?

2 Whether the goods in question were in wet condition when tendered for despatch at the sending station?

3 Whether the Traffic Inspector of Bhusawal had settled the matter at Hinglajhat Station and whether he had agreed to pay Rs. 30 in one month?

4 To what extent is the defendant liable?

Issues Nos 1 and 2 — The defendant gave the Risk Note executed in form A in evidence. The Risk Note in question was signed by one Tatya Nilkantha. The defendant examined him as a witness and he deposed that he had signed the Risk Note on behalf of Hirbhair Shubhkaran, the plaintiff's "Arhatya" and that he was duly authorised thereto. He further held that the goods were in wet condition when they were entrusted to the Railway Company. I find therefore that the Risk Note was executed on behalf of the consignor and that the goods were in wet condition when tendered for despatch at Rupni Station.

Issue No 3 — As regards the settlement question, the plaintiff examined the Agent of the Company Mr. H. Shurren. He deposed that the Traffic Inspector of Bhusawal never came to Hinglajhat Station to make the settlement, but that he himself had met one and agreed to pay Rs. 30 to plaintiff as damages, in case the goods were sent at Railway risk. He further deposed that on enquiry it was found that the goods were sent not at Railway risk but at the sender's risk and therefore the settlement of Rs. 30 was not binding. I therefore find that the settlement was made, but it was subject to the aforesaid condition.

Issue No 4 — There are many rulings of the different High Courts which saved the Companies from all responsibility in cases where Risk Notes were executed in any form. Many of these have been reviewed by Mr. Drake Brockman, Additional Judicial Commissioner in Civil Reference No. 45 of 1905 reported on page 12, in the report of the month of August 1906. In the present case they are not applicable, as there was neither short delivery, non-delivery nor loss in transit. In the present case the goods were in wet condition when

they were tendered for despatch at the sending station and possibly therefore they could not be otherwise at the Hinganghat station. It is clear that no damage was caused to the goods and I therefore find that the Company is not at all liable for the plaintiff's claim.

JAI NARAYAN
G. I P Ry

I dismiss the plaintiff's claim with costs. The plaintiff should pay the defendant's costs.

Case No. 9

In the Court of the Munsiff, 2nd Court, Manbhoom.

Suit No. 574 of 1907

A. J. PHILLIPS, PLAINTIFF

v

BENGAL NAGPUR RAILWAY COMPANY, DEFENDANT

Railway Company, liability of—Damage to goods—Delay in delivery—Risk Note, form A

1907
August, 6

The plaintiff sued the defendant Company to recover from them Rs. 140 by way of damages sustained by him owing to undue delay in the arrival of the goods at the destination and deterioration in quantity. The suit was dismissed on the ground that the defendants did not guarantee the arrival of the goods within any specified time and they could not therefore be held liable for any delay, that under the terms of the risk note form A signed by the sender they were absolved from all liability as to any damage or shortage caused by bail or insecure picking and that no objection was taken while the goods were in their charge.

The case of the plaintiff is that he forwarded 5 bags of lac to the Barahabhum Station from Raygaonpur, that the weight of the entire consignment was 5 mannds 32 seers, that the servants of the Bengal Nagpur Railway Company having carelessly neglected to mark the Station of destination on the bags there was undue delay in the arrival of the goods at Barahabhum and the lac deteriorated in quantity, that in consequence he suffered loss at the rate of Rs. 25 per munda that there was also shortage of weight by 5½ seers and he seeks to recover from the defendant Company Rs. 150 by way of damages.

The defendants contend that, since the plaintiff made no objection at the time of taking delivery, it cannot now be entertained that there was negligence on the part of their servants, that as they did not guarantee the arrival of the consignment within any specified time, they cannot be held liable for any delay, that the conditions under

A J Phillips which the Goods were carried are embodied in the risk note signed by
 B N 1 v the consignee and dated the 15th July 1906, that under the terms of
 the said risk note they are absolved from all liability, that even if the
 weight were 5 maunds 32 seers, as the bags were old and tattered and
 the packing was done by the plaintiff in a careless manner, they are
 not responsible for shortage of weight, that they took proper care in
 the carriage of the goods that the weight did not fall short and no
 injury occurred while the goods were under their charge and that
 the plaintiff has fraudulently brought this false claim

The point for determination is — Can the plaintiff obtain any damages? If so how much?

There is nothing to show that the Railway Company did not in the matter of these goods take the ordinary care which a bailee is bound to take. It has been endeavoured to be proved that the lac became jammed, but that might be due to the pressure of the goods placed in the same wagon or the heat might have caused such condition possible. The goods were carried in an iron wagon and it was the month of July. The plaint is very vague, and it is not clearly stated how the lac was rendered inferior in quality. There is no trustworthy evidence that, when the lac was made over at Rajgangpur for despatch to Barahabhum, it was in a loose condition. The statement of the plaintiff in this particular is entirely of a hearsay character. The testimony of his assistant, Mr David is not entitled to any weight as from the forwarding note Ex A it appears that the lac was consigned by Jahram Marwar, and why the name of Jahram Marwar is entered as the consignee if Mr David despatched the lac has not been explained, Jahram Marwar has not been examined. According to the Station Master of Rajgangpur, the lac was green and the bags in which it was despatched were old and the packing was defective. As to any negligence on the part of the Railway servants the evidence tendered by the plaintiff is almost nil. It was incumbent on him to prove that as a matter of fact the station of destination was not marked on the bags by the Station Master of Rajgangpur but the onus he has completely failed to discharge. It is true that in reply to the plaintiff's letter, dated the 20th July 1906 (Exhibit B) the Station Master of Barahabhum wrote that the delay was on account of the fault of the Station Master of Rajgangpur as he did not mark the bags but that was a mere surmise made at the time and according to him what really happened was that the bags were old and bore several marks and there was difficulty in deciphering the distinction when they arrived at Chakradharpore and so enquiry had to be made from the forwarding station. This rather serves to indicate that the fault is laid with the consignee for the address

the consignee ought to have been legibly marked by him on the bags. Again, the plaintiff has failed to establish that any unusual delay occurred in the transmission of the bags from Rajgangpur to Barabhabhum. He cannot himself say what time is occupied in the transit. There is no direct Goods train service between Rajgangpur and Barabhabhum and a transshipment is necessary at Chakardharpur. It has been proved by the defence that it usually takes 3 or 4 days for goods to arrive from Rajgangpur to Barabhabhum and this limit was not exceeded in the present instance. Moreover, it is quite against probability and the natural order of things that if the lac really became depreciated not the slightest allusion to the fact was made when the plaintiff complained on the 20th of July 1906 of the shortage of weight. The delivery was taken on the preceding day and no objection was made at the time. I am inclined to think that this story is simply an afterthought and the plaintiff has hit upon an off hand remark made by the Station Master of Barabhabhum in order to recover compensation if possible against the Railway Company. With regard to the alleged deficiency of 5½ seers, I am of opinion that since the plaintiff took delivery of the consignment without any demurr and did not choose to have it then reweighed, it is not open to him to object that the weight fell short of what was noted in the Railway receipt. I next proceed to consider the effect of the risk note signed by the consignor and marked as Exhibit D. The bagging was old and slack, and so a risk note form "A" was taken from the consignor. The conditions are obtained in Hindi on the back of it, and the consignor Jahram Miswari was fully aware of the same when he put his signature down. The risk note form A is authorised by Section 72 Cl. (2) of the Indian Railways Act (IX of 1890) and sanctioned by the Governor General in Council. As the consignor signed this special agreement to hold them harmless, the Railway Company became absolved from all liability to account to the consignee for any loss from any cause whatsoever. The Company in such a case is not a bailee under the Indian Contract Act. This view is supported by the decision in *Lunga Rao v. East India Railway Company* [1 B. 10 Cal. P. 257]. Upon all these considerations I find this case against the plaintiff.

For the foregoing reasons, it is ordered that the present suit be dismissed with costs.

A. J. Phillips
B. N. Ry

Case No. 10.

In the Court of the Judge of Small Causes, Kamptee

CASE No 415 OF 1907

BEHARILAL, PLAINTIFF,

v.

AGT AND CHIEF ENGINEER, B N RAILWAY, DEFENDANT

Short delivery of Goods—Risk Note Form II—Delay in delivery

A Railway Company is not responsible for loss sustained by the plaintiffs owing to late delivery of goods in the absence of any special agreement between the parties that the goods were to be delivered within any special period. Carriers by Railway are not liable for shortage of goods entrusted to them for carriage under the terms of Risk Note executed by the sender in the form approved by the Governor General in Council under Section 72 of the Indian Railways Act IV of 1890.

Amount of claim, Rs 86 11-9

JUDGMENT under Section 203, Civil Procedure Code

This suit has been brought by the plaintiff for the recovery of Rs 86 11 9 on account of the shortage in goods consigned from Seoni to Kamptee. Plaintiff alleges that the goods were consigned on 16th January 1906 and were delivered to the plaintiff on 6th April 1906, that owing to goods having arrived late he was required to sell the goods at a lower rate, and that the goods were found short by 1 maunds 34 seers. Plaintiff therefore claims the amount on account of shortage in goods and the loss sustained by him on account of his being required to sell the goods at a lower rate.

The contentions put forward on behalf of the defendant Company were that the goods were consigned at a special reduced rate in respect of which a Risk Note was executed in favor of the defendant which absolved the Company from responsibility for loss, damage or destruction, that the Company had never agreed to deliver the goods to the plaintiff within any specified period and they were in no way

Note—Risk Note, Forms B & H, have been revised and sanctioned by the Governor General in Council for adoption on all lines of Railway with effect from 1st April 1907. They are set out in full in Appendix C.

1907
Oct 21

responsible for the late delivery of the goods. The plaintiff's claim was therefore denied. The points for determination were as follows —

Beharlat
v
B N Ry

1 Whether the defendant Company was freed from all responsibility in respect of loss, deterioration or destruction of property on account of the Risk Note executed in their favor.

2 Whether defendants were in any way responsible for the late delivery of the goods and were liable to the plaintiff on account of his being required to sell the goods at a lower rate. The defendants have filed the Risk Note through their pleader, and it has been admitted by plaintiff's pleader. It is Exhibit P 1. This Risk Note was executed in the form approved by the Governor General in Council under Section 72 (2) of the Indian Railways Act 1890. This risk note absolved the Company from all liability for the shortage of goods (2 Nagpur Law Report, Page 25). I therefore hold accordingly.

With regard to point No. 2, I have only to state that there was no special agreement between the parties that the goods were to be delivered to the plaintiff within any special period. In the absence of any such agreement the plaintiff is not entitled to recover anything on account of loss sustained owing to his being required to sell the goods at a lower rate, so the plaintiff is not entitled to claim anything on this ground. Under these circumstances the plaintiff's suit falls and is dismissed with costs, and it is directed that the costs of the defendant Company be borne by the plaintiff.

Case No. 11.

In the Court of Small Causes at Bombay.

SUD No. 1371 of 1907

ABULLO HAJI GILLGA, PLAINTIFF

v

B. G. J. P. RAILWAY & OTHERS, DEFENDANTS

*Mail Bag Company, liability of—Damage to Goods—Risk Note Form A—
Notice of claim*

1908
January, 15.

The plaintiff sued the defendants for damage caused to his goods, which were tendered to the 1st defendant Company for carriage to Bombay. The suit was dismissed on the following grounds —

(1) That the goods were slightly damaged by rain before they were entrusted to the Railway Company for despatch.

Alfred H. J.
Goswami
B. C. J. P. R.

(2) That the Railway Company were absolved from liability by the plaintiff's agent executed a Risk Note on Form A.

(3) That the suit was not maintainable as notice of claim required by Section 77 of the Railways Act 1890, was not given to the Manager of the Railway and that the goods had been damaged before they were delivered to the 2nd defendant Company.

JUDGMENT.—In this case plaintiff sues the defendants to recover Rs. 1,116 11 0 for damages occasioned to 131 bales of pressed cotton consigned on 8th June 1906, under Railway Receipt No. 1919 to the 1st defendant Railway at Junagad for carriage to Bombay. It appears that the bales were carried by the Railway Company to Bhavnagar and there shipped on board the 2nd defendant's S. S. *Sabarmati* for Bombay. The bales arrived in Bombay on or about 15th June in a wet and damaged condition and a survey was held and the plaintiff now sues to recover the amount awarded on such survey together with interest and other charges. The defendants deny that the bales were damaged whilst in their possession or through the negligence or carelessness of their servants and claim protection under Risk Note Form 2 executed by the plaintiff's carting agent Jaychand Parbhudis when the goods were consigned at Junagad. The Railway Company also at a late stage of the proceedings after the evidence had been practically completed raised the issue that no claim had been preferred on the Railway Administration as required by the provisions of Section 77 of Act IX of 1890. Now this Risk Note is in the form approved by the Governor General in Council under Section 72 (2) (b) of the Indian Railways Act IX of 1890, and the first thing to notice about it is that it extends to the 2nd defendant Company the protection afforded to the Railway Administration to whom the goods are consigned. It has been argued that this is '*ultra vires*,' but I hold on the authority of I. L. R., 21 Mad 172, that the 2nd defendant is entitled to the protection afforded by it.

Now it seems tolerably clear that these bales were not damaged whilst in the custody of the 2nd defendant Company. That Company, quite apart from the protection afforded by the Risk Note for the execution of which the plaintiff says he gave no authority could only be liable to the plaintiff if the damage occurred whilst the bales were in their custody. Were the 2nd defendant a Railway Administration this would be clear from Section 80 of the Railways Act but as the 2nd defendant is neither a Railway Company nor entitled to the protection afforded by Act III of 1865 his rights or liabilities are those of an insurer and if he received the bales in a good condition and delivered them damaged the onus would be on him to show that the damage was caused by the Act of God or the King's enemies.

That the bales were as a matter of fact damaged before the 2nd defendant took delivery of them seems proved from the evidence. The correspondence between the Railway Company and the 2nd defendant Company shows that a number of bales were lying on the wharf at Bhavnagar exposed to the elements and the Railway Company attempted to throw the blame for this on the 2nd defendant Company alleging that the latter had cancelled a ship with the result that the bales ready for embarkation had accumulated. The 2nd defendant Company repudiated any breach of the agreement between the two Companies for the carriage of goods and whichever Company was in fault between them the unprotected bales were damaged. Now the case made out in the plaint is not on any breach of any duty to the plaintiff arising out of the contract for the carriage of goods entered into *between the two companies* so that we are not concerned with which Company broke that contract, but need only look at that contract for the purpose of seeing at what stage goods consigned to the Railway came into the possession of the 2nd defendant Company. It appears that the goods did not come into the custody of the 2nd defendant Company until they were received on board. If, therefore, they were damaged on the wharf at Bhavnagar they were not then in the 2nd defendant's custody and the 2nd defendant cannot be held liable. It is clear the goods were not damaged on board the ship for the surveyor's report shows they were covered with mud and there is no evidence of any sea-water damage. I am therefore constrained to hold that the 2nd defendant can in no case be held liable for this damage.

Abmed Haja
Gerga
v.
R G J P Ry

The Railway Company seeks shelter behind the Risk Note and the want of the statutory notice of claim required by Section 77 of the Railway Act. I may deal shortly first with the Risk Note. It is executed by Jeychand Parbhudas, the carting agent at Junagad who consigned the goods. Plaintiff's man at Junagad was Janoo whose duty it was to take the cotton to the Press at Junagad, get it pressed and consign it to Bombay. As such agent he was entrusted with all the powers incidental to his business and therefore with the power to employ a carting agent. Jeychand says he specially got the authority of Janoo and Chattrabhai, the Press Manager, to execute this Risk Note, and his evidence in this respect is corroborated by the evidence of Manishanker, the Goods Clerk, who testifies to refusing to accept the goods except under a Risk Note, whereupon he says Jeychand went away to get authority. If it was incidental to Jeychand's business to sign Risk Notes when required he was justified in doing so in a proper case. If it was not, it seems unlikely he would take upon himself that responsibility without getting special authority. On the evidence I hold he received authority to sign the Risk Note and that the plaintiff gave Janoo such authority.

Ahmed Haji
Geoga
R G J P Ry
—

It was certainly a proper case for a Risk Note, for although I have held the real damage to the bales occurred at Bhavnagar, yet there can be no doubt that they were slightly injured by rain when the plaintiffs' man loaded the wagons with them in the Press Company's private yard and before they were shunted into the Railway compound where the Railway Company's possession begins. The evidence shows the wagons were given by the Railway Company to the plaintiffs' man at 2 P.M. and returned to the station yard at 6 P.M., (see Ex No 7) and as the rain register shows an unexpected fall of rain on that day, the oral evidence for the defendant as to the state of the bales seems amply corroborated.

Joychand executed the printed form, Ex No 2, before the blanks left for the details of the goods were filled in. These blanks were not, as a matter of fact, filled in till the next day, but I hold this immaterial as the printed form contains all the essential terms of the agreement between the parties. I am inclined to think from a perusal of this and other Risk Notes (Ex Nos 4, 5 and 6) but in that Joychand at first simply wrote the name "Ahmed Haji Giga" but even if this were so, it would in my opinion sufficiently comply with the terms of S 72 of the Railway Act. Mr Dadachanjee contends there was no consideration for this exemption clause under the Risk Note and says consignors are bound to send their goods by rail. Obviously, however, Railway Companies are entitled to protect themselves when goods are delivered to them in a damaged condition and this is a case in point, and in fact the Railway Act specially authorizes the form in which this Risk Note is drawn. I hold therefore that the Risk Note was properly executed and that this was a proper case for the taking of a Risk Note, but whether or not the terms of the Risk Note cover a damage not arising from the state in which the goods were delivered to the Railway Company is a point on which, having regard to my decision on the point of notice of claim under Section 77, I need come to no conclusion. That the Risk Note was executed at the date of the consignment appears clear from the reference to it in the Railway Receipt, Ex No 3. But even if the Railway Company were to fail on this point the plea under Section 77 of the Railway Act would hold good. That plea was taken practically after all the evidence had been complete and I allowed it to be raised although Mr Dadachanjee objected to its being raised at so late a stage of the proceedings. The case of the *Secretary of State v Dipchand Poddar*, 1 L.R., 24 Cal 306 shows that a defendant need not plead want of notice but can raise the objection at the hearing and in any event the terms of Section 77 are very imperative. That section says a person shall not be entitled to compensation unless his claim for compensation has been preferred in writing by him or on his behalf to the Railway Administration

within six months from the date of the delivery of the goods. This is not like a section in a Code of Adjective law requiring notice of action prior to the filing of a suit which notice may be waived or even, as in suit for an injunction against a public officer, actually dispensed with. It is a condition precedent to the right to compensation at all and even if it could be waived there is no evidence of any waiver in the correspondence. All that the correspondence shows is that the Railway Company were aware that a claim for compensation was being made and assented to a survey. This does not amount to estoppel, waiver or compliance with the terms of Section 77. If that were so, a Railway Company would be precluded from taking the advantage of assisting at a survey of damaged goods for fear it would be considered a waiver of the Company's right to a notice under the Act. Under Section 140 of the Railway Act, the 'Railway Administration' in this case is the 'Manager' and it is admitted that no notice of claim was addressed to him by the plaintiff until the 15th January 1907, i.e., more than six months after the date of the delivery of the goods. It is contended that notice of claim was sent to the 2nd defendant and forwarded by him to the Traffic Superintendent of the Railway Company who in turn forwarded it to the Manager, but the point to be noticed is that there was no claim made on the Railway Administration. The claim relied on by the plaintiff was made on and addressed to the 2nd defendant, and says that the plaintiff will hold 2nd defendant and the Railway Company liable. That is not a claim on the Railway even though it should happen to be forwarded on to the Railway by the 2nd defendant. Nor can it be said that the 2nd defendant was the agent of the plaintiff to forward the claim on to the Railway. The plaintiff does not ask him to do so and in forwarding the plaintiff's claim the 2nd defendant does not purport to forward it as notice on behalf of the plaintiff under Section 77 of the Act. The judgment of Sir Lawrence Jenkins, C.J., in *E I L Company v Jethumal*, I L R 26 Bombay 669, is most appropriate and the "*ratio decidendi*" in that case applies here. The case of *Gunga Parshad v the Agent Bengal and North Western Railway Company* (High Court Decisions of Indian Railway Cases)⁽¹⁾ is also in point.

Ahmed Haji
Geegw
B G J P Ry

It is clear therefore, the plaintiff must fail. I therefore dismiss the suit with Rs 90, professional costs to the 2nd defendant. As the 1st defendant raised the plea of want of notice under Section 77 at the very end of the evidence and as I have come to no conclusion as to the Railway Company's liability apart from the question of want of notice, I make no order for their professional costs.

(1) See ante page 373

Case No 12.

**Small Cause Court of the Sadar Munsif,
1st Court, Dinajpur.**

REGISTER No 251.

BI NODE LAL KUNDU, PLAINTIFF

v

**SECRETARY OF STATE FOR INDIA IN
COUNCIL, DEFENDANT**

1909
June, 5

Short delivery of goods—Risk Note Form A

This is a suit against the defendant for compensation for the value of 9 maunds and 30 seers of corrugated iron sheets, which were found short at the destination in a consignment of 25 bundles tendered at Calcutta for despatch to the address of the plaintiff at Dinajpur Station. The suit was dismissed on the ground that the goods were insecurely packed and that the defendant Company were not liable for compensation for loss under risk note form A executed by the sender.

25 bundles of corrugated iron sheets were tendered at Calcutta station by the senders S C Sett and Sons for delivery to the plaintiff at Dinajpur Station, where a shortage of 9 maunds and 30 seers in weight of the bundles was found at the time when delivery of the things was taken. The plaintiff now sues the defendant for recovery of Rs 72 3 0 as price of 9 maunds and 30 seers of corrugated iron sheets lost, and for Rs 6 1 0 as freight overcharged for this 9 maunds and 30 seers of corrugated iron sheets. It is not clear how Rs 72 3 0 has been assessed as the price of this 9 maunds and 30 seers of corrugated iron sheets.

The defendant pleads non liability for compensation claimed but states that he is willing to refund freight on the excess weight charged.

Point for decision is —

Whether the defendant is liable for the compensation claimed?

The evidence on the plaintiff's side shows that one Gope Nath Singh, who called himself as Darwan of the senders S C Sett and Sons and who tendered the articles at Sealdah Station, signed forwarding note (Ex A) and risk note form "A" (Ex B) on behalf of the senders S C Sett and Sons. From his signatures in these two documents it appears that the man was Ghabu Nath Singh. The form of that risk note has been approved by the Governor General in Council as

required by Section 72, cl (2 b) of Railway Act IX of 1890 It was signed by the sender's man on their behalf as required by that Section, cl (2 a)

Benode Lal
Kundu
v
Secretary of
State

It is admitted that S C Sett and Sons sent these things to the plaintiff. Some one must have tendered these things at the Railway Station on their behalf. The manager of that firm has been examined on commission at the defendant's instance, but he could not say who actually delivered the goods to the Railway Administration at Sealdah. The plaintiff could easily ascertain from the senders who that man was. As the things were insecurely packed, as proved by the evidence on the defendant's side, as the man who delivered the things to the Railway Administration on behalf of the senders S C Sett and Sons for carriage to Dinajpur executed the risk note form "A" (Ex B) on behalf of those senders after its contents were explained to him (as proved by the evidence on defendant's side against which there is nothing on the plaintiff's side) and thereby exonerated the defendant from compensation for loss of the things, I think the defendant is not liable for compensation for loss complained of, which arose from insecure packing of the things. So I find that the plaintiff cannot recover any compensation from the defendant. I think he ought to have claimed his remedy against the senders for whose fault he has suffered loss.

The defendant is willing to refund the freight on the excess weight charged, which according to the plaintiffs is Rs 6 1 0. The defendant does not dispute this amount.

The suit is accordingly decreed for Rs 6 1 0. Parties to get costs in proportion to success.

Case No 13

In the Court of the Munsif of Hawali, Bareilly.

Suit No 5 of 1907

AMBHA PERSHAD

v

E F JACOB, Esqr, CIE,

MANAGER, OUDH AND ROHILKHAND RAILWAY

Railway Act, IX of 1890 S 73—Declaration of the contents and value of a parcel—Liability of Railway Company

1907
May 8.

In a suit against a Railway Company for loss of a parcel which contained articles worth only Rs 10 mentioned in the Second Schedule of

Ambha
Pershad

F F Jacob

the Railway Act, IX of 1890 it was dismissed as the plaintiffs failed to declare its value and contents, as required by Section 70 of the Act

The plaintiff sued to recover Rs 116 7-3 from the defendant

The plaintiff is a gold and silver lace seller at Bareilly

His case is that he despatched a parcel of *gota and lachla* valued at Rs 110 7 3 to one Ram Charan and Bansu Dhar of Cawnpore on the 12th April 1906, for which he obtained Railway Receipt No 42409 from the Parcel Clerk of the Bareilly Junction Station, that the parcel did not reach its destination and was lost on the way that the plaintiff sent a notice to the defendant but he sent no reply, that the plaintiff is legally and equitably entitled to get the value of the articles sent, and hence this suit

Upon these allegations the plaintiff prays to recover Rs 110 7 3 the value of the articles sent and Rs 6 damages, in all Rs 116 7 3 from the defendant

The defendant resists the suit on the following grounds—

1 That the defendant has no personal knowledge of the allegation contained in paras 1, 3 and 4 of the plaint

2 That the defendant does not admit the allegations contained in para 2 of the plaint, that the plaintiff sent *gota and lachla* worth Rs 110 7 3 to Ram Charan and Bansu Dhar of Cawnpore on the 12th April 1906, and the defendant also does not admit the description of the articles given in the said para of the plaint

3 That the plaintiff delivered a parcel weighing 2 seers and one chatak without declaring the value and the contents of the parcel at Bareilly Junction for carriage by Railway to Cawnpore and that the freight which was charged on the parcel was at the ordinary parcel rate

4 That as the alleged contents of the parcel were among those articles which are mentioned in the Second Schedule of the Railway Act (Act IX of 1890), and that as their alleged value was over 100 Rupees, the plaintiff ought to have caused the value and contents to be declared or ought to have declared them at the time of the delivery of the parcel

5 That the plaintiff neither caused the value and contents of the parcel to be declared, nor declared them at the time of the delivery of the parcel at the Bareilly Junction, and that had the plaintiff declared the value and the contents of the parcel at the time of the delivery of the parcel at the Bareilly Junction Station, the Oudh and Rohilkhand Railway would either have taken a risk note from the plaintiff, by which the parcel would have been carried at the plaint

his own risk, or would have required the plaintiff to insure the parcel by paying a percentage on the value so declared by way of compensation for increased risk.

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v
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6 That under the above circumstances the Oudh and Rohilkhand Railway or the defendant is not, according to the provisions of Section 75 of the Railway Act (No 1X of 1890), liable for the alleged loss of the parcel

Upon the above pleadings the following issues have been framed in this case at the motion of the pleaders for both the parties —

I Whether the parcel in dispute did contain *gota and lachka* worth Rs 110 7 3

II Whether the plaintiff did not declare the contents and the value of the parcel, and whether it was incumbent upon him to do so

III Whether Section 75 of the Act IX of 1890 is a bar to the plaintiff's claim

IV Whether the defendant is liable to pay the sum in suit or any portion of it

Finding Issues I to IV

I have given the case my best consideration. In my opinion the plaintiff's claim fails both on merits and on law.

The contents and the value of the parcel are not admitted by the defendant. It lay therefore upon the plaintiff to prove that the articles consigned by him to the Railway Company were worth Rs 110 as alleged by him. He has not been able to do so.

To prove the value and the contents of the parcel in question we have the testimony of the plaintiff and of his one witness Mohabbat Hussain only.

Relating to the contents and the value of the parcel there is only one sentence in the deposition of the plaintiff which is as follows —

I had given the parcel to B Kishan Lal clerk and at the time of its delivery I had told him that it contained *gota* worth about Rs 100. The plaintiff does not state here or at any other place in his deposition that the *gota* was actually worth Rs 110. The statements of the plaintiff on this point are thus quite vague and indefinite. The witness for the plaintiff deposes that the plaintiff had given two parcels on the date in question to the parcel clerk and had stated to him that they both contained goods worth Rs 200 that on a talk between the plaintiff and the clerk the plaintiff had stated that one of them contained goods worth Rs 100 and the other worth less than Rs 100. This witness does not state that he knew that the parcel in dispute actually contained *gota* worth the amount

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v
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claimed by the plaintiff. The evidence of this witness therefore does not prove at all that the parcel in dispute did contain *gota* and that it was worth Rs 110, as alleged by the plaintiff. The plaintiff ought to have produced some witnesses to show that the parcel was packed and sealed before him and that *gota* worth Rs 110 was actually put into it. The witness for the plaintiff makes no mention of *gota* at all in his deposition, and there is nothing in his testimony from which even so inference can be drawn that he had actually seen the plaintiff packing *gota* worth Rs 110 in the parcel, or that he has otherwise a personal knowledge of the fact that the parcel contained *gota* worth the amount claimed by the plaintiff.

This man has been produced simply to prove that the contents and the value of the parcel had been declared before him by the plaintiff to the parcel clerk. The testimony of this witness therefore is quite irrelevant in reference to the point under consideration, namely, the actual value and the contents of the parcel.

When the value of the parcel is in dispute, I cannot on the single testimony of the plaintiff, which is quite vague and indefinite, hold that the parcel in dispute contained *gota* worth Rs 110 claimed by the plaintiff.

I therefore decide issue No 1 against the plaintiff.

The suit thus fails on this ground.

It fails on questions of law too involved in the Court.

The defendant claims exemption from liability on the ground that the case is governed by Section 75 of the Railway Company's Act (IX of 1890) and that as the plaintiff did not declare the value of the contents of the parcel as required by that Section so he is entitled to get no relief.

The parcel in dispute is alleged by the plaintiff to have contained articles of the excepted nature, such as are mentioned in Schedule II of the Railway Company's Act. They are said to have valued more than Rs 100 0, *vide* para No 2 of the plaint.

Under these circumstances, it is clear that Section 75 of the Railway Company's Act applied to the case.

The question therefore for consideration is, as to whether at the time of the despatching of the parcel the plaintiff complied with the direction contained in Section 75 of the Railway Company's Act, and if not whether this non compliance with them absolved the Railway Company from all liability for the loss of the plaintiff's parcel.

In my opinion, the plaintiff did not comply at all with the requirements of Section 75 of the Act and, therefore, that Section is a bar to his claim.

Clause I of Section 75 distinctly provides that the person delivering a package for carriage to the Railway Administration must cause the "value and contents" to be declared or to declare them

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Persad
v
E F Jacob

The burden of proving the above declaration of both the contents and of the value lay upon the plaintiff. He has utterly failed to discharge that burden. Besides tendering his deposition, the plaintiff produces only one witness, Mohabbat Husain, more to prove these declarations. The evidence of Mohabbat Husain is quite worthless. He states that on the date in question two parcels were tendered by the plaintiff to the parcel clerk, and that in reply to a talk that had taken place between the plaintiff and the parcel clerk the plaintiff had stated that one of these parcels contained *Mal* (goods) worth Rs 100 and the other worth less than Rs 100. He does not state that the plaintiff had stated to the parcel clerk that the parcel in dispute contained *lakhri* and *gota*. He makes no mention of *lakhri* and *gota* at all. He uses the word *Mal* (goods) in reference to the contents of the parcel in dispute (as well as the other parcel). The evidence of this witness thus shows at least that the plaintiff did not declare the actual contents of the parcel to the clerk. It also shows that the plaintiff did not declare the actual value of the parcel too. The evidence of this witness thus shows that neither the actual contents of the parcel nor their exact value were declared by the plaintiff to the parcel clerk. There thus remains the evidence of the plaintiff only to prove the declaration of the value and the contents of the parcel to the parcel clerk. I can place no reliance on the single testimony of the plaintiff when it is not supported by any other evidence on the record.

Moreover, the evidence of the plaintiff also would show at least he did not declare the actual value of the parcel. He says that he had told to the parcel clerk that it contained *gota* worth about Rs 100. The words *about Rs 100* have been used. In the plaint, the plaintiff states that *gota* was worth Rs 110 7 3. It is evident from this therefore that the plaintiff did not disclose the actual value of the parcel to the parcel clerk.

One fact is noteworthy here. In the plaint, as I have just said above (vide para 2 of the plaint), the plaintiff states that the value of the parcel was Rs 110 7 3. In his deposition he states that it was worth about Rs 110 only. The plaintiff has invented these latter statements to take the case out of the provisions of Section 75 of the Railway Act. But these after thought statements can give no help to the plaintiff in the face of clear statements in para No 2 of the plaint that the parcel in dispute was worth Rs 110 7 3. They can only serve to show the bad faith of the plaintiff.

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Pershad
v
E. F. Jacob

The evidence of the plaintiff himself thus shows that at least he did not disclose the actual value of the parcel. The evidence of the parcel clerk shows that neither the contents nor the value of the parcel were disclosed to him and so the parcel was accepted and booked and charged as an ordinary parcel. It was the duty of the plaintiff himself to declare the actual contents and the value of the parcel in order to give the Railway Administration the opportunity of claiming the higher charge provided for the articles of the excepted nature (such as the parcel in dispute is alleged to have contained) in addition to a percentage on the value disclosed by way of compensation for increased risk.

The charge paid for the parcel was the ordinary parcel rate. Had the plaintiff declared the contents and the value of the parcel the Railway Authorities would have charged the parcel at the higher rate prescribed for excepted articles in Schedule II of the Act and in addition to that they would have claimed a percentage over the value so declared by way of compensation for increased risk or, if the plaintiff would have so elected, they would have sent the parcel at the plaintiff's risk after taking a risk note from him. This in itself is a sufficient evidence of the fact that the plaintiff neither disclosed the actual contents nor the actual value of the parcel in dispute. I am inclined to think that the plaintiff purposely concealed the actual contents and the value of the parcel in order to evade the payment of the higher charges referred to above.

For all these reasons I am of opinion that neither the contents nor the value of the parcel were disclosed and declared by the plaintiff as required by Section 75 of the Act.

It is contended on behalf of the plaintiff that, though he did not declare the value and the contents of the parcel still the Railway Company as a bulce is liable to account for the loss of the plaintiff's parcel.

This argument is not sound.

No authority has been produced on behalf of the plaintiff in support of this contention. The terms of Section 75, Railway Act are quite clear. Under that section the declaration of the contents and value of the parcel are conditions precedent to the attaching of the responsibility on the Railway Company. Unless these conditions imposed on the consignor by the above section are complied with by him the Railway Company cannot be liable for the loss, destruction, etc., of the parcel. As these requirements were not complied with, the Railway Company was absolved of all liability for the loss of the plaintiff's parcel. The ruling in *Bala Ram Hari Chand v. The Southern Mahratta Railway Company* 1 L.R., 19 Bom., 150 applies to the case (vide also the rulings at P. 105 of the said volume which was passed in reference to the old Railway Act).

The present case is much stronger than the one in the ruling referred to above. In that case the consignor had paid the higher rate prescribed for articles of excepted nature and had declared the contents of the parcel too, but not their value. In the present case the plaintiff neither declared the value nor the contents of the parcel nor did he pay the higher rate of charges prescribed by the Railway Company for *lachka* and *gota* which are articles of excepted nature, as detailed in Schedule II of Act IX of 1890.

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The ruling in the case of *Nanku Ram v The Indian Midland Railway Company*, W N, 1900, p III, is not in point as it was not passed with reference to Section 75 of the Railway Act.

That ruling nowhere lays down that, irrespective of the provisions of the Indian Railways Act, the responsibility of the Railway Company for loss, destruction, etc., of goods is always that of a bailee and is to be regulated in all cases by the law laid down on this subject in the Indian Contract Act.

The present case is clearly governed by Section 75 of the Railway Company's Act (IX of 1890) and had the plaintiff complied with the condition imposed upon him by that section the relation of a bailor and bailee would have arisen between him and the Railway Company, and in that case the Railway Company as a bailee would have been liable to account for the loss of the plaintiff's parcel.

I consider that the liability of the Railway Company as common carriers has been taken away by the provisions of Sections 75 of the Railway Act (IX of 1890) and as the plaintiff at the time of the delivery of the excepted articles to the Company's clerk did not declare the value and the nature thereof as required by that section, the Railway Company cannot be held liable as a bailee under the Indian Contract Act.

In the case of *The East Indian Railway Company v Bunyad Ali*, W N, 1895, p 150, it was held by the Honorable High Court in reference to a case arising under Section 72 of the Railway Company's Act (IX of 1890) that it is not open to any Court to take a case out of the provisions of the statute when the case clearly falls within these provisions. The case clearly falls within the provisions of Section 75 of the Railway Act and cannot be taken out of it.

Next, it is contended on behalf of the plaintiff that even though the plaintiff did not declare the value and the contents of the parcel, yet he is entitled to get the sum of Rs. 100 at least by way of damages from the defendant as under the bye laws framed by the defendant Company it (the Company) is always liable to pay damages up to Rs. 100 in case of the loss of the parcels of over that value.

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I do not agree in this view. In support of this contention the plaintiff puts in evidence the Railway Company's Coaching Tariff (Ex VII) and relied upon Rule 215 of it. Rule 212 of this Tariff applies to the case. It is an exposition of the provisions of Section 75 of the Railway Company's Act. When the case clearly falls under rule the plaintiff cannot now be allowed to take it out of it.

Rule 215 of the Tariff does not help the plaintiff. It must be read in connection with the other rules in the Tariff. Rule 209 of this Tariff clearly provides that the Company will not be liable for the loss of any goods unless their contents are properly described, the contents of the goods in the parcel in dispute were purposely concealed. As to Rule 215, para (b) of it clearly provides that the Company will be liable up to the prescribed limit, viz. Rs 100 only in case the consignor declares the contents of the parcel but refuses to insure it. Here the plaintiff did not declare the contents of the parcels nor did he pay the special charges provided for articles of excepted nature. Had the plaintiff declared the proper contents of the parcel, the Railway Administration would have realized the higher rates prescribed for articles of excepted nature and would have been in the position of taking special care for the safe custody and carriage of the parcel in dispute.

As I have just said, the plaintiff by concealing the proper contents of the parcel cheated the Railway Company and evaded the payment of higher rates, which in case of a proper declaration the Railway Company would have demanded from him.

Under Rule 215 it is optional with the consignor to insure, i.e., to pay the percentage fee over and above the rates prescribed for the parcel or not, but it is not optional with him to conceal the contents of the parcel and to pay an ordinary rate for it instead of the higher rate prescribed in the Tariff of the Company under the authority vested in them by the Government of India, when an ordinary charge is paid for articles of accepted nature (the prescribed charges for which are much higher and are calculated according to the value of the articles), the Company is expressly exempted from liability under Rule 212 of the Tariff and the other rules.

These rules fix the Company with liability only where an increased charge is paid. The increased charge, it is evident, is demanded as a compensation for the greater risk and care to be taken by the Railway Company for the carriage of the articles of special value, when these increased charges were not paid by the consignor he can not hold the Company liable for the loss of his parcel.

For these reasons, I am of opinion that under Rule 215 of the Tariff the plaintiff cannot claim a limited damage, viz Rs 100, from the defendant

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For all these reasons, I am of opinion that the plaintiff's claim fails on these legal grounds also

ORDERED

That the claim be dismissed with costs

Case No. 14.

In the Court of Sub Judge of Faridpur.

MOVET APPEAL No 283 OF 1908

APPEAL FROM THE DECISION OF MUNSIFF, CHIKANDI
ADDITIONAL COURT, DATED 29TH JULY, 1908

SARAT CHANDRA BOSE AND OTHERS (PLAINTIFFS), APPELLANTS

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL

(DEFENDANT), RESPONDENT

*Railway Act, IX of 1890, Section 75—Declaration of the contents and value
of a parcel—Shawl, definition of*

1908
Nov 13

In a suit against a Railway administration for the recovery of the value of a parcel containing shawls lost in transit, it was held that notice given by the plaintiff's pleader was sufficient, and that, as the contents and the value of the parcel were not declared and insurance charge paid as required by Section 75 of the Indian Railways Act, IX of 1890, the administration were not liable to the claim of the plaintiff

THE facts out of which this appeal has arisen are these —The plaintiffs are a firm of merchants carrying on business under the name and style, Basu Friend and Co at Gossains Hat, within the jurisdiction of the Chikandi Munsiff. On the 13th November, 1906, the plaintiffs in the name of their Calcutta Agent, one B. K. Sen booked a parcel containing country made cloths and alwans at the Bara Bazar office of the Eastern Bengal State Railway at Calcutta for conveyance by them and the I O S N and Railway Company to Bijnisar, a steamer station on the Padma, and the delivery to the plaintiff No. 1, but the goods appear to have been lost in transit and some correspondence passed between the plaintiffs and the Railway

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I do not agree in this view. In support of this contention the plaintiff puts in evidence the Railway Company's Coaching Tariff (Ex VII) and relied upon Rule 215 of it. Rule 212 of this Tariff applies to the case. It is an exposition of the provisions of Section 75 of the Railway Company's Act. When the case clearly falls under rule the plaintiff cannot now be allowed to take it out of it.

Rule 215 of the Tariff does not help the plaintiff. It must be read in connection with the other rules in the Tariff. Rule 209 of this Tariff clearly provides that the Company will not be liable for the loss of any goods unless their contents are properly described, the contents of the goods in the parcel in dispute were purposely concealed. As to Rule 215, para (b) of it clearly provides that the Company will be liable up to the prescribed limit, viz, Rs 100 only in case the consignor declares the contents of the parcel but refuses to insure it. Here the plaintiff did not declare the contents of the parcels nor did he pay the special charges provided for articles of excepted nature. Had the plaintiff declared the proper contents of the parcel the Railway Administration would have realized the higher rates prescribed for articles of excepted nature and would have been in the position of taking special care for the safe custody and carriage of the parcel in dispute.

As I have just said, the plaintiff by concealing the proper contents of the parcel cheated the Railway Company and evaded the payment of higher rates, which in case of a proper declaration the Railway Company would have demanded from him.

Under Rule 215 it is optional with the consignor to insure or to pay the percentage fee over and above the rates prescribed for the parcel or not, but it is not optional with him to conceal the contents of the parcel and to pay an ordinary rate for it instead of the higher rate prescribed in the Tariff of the Company under the authority vested in them by the Government of India, when an ordinary charge is paid for articles of excepted nature (the prescribed charges for which are much higher and are calculated according to the value of the articles), the Company is expressly exempted from liability under Rule 212 of the Tariff and the other rules.

These rules fix the Company with liability only where an increased charge is paid. The increased charge, it is evident, is demanded as a compensation for the greater risk and care to be taken by the Railway Company for the carriage of the articles of special value when these increased charges were not paid by the consignor he cannot hold the Company liable for the loss of his parcel.

For these reasons, I am of opinion that under Rule 215 of the Tariff the plaintiff cannot claim a limited damage, viz Rs 100, from the defendant

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Pershad
v
E F Jacob

For all these reasons, I am of opinion that the plaintiff's claim fails on these legal grounds also

ORDERED

That the claim be dismissed with costs

Case No 14.

In the Court of Sub Judge of Faridpur.

MOVIE APPEAL No 283 of 1908

APPEAL FROM THE DECISION OF MUNSIFF, CHIKANDI
ADDITIONAL COURT, DATED 29TH JULY, 1908

SARAT CHANDRA BOSE AND OTHERS (PLAINTIFFS), APPELLANTS

v

SECRETARY OF STATE FOR INDIA IN COUNCIL

(DEFENDANT), RESPONDENT

*Railway Act, IX of 1890 Section 75—Declaration of the contents and value
of a parcel—Shawl, definition of*

1908
Nov 13

In a suit against a Railway administration for the recovery of the value of a parcel containing shawls lost in transit, it was held that notice given by the plaintiff's pleader was sufficient and that as the contents and the value of the parcel were not declared and insurance charge paid as required by Section 75 of the Indian Railways Act, IX of 1890, the administration were not liable to the claim of the plaintiff

THE facts out of which this appeal has arisen are these —The plaintiffs are a firm of merchants carrying on business under the name and style, Basu Friend and Co nt Gossain s Hat, within the jurisdiction of the Chikandi Munsiff On the 13th November, 1906, the plaintiffs in the name of their Calcutta Agent, one B K Sen booked a parcel containing country made cloths and shawls at the Bara Bazar office of the Eastern Bengal State Railway nt Calcutta for conveyance by them and the I O S N and Railway Company to Bijnisar, a steamer station on the Padma, and the delivery to the plaintiff No 1, but the goods appear to have been lost in transit and some correspondence passed between the plaintiffs and the Railway

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and Steamer authorities on the subject, but it led to no practical result. At last the plaintiffs through their pleader, Babu Satish Chandra Sen, gave notice of suit to the Collector of Faridport and the Manager of the Eastern Bengal State Railway, claiming from them Rs 497 6 0 as price of the goods, Rs 11 0 3 as packing charge, and Rs 91 9 6 as damages, or in total Rs 600. It is alleged that the Traffic Superintendent of the Railway thereupon offered terms of compromise, but the plaintiffs could not accept these terms which were not favourable to them and that hence they have brought the suit. The plaintiffs claim upon Rs 600 at which they assess their loss, interest at 12 per cent per annum and in total Rs 624 0 0. The Manager of the Eastern Bengal State Railway and the Collector of Faridport have appeared and contest the suit. They take various objections to the suit, but for the purpose of this appeal it is necessary to refer to two of them only. They are that the notice served on the Collector is not legally sufficient and valid and that under Section 75 of the Indian Railways Act (Act IX of 1890) the Railway Administration is not responsible for the loss of the goods and is not liable for the plaintiffs' claim.

The Munsiff who tried the suit has decided both the points against the plaintiffs and dismissed the suit. The plaintiffs have appealed. As regards the first point the contention of the appellants is that the lower Court is wrong in its view that the notice served on the Secretary of State for India in Council, the first defendant, is not legally sufficient and valid. The objection of the defendants is that pleader Babu Satish Chandra Sen, who acted for the plaintiffs in the matter had no authority for the purpose. The plaintiff No 1 says that he did not authorise him to give the notice, but as regards the other plaintiffs there is nothing to show that he had also their authority to send the notice. The Lower Court has under the circumstances held that the notice is bad in law. This conclusion of the learned Munsiff seems to me to be wrong. As held by the Madras High Court in the case of the *Secretary of State for India in Council v. Pammal Pillai*, I L R, 24 Mad, 279, the object of the notice required by Section 424 of the Code of Civil Procedure is to give the defendant an opportunity of settling the claim, if so advised without litigation, and this object has in my opinion been fully attained by the notice which has been given to the defendant. In the Madras case two out of these joint claimants gave the notice and it was held to be sufficient. The present case is stronger inasmuch as it would appear that the notice proceeded from all the plaintiffs and the only question raised was as to the authority of the pleader who acted for them. I therefore find the first point in the plaintiffs' favour.

With regard to the second point, the whole controversy turns upon whether under Section 75 of the Railways Act, it was the duty of

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the plaintiffs to declare the contents of the parcel and their value at the time of booking it for carriage by the Railways. The answer to this question depends upon whether the articles consigned by the plaintiffs to the Company for carriage come within the list of articles specified in the 2nd Schedule to the Act. The defendant's case is that the "alwans" mentioned in the plaint come under the term "Shawls". The learned pleader for the appellants has urged that the word "shawls" must be understood in the sense in which it is understood by Indians, i.e., the rich and valuable products which are turned out by the looms of Kashmere and Amritsar. He has also argued that the word "shawls" applies to woollen cloths having ornamental borders. I must say without any hesitation that I am unable to accept this contention as correct. The word "shawl" as occurring in a law in the English language must be understood in an English sense irrespective of its origin which is Indian. Now Webster defines the word "shawl" as a cloth of wool, cotton, silk and hair used specially by women as a loose covering for the neck or shoulders, and I must say that the "alwans" which are manufactured of wool and the latter come within this definition. I am not prepared to accept the restricted meaning which is sought to be given to the word by the learned pleader for the appellants. Even assuming that to be the radical meaning of the word, in my opinion the goods booked by the plaintiffs come under the designation of "shewls," and as their value exceeded Rs 100 the plaintiffs ought to have declared the contents of the parcel and their value at the time of booking the parcel at the Bara Bazar office. I, therefore, hold that the defendants are not liable for the plaintiffs' claim.

The result, therefore, is that appeal fails and is dismissed with costs which I award to both sets of respondents.

Case No 15.

In the Court of Small Causes, Calcutta.

AMON MULL AND OTHERS

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL

*Railway Administration, liability of—Loss of goods tendered for despatch—
Marking and weighing—Receipt not granted*

1907
June, 12.

The plaintiffs took two bales of cloth to the godown of the defendant and presented a forwarding note which was checked and entered in the

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register by a clerk, but the goods were neither marked nor weighed and consequently no receipt was granted on that day. On the following day when the plaintiffs called to get all this done, one of the bales was found missing and the plaintiffs sued the defendant for the value of the missing bale, but the suit was dismissed on the ground that the defendant was not liable for the loss before marking and weighing took place.

JUDGMENT.—This is a suit to recover the value of one of the two bales which the plaintiff made over to Eastern Bengal State Railway at the Armenian Ghat on 4th September 1906 to be despatched to Falchori and which was missing from the defendant's godown. The defendant contends that under the general rules framed under the Indian Railway Act, the Railway Administration are not liable until the goods are taken over by the Railway Administration for despatch and a receipt given.

It appears that the plaintiff took both the bales of cloth to the Railway godown and a forwarding note was filled in, which was checked by an officer and entered in the register. The goods were not marked nor weighed, consequently no Railway receipt was issued on that day. On the next day, the plaintiff called to get all this done whereupon he found one of the bales missing. Enquiry was made into the matter with the result that the missing bale was not found. The learned pleader for the plaintiff contends that the Rules framed under Sections 47 and 54 of the Indian Railway Act are not consistent with the Act, as they are unreasonable. He relies on the decision of STEPHEN J., in *Jalim Sing v The Secretary of State for India*, (8 Cal., Weekly Notes, Page 725). Now as to the soundness of the Judgment of STEPHEN J., there can be doubt. But it does seem to me that the facts of the present case are certainly different from those in the case of *Jalim Sing*. In the case before me the goods were taken to the Railway godown and the process of booking had just begun and the forwarding note was only entered in the register. No marking or weighing had taken place. STEPHEN J. himself observed that, in his opinion, it was not unreasonable that as long as the consignor's servant was seeing the goods through process of booking and marking and weighing, the Railway Company should not be responsible.

Under the circumstances I hold that in this case the defendant was not liable for the loss of the bale before the marking and weighing took place, and the suit is accordingly dismissed with costs and Attorney's fee certified.

Case No. 16.

In the District Court of Chittagong.

APPEAL No 618 OF 1907

RAM SUNDER SHAHA AND OTHERS (PLAINTIFFS) APPELLANTS

v.

ASSAM BENGAL RAILWAY COMPANY (DEFENDANTS),

RESPONDENTS

Breach of contract to carry goods—Plaintiffs loading goods in wagon allotted to another merchant—Liability of the defendant Company

1908
July, 27

The plaintiffs loaded their salt in a wagon allotted to another merchant and got a Forwarding Note signed by the Tally Clerk of the defendant Company, but no receipt was granted. They then carried the goods in the Double Mooring station which is about a mile from the Salt Gola. As soon as the defendant Company came to know of the conduct of the plaintiffs' men, they cancelled the Forwarding Note and asked them to remove the goods from the wagon, but, as the plaintiffs failed to unload the wagon, they (the servants of the Company) threw out the goods and they were lying in the Lost Property Office, as the plaintiffs refused to take back the same.

The plaintiffs thereupon sued the defendant Company for damages for breach of contract to carry the goods. The suit was dismissed and on appeal it was held that there was no contract on the part of the Railway Company to carry the goods and they were not bound to carry them, that the defendant Company's act in unloading the goods from the wagon did not in itself amount to a wrongful one and that the plaintiffs could not claim the price of the goods, if the defendant Company agree to deliver the same in good order.

This appeal arises out of a suit by the plaintiffs appellants, against the defendant Railway Company for damages for breach of contract to carry goods in the emsnee at Fazilpur station from this town. It was plaintiffs' case that the defendant Company sent certain wagons for the salt bonders of Chittagong on the 21st September to the Sadarghat salt gola at the request of the Collector of Customs. The plaintiffs' men accordingly on that very day loaded one of the wagons No 699 with their salt for despatch to Fazilpur station and got a forwarding note signed by the tally clerk of the defendant Company and a railway receipt was signed by the goods clerk of the defendant and ready for delivery to the

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—

plaintiffs' man Nirnde, but the receipt was not granted on that day and the goods clerk told plaintiffs' man to come on the next day for the receipt. In the meantime the goods had been carried to the Double Mooring station which is about a mile or $1\frac{1}{4}$ mile from the salt gola. The plaintiffs afterwards learnt that the Traffic Manager at the instigation of a rival salt bondere threw their salt out of the wagon and had it reloaded with the salt of his rival and antagonist N N Roy and refused to grant the plaintiffs a receipt for their goods and refused to carry the same to their consignee at the Fazilpur station.

The plaintiffs accordingly sued to recover the price of 270 maunds of salt which they loaded in the said wagon at the rate of market price of the same at the time at Fazilpur and adjacent places together with costs incurred by them for loading the same as damages for breach of contract for carriage of the said goods.

The defendant Company contended that they never contracted to carry the goods of the plaintiffs, that the plaintiffs men fraudulently usurped the wagon No 699 which was allotted to one N N Roy and that as soon as they knew of this conduct of the plaintiffs' men they cancelled the forwarding note and asked the plaintiffs to remove the goods from the wagon, but as the plaintiffs failed to unload the wagon, they throw out the goods after taking precaution that they might not be damaged. The goods were lying in their Lost Property office as the plaintiffs refused to take back the same. They therefore contended the plaintiffs could take back their goods but could claim no damages.

The lower Court found upon the evidence adduced in the case that there was no agreement either express or implied on the part of the defendant Company to carry the goods in question of the plaintiffs and that therefore there was no breach for such contract for which plaintiffs could recover damages. It also held that the defendants' act of removing the plaintiffs salt from the wagon was not a wrongful act for which the defendant was liable to pay damages. The suit was accordingly dismissed. The plaintiffs have appealed.

The point for determination is whether their alleged contract was sufficiently proved and whether the forwarding note obtained by them was sufficient evidence of such contract. The case reported in Indian Law Report, Cal 31, page 951, was cited as an authority in the appellant's favour.

Now it is admitted that at the time there was a great competition amongst the traders for wagons owing to increased traffic and that none could get a wagon without an application to Mr Martin who was specially deputed to make equitable distribution of wagons. If

is further admitted that the plaintiffs made no such application. The letter of the Collector of Customs proves nothing on the point as the Collector simply asked the Traffic Manager to send some wagons for the salt bonders. It is satisfactorily proved that the wagon loaded by the plaintiffs' men had been allotted to N N Roy. I can never believe that the Ex C was a forged document and not genuine. The wagon in question therefore must be held to have been usurped by the plaintiffs' men without permission of the defendant Company and the forwarding note was therefore evidently prepared and signed through misapprehension, if not under misrepresentation and fraud. The goods were loaded at 2 or 2.30 P.M. Objections were raised by N N Roy's men immediately after the forwarding note had been signed. No receipt was accordingly granted that day. The next day on the matter having been brought to the notice of Mr Martin, he cancelled the note and his act was confirmed by the Traffic Manager. The tally clerk's granting the forwarding note therefor did not therefore amount to a contract on the part of the defendant Company to carry the goods in question. Taking or carrying of the goods to the Double Mooring station was an unauthorized act on the part of the servants of the Company. The goods could not be said to have been on transit, as the salt gola was not a station and Double Mooring station was not an intermediate station of the A B Railway. The Railway receipt had not then been received. The conduct of the then goods clerk is suspicious. There was then a great demand for wagons and the plaintiffs' men somehow or other might have induced the goods clerk to have 3 receipts prepared and signed. No receipt, however, was admittedly made over to the plaintiffs' men. I fully agree with the lower Court's findings on facts.

The case reported in Indian Law Report 31 Calcutta, before alluded to, is clearly distinguishable from the present case. In the present case the Goods were never accepted by the defendant. The goods might have been in the physical custody of the defendant Company and the Company might be liable for damages, if they were subsequently lost or damaged but the plaintiffs' suit was not for recovery of such damages. The question on the present case was whether defendant Company were bound to carry the goods. The defendant Company might be guilty of violation of the provisions of Clause 2 of Section 42 of the Railway Act, but that is a question which we have no right to discuss here. If the defendant Company never agreed to carry the goods in question, the plaintiffs could not compel the Company to do so nor claim compensation in these Courts for their failing to do so. I therefore agree with the Lower Court's finding that there was no express or implied contract proved as alleged by the plaintiffs.

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v
A B Rly

The question whether the plaintiffs are liable for the alleged wrongful act of the defendant Company irrespective of contract depends upon the fact whether the suit in question has been in any way damaged or lost. The plaintiffs did not seek for such damages in the present suit nor have adduced any evidence as to loss or deterioration of the goods. The plaintiffs were certainly bound to remove their goods from the wagon and the defendant's act of unloading the same does not in itself amount to a wrongful or tortious one. The plaintiff can take back the goods and can sue for damages, if the defendant Company refuse to deliver the same, or if the goods have been damaged or lost. They cannot certainly recover the price of the goods if the defendant agrees to deliver the same in good order. The suit was not properly framed.

So plaintiffs appellants' right to recover damages for breach of the alleged contract and for alleged wrongful act was not sufficiently proved. The Lower Court's decision is correct. The appeal is accordingly dismissed with costs.

Case No. 17.

In the Court of the Sub-Judge at Nowgong

APPEAL No 32 ORDINARY OF 1901

A B RAILWAY AND OTHERS (DEFENDANTS), APPELLANTS

KALURAM AGAROLA (PLAINTIFF), RESPONDENT

1901
Sep 30

Short delivery of Goods—Liability of Railway Company—Risk Note—Loss caused by insecure packing

In a suit against the defendants to recover the value of goods lost in transit it was held that the first defendant Company was alone liable to the claim of the plaintiff and the plaintiff's agent who signed the Risk Note had no authority to do so and even if he had authority the Risk Note would apply only to losses sustained owing to insecure state of packing and not to loss caused by removal of the contents of the containerment.

APPEAL laid at Rs 92 2 6 against the decree of the Lower Court for value of goods lost.

JUDGMENT—This case was brought by the respondent's agent at Chapamukh to recover from the appellant Companies the sum of Rs 92 2 6 for loss incurred by the disappearance of goods in transit.

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Agarola

from Calcutta to Chaparmukh in this district. It appears that certain goods were made over in two bales to the E B S Railway in Calcutta for transport to Chaparmukh. One of the bales arrived 8 seers short in weight and on being opened it was found that a portion of its contents had been abstracted and some gunny bags of no value had been substituted. The consignee's agent at Chaparmukh thereupon instituted a suit against the three Companies for the loss incurred. The Steamer Company and the A B Railway plead that they have been wrongly made defendants as the contract was between the sender and the E B S Railway and for other reasons. The Bill of Lading has not been put in evidence but it appears that the E B S Railway contracted to deliver the goods to the plaintiff at Chaparmukh and I do not think that the other defendants are liable except defendant No 1. The order of the Lower Court as far as the A B Railway and the Steamer Company are concerned, is therefore set aside. The E B S Railway bases its defence on the fact that a Risk Note was signed by the person delivering the goods to them which absolves them from responsibility. The Risk Note purports to be signed by Ghasi Ram who is stated by Kaluram to be his servant. If the person who executed it was competent to execute it it should absolve the Railway from any responsibility from loss by wastage, damage or other loss which was a consequence of its insecure packing. Ghasi Ram does not however appear to have had any authority to sign such a document and even if he had it would only apply to loss owing to the insecure state of packing not to loss caused by deliberate removal of the contents, such as would appear to have happened in the present instance. I accordingly find that Janoki Dass apparently as Agent of Kaluram consigned two bales to Kaluram at Chaparmukh, that the E B S Railway accepted the contract that the bales arrived at Chaparmukh and were delivered to Kaluram's agent short to the extent mentioned in the plaint, that the loss occurred while on the E B S line or on the sub-contractor transport Company's lines, the Steamer Company or the A B Railway, that the Company were not protected by the Risk Note even if it were executed by a competent person, as the loss not due to the alleged imperfect packing and that the E B S Railway are therefore liable to pay compensation for loss to the consignee, Kaluram, the amount decreed in the Lower Court with costs in both Courts. The A B Railway and the Steamer Company will get their cost from the respondent.

Case No 18

In the Small Cause Court of the Munsif at Cuttack

ILLUSIPR No 1668

SHAIK GARIBULLA AND ANOTHER, PLAINTIFFS

v

AGENT, B N RY. CO, DEFENDANT

1906
Sept, 1*Inability of Railway Company—Short delivery of goods—Complaint of shortage after removal*

In a suit against the defendant Company for short delivery of two boxes of shoes it was held that as the plaintiffs brought to the notice of the goods clerk about the broken condition of the box only 7 hours after the goods were removed to the merchant's shop instead of drawing the attention of the goods clerk or the Station Master at the time of delivery the defendant Company cannot be held liable for the plaintiffs claim.

JUDGMENT.—The points for determination are 1st, whether the defendant Company is liable, and 2ndly, what compensation, if any the plaintiff can get.

It appears that the plaintiffs got a consignment of 2 boxes of shoes from Calcutta. The consignment was booked at the Armenian Ghat Station of the F B S Railway and directed to Cuttack Station on the B N Railway. It was despatched at Railway risk so that it may be presumed that the boxes were in good condition when they were booked. When, however, the plaintiff No 2 took delivery of the boxes at Cuttack station he found a plank of one of the boxes concerned removed. He informed the goods clerk about it but the latter took no heed of it. The goods clerk no doubt denies that he was informed about the condition of the box but I believe the plaintiff No 2, when he says that he did draw the attention of the goods clerk. It is, however, admitted that the box was not shown to the goods clerk nor was the Station Master informed about its condition. When the goods clerk did not pay any attention to the plaintiff No 2's complaint, the latter's obvious duty was certainly to inform the Station Master, get the box opened in his presence and have the contents weighed. The plaintiff did not do anything of the kind, but he takes delivery of the boxes, goes straight to his shop and opens the box there. He then found that in accordance with the chalan furnished by the consignor, 8 pairs of

shoes were missing, and, that in their place, 2 pieces of iron bar with the letters L I R marked upon one of them were inside the box, which were there presumably to make up the recorded weight of the box. In the afternoon at about 4 1/2 M., the plaintiff No 1 took the two pieces of iron to the station and informed the goods clerk about the case of his goods. Delivery of the goods had been taken at about 7 A M., and the information about the loss was given 7 hours after. This is certainly not the condition on which the Railway Company undertakes to carry goods and it would certainly be setting a premium upon fraud, if a person were allowed to charge the Railway Company with liability in such a circumstance. In the present case, however, there is some extenuation for the plaintiff from the refusal of the goods clerk to immediately pay attention to the plaintiffs' complaint, and relief could have been granted to the plaintiffs, if they could show that really 130 pairs of shoes had been packed in the box. On this point there is absolutely no evidence. It is quite likely that the box was tampered with while in transit, but in the absence of any evidence on the point indicated, the Court cannot certainly make any presumption in plaintiffs' favour, that being so, I am constrained to hold that the plaintiffs cannot have any relief against the defendant.

I therefore dismiss the suit, but I make no order as to costs.

Case No 19.

In the Court of Small Causes at Sealdah.

S. C. C. Suit No 613 11909

SHAIKH JAMIRUDDIN, PLAINTIFF

v

SECRETARY OF STATE FOR INDIA IN COUNCIL,

DEFENDANT

*Short delivery of goods—Suit for compensation for—Failure of superintendent—
Notice of claim to the Manager*

1909
June, 29

In a suit against the Railway Administration for compensation for short delivery of 5 bundles of goat skins out of 25 bundles booked by the plaintiff, it was held that although receipt was given for 5 bundles yet owing to pressure of traffic and laxity of supervision on the part of the station staff the quantity received was 25 bundles only. It was also held that notice of claim served upon the Manager and acknowledged by the Traffic Superintendent was a sufficient notice under the Railways Act.

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Garibulla
v
B.N. Ry
—

Shailb
Jamiruddin
Secretary of
State

JUDGMENT—The suit is to recover compensation for short delivery of goods, 5 bundles of goat skins. The plaintiff's suit is against the Railway Administration represented in this suit by the Secretary of State for India in Council. He alleges that he booked 28 bundles of goat skins at Haldibari to be delivered at Sealdah but the delivery here fell short by 6 bundles, for which a short certificate was granted. Hence the present suit. The Railway Company repudiates all liability to pay and contends that owing to pressure of Traffic at Haldibari and also laxity of supervision on the part of the station staff there, an incorrect receipt was given for 28 bundles whereas the quantity booked was 23 bundles only. At the hearing a question was raised that the suit was not maintainable, as there was no service of notice on the Manager of the Railway Company as provided by the Railway Act.

Two questions for decision—

1. Whether there was a service of notice on the Manager?
2. How many bundles of goat skins were booked by the plaintiff at Haldibari?

The Railway Company admits the loss of one bundle for which they are ready to pay compensation Rs 90. The earlier correspondence for the short delivery of goods was with the Traffic Superintendent and to him a notice of the short delivery of the goods with a claim for compensation was preferred, but such notice it has been held in several cases is not a proper notice under the law which requires that the notice should be addressed to the Manager. There is however a notice to the Manager dated 6th August 1908, which is within six months of the date of the loss complained of, the receipt of which was acknowledged by the Traffic Superintendent by his letter, dated 14th August 1908. The letter no doubt does not contain all the particulars necessary to be stated in a notice but when the previous correspondence with the Traffic Superintendent to which reference has been made on it is taken into account, I cannot but regard that it was a sufficient notice and the more so when no complaint on the subject. I mean the shortcomings of the notice, were made in the written statement. I hold the notice to have been good and the suit cannot fail for want of notice.

Now, as to the merits of the case, how many bundles of goat skins were booked by the plaintiff at Haldibari. On the day the goods were consigned to the Railway station staff at Haldibari the traffic was unusually heavy. The plaintiff's broker brought the bundles of goat skins in carts and these bundles along with several others belonging to the plaintiff in suit No 591 of 1909 (not prosecuted) were placed at the top of jute laden in a double wagon. It was by the plaintiff's carters. As the wagons were drawn up line

and to start shortly the plaintiff was in a hurry to put the bundles on the top of the jute. He had dealings with the Railway clerk and so the goods clerk accepted his word as to the quantity and gave a receipt depending upon the consignee's statement. This was no doubt extremely foolish on the part of the goods clerk and all this trouble to the Railway Company has arisen on account of his carelessness. Too much work in hand cannot be a complete justification of his negligence.

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At Sara, the next forwarding station where the wagons are unloaded for transhipment to the other side of the river, the shortage in the consignment was detected, and Sara telegraphed to Haldibari and the same was done at Goalbathan who telegraphed the shortage to Sara. If the goods were booked according to the quantity as stated in the Railway receipt at Haldibari, then the shortage discovered at Sara must have been due to three causes, or to put it in a different way can be explained in three ways —

(I) That the deficit or the lost bundles were not booked or consigned at all by the consignor.

(II) That the bundles were removed from the Haldibari station after consignment.

(III) That they were lost in transit between Haldibari and Sara or removed at Sara.

They were not lost in transit, because the checker at Sara found the card label in the wagon intact with the seal. The removal of such a large quantity of articles at Haldibari or at Sara would presuppose complicity among several of the railway servants, which would be an extremely risky step and liable to detection. At Sara the work of unloading is done in broad daylight and the distance between the flat and the wagon is short. At Haldibari to unload the bundles from the wagon would be difficult from the position in which they were placed and it could not be done without being discovered by some one of the Railway staff. I cannot for one moment suppose that the goods clerk would give a receipt for 28 bundles actual quantity received and then allow (b) bundles to be removed. Such a theory would be extremely absurd. He could not have connived at the removal of the goods. As to other people stealing the bundles from the bulk and nature of the articles such a theory would not be quite acceptable. Moreover there was the difficulty of getting coolies to touch hides and further difficulty of concealing or making away with the goods. So the possibilities of the goods being stolen or removed at Haldibari or Sara may be discarded and then remains the question whether the six bundles were booked at all. In a case like this it was simply within the power of the consignor to show that he did actually bring the quantity

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+
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alleged to the Railway station. He could have produced the carters who brought the goods. He could have produced his books of account to show how many bundles he had despatched.

But neither he nor his *Aratdar* has chosen to produce books of account which they were called upon to do.

Moreover, the conduct of the plaintiff was not that of a man who had sustained a loss. He did not complain to the Station Master at Haldibari which must have been natural if his loss were real. It is his *Aratdar*, who taking advantage of the short delivery certificate starts the correspondence with the Traffic Superintendent perhaps without his knowledge. There must have been some correspondence between the plaintiff and the *Aratdar*, if the latter did find that the dealing was less than the consignment.

But no correspondence has been produced. I hold that, owing to the imprudent conduct of the goods clerk at Haldibari and want of supervision on his part and of others who were responsible for it, a receipt was given for a quantity in excess of that consigned.

As to the shortage of 1 bundle, which the Railway Company admits, I think this might have been the result of confusion of goods at the transshipment at *Goalbatlan*, the flat had been loaded with various classes of goods and the "manifest book" shows that the consignment of goat skins and hides formed a considerable portion. These had been carried from different stations and were stacked at a place on a portion of the flat. That one bundle should be misplaced or mixed up with other bundles of similar size is not at all strange and at Sealdah the tally clerk could not find it out from other bundles. This bundle of one consignment was mixed up with other and wrongly delivered to another.

Upon a consideration of all the facts and circumstances I am of opinion that the Railway Company is liable to make good to the plaintiff the loss of one bundle the price of which I estimate at Rs. 100, it shall also be responsible to the plaintiff for the costs of this suit. I think it would be fair that the Railway Company should refund to the plaintiff the excess freight of 5 bundles. The Railway Company shall bear its own costs.

Case No. 20.

In the Court of the Sub Judge of Muzuffarpore.

MONEY APPEAL No 125 of 1901 *

APPEAL FROM THE DECISION OF THE MUNSIF
OF HAJIPUR, DATED 13TH MAY 1901

* B & N W RY CO, (DEFENDANT) APPELLANT,

v

HANUMAN SHAW AND OTHERS (PLAINTIFFS), RESPONDENTS

*Claim for non delivery of Goods—Grant of receipt—Want of proof of actual
delivery to the defendant Company*1901
Oct 11

In a suit against the defendant Company for compensation for non-delivery of 100 bags of rice alleged to have been delivered to the defendant Company, it was held from the evidence recorded during the enquiry that the goods were not actually handed over to the defendant Company, although a receipt was granted for the same by the Company's servant, and they were never despatched from the booking station. The suit was therefore dismissed.

THE suit was for recovery of compensation on the allegation that the servants of the plaintiffs consigned 100 bags of rice to the B & N W Railway Company on the 11th March 1900 in order to be delivered at Hajipur, but plaintiffs did not get the same.

The defence was that no goods were consigned at the Raharia station by plaintiffs' servants on 11th March 1900 and plaintiffs were not entitled to any relief and that the 100 bags of rice which had been actually consigned at the said station were duly delivered to the plaintiffs at Hajipur.

The lower Court decreed the suit and defendants have preferred this appeal.

The principal question for determination is whether 100 bags of rice were consigned to the defendants at the Raharia Railway station on 11th March 1900 as alleged by the plaintiffs.

It is said that receipt No 1 was given for 100 bags of rice consigned on 11th March 1900.

Now it is an admitted fact that on 10th March 1900 100 bags of rice were received at Raharia to be despatched to plaintiffs, that

* For Judgment of the High Court, see ante page 227

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this consignment reached Hajipur on the 16th March and duly made over to the plaintiffs. It was carried in wagon No 3649.

The question is whether there was another consignment of 100 bags on the 11th March. Defendants deny it.

It appears that a receipt, Ex No 1, was given to the plaintiffs' servant and it bears date, the 11th March. The corresponding goods consignment note, Ex No E, filed by defendants shows however, some startling facts.

In the first place it appears from Ex No E, that the consignment bears two dates namely 9th March at the top and 11th March at the bottom, and, as for the No of the wagon, the first entry was 3649 it was penned through and below it was written 3230 this was again penned through and again 3649 was written.

Why two dates were given one preceding and the other following 10th March when the admitted consignment of 100 bags of rice was received from Hari Shah. It may lead to the suspicion that the two hulle of 100 bags of rice were really and for some reason or other for only one consignment.

Why the same wagon No 3649 on both the goods consignment notes?

If, however, wagon No 3649 carried only the 100 bags of 10th March, as it was really the case, how were the 100 bags in question 11th March carried?

The goods inward book Ex No 2, kept at the Hajipur station shows that wagon No 3230 was used for the carriage of this disputed consignment.

But it is very satisfactorily proved that wagon No 3230 carried not plaintiffs' bags, but those of another Mahajan of Hajipur named Sakhi Sahu and the number of bags it carried was not 100 but 102. Ex No 9, was the bill of lading of this Sakhi Sahu and the Assistant Station Master of Hajipur Chamon Singh proves the fact. He says that there were seven Telegraphic messages between Raharia and Hajipur before it was finally found out that wagon No 3230 contained the goods of Sakhi Sahu and not plaintiffs and eventually the goods of wagon No 3230 were delivered to this Sakhi Sahu.

Plaintiffs do not say nor have attempted to prove that the 100 bags of rice were carried in wagon No 3230.

Rajani Kanta Dutt the Assistant Station Master of Raharia says on consulting his books that wagons Nos 3649 and 3230 came to Raharia on the 11th March 1900 and left it on the next day the 12th March, and also that no wagon bearing No 3230 reached Raharia on the 9th or 10th March 1900. The No 3230 goods were

Sahni Saha's Invoice was evidently a mistake, the correct No was 3230

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From the deposition of this witness, which I see no reason what ever to disbelieve it is quite evident that the only wagon which carried plaintiffs' goods about those dates was wagon No 3649 and these goods were those, which were consigned by means of goods consignment note No 451 dated 10th March

It further appears from this deposition that one Jogendra Nath Ghosal, Station Master, signed the receipt Ex No I, that the man was ill at the time and left service It does not appear that he worked after the 11th March, while it is a fact that he was dismissed from his service shortly after

Whether the Receipt, Ex No I, was obtained collusively and fraudulently or through mistake of the old Station Master, it is very difficult to say in the absence of better materials but so far it is clear that the goods represented by Ex No I were not loaded in any wagon of the Railway Company and presumably they were not actually made over to the Railway Company's servants

Plaintiffs could prove the delivery of the goods to the Station Master, if it were really made by much better evidence They have an extensive business and their accounts would have been very strong corroboration of the receipt The man Goodri, whose name was entered in the goods consignment note as the sender of the goods, should have been a very good witness on the point The withholding of this evidence is certainly suspicious

It is no doubt true, as contended by the learned pleader for the Respondent, that the receipt, Ex No I, was sufficient *prima facie* evidence of the consignment of the goods mentioned in it but I am of opinion that this presumption is sufficiently rebutted by the evidence, which is on the record to prove that the goods were not actually received in any wagon of the Railway Company and that they were never despatched from Raharia to Hajipur The suit of the plaintiffs must therefore fail

Considering, however, that there was culpable negligence and carelessness on the part of the Railway Company's servants I cannot award any costs to the defendants

Ordered that the appeal be decreed and defendants' suit be dismissed The parties do bear their own costs in both Courts

Case No 21

In the Court of the Additional Sub-Judge
of Jalpaiguri.

MONEY APPEAL No 27 OF 1904

EMPIRE OF INDIA AND CEYLON TEA COMPANY,
LIMITED (PLAINTIFF), APPELLANT

v.

1 BENGAL DUARS RAILWAY COMPANY, LIMITED,
(DEFENDANT), RESPONDENT

2 NIRANJAN BISWAS, P F (DEFENDANT), RESPONDENT

1905
July, 12

*Suit for non delivery of goods—Effect of shifting of the place of business—
Refusal to take delivery—Railway Act, IX of 1890 Section 77—Not a
of claim*

In a suit against B D Railway Company for non delivery of goods at Karlaghat, a ferry station, which was shifted to a *char* on the eastern side of the river Teesta according to its course, it was dismissed on the ground, that the plaintiffs knowing that there was no such separate and permanent Station as Karlaghat and that it was only a ferry station which was shifted to a *char* about a mile on the eastern side of the river Teesta, and knowing also that at the time the parcel was booked it was received at *char* where the business of the Company was carried on they wilfully refused to take delivery of the parcel at the *char* although they received a notice from the Railway Company

Held, that notice of claim given by the plaintiff to the Engineer in Chief of the defendant Company was a sufficient notice

THE facts of the case which gave rise to this appeal are these—
Mr L C Daunt, the Manager and Attorney of the plaintiff Company, booked a certain quantity of Tea seeds on 12th February 1903 by the defendant Company's Railway from Mal Station for delivery to Niranjana Biswas, the defendant No 2 at Karlaghat and obtained a goods receipt note, by which the defendant Company, it is said, undertook to deliver the consignment to the defendant No 2 at Karlaghat. The defendant No 2 not getting delivery of the parcel at Karlaghat within 3 weeks from the date of the receipt, he sent a letter to the Manager and Engineer in Chief of the defendant Company on 3rd March 1903 claiming compensation for the non delivery of the consignment. In reply, the Manager wrote to the

pro forma defendant, Nirnanjan Biswas, to take delivery of the parcel from the booking office of the Company, which at that time was situated in a *char* of the river Teesta about a mile to the east of Karlaghat. He however declined to take delivery of the parcel there and insisted upon getting it at the place to which it was booked, viz., Karlaghat, but as the defendant Company failed to deliver it there, the plaintiff Company brought this suit to recover damages from the defendant Company. It is said that the Tea seeds were sent to the defendant No. 2, who is an assistant of a branch Tea concern at Dengnajar for the purpose of the Dengnajar Tea Estate, that the nursery of the Company at the said place suffered for want of Tea seeds and that, if the parcel had been timely delivered, they could make a profit of Rs. 500 out of the seeds. They therefore claim Rs. 500 as the loss suffered by them plus Rs. 120 as the price of the seeds.

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The defendant Company denied their liability to any damage and urged that the consignment duly reached its destination, that the employees of the plaintiff Company were then repeatedly requested to take delivery of the same, but they wilfully and persistently declined to do so, that they have no Railway Station by the name of Karlaghat, that the place known by the name of Karlaghat was only a ferry ghat, that this ghat shifts its locality according to the course of the river Teesta, that at the time when the parcel was booked, it was fully known to the employees of the plaintiff Company that this ferry ghat was not on the western high bank of the Teesta but was on the sandy bank of it, and that therefore they were bound to take delivery of the consignment from the booking office of the ferry ghat on the *char*. A preliminary objection also was taken to the effect that, under Section 77 of Act IX of 1890 (the Indian Railway Act), no claim for compensation is admissible without a previous notice on the defendant Company.

The following issues were framed for determination in the case —

- 1 Is the plaintiffs suit maintainable without any previous notice on the defendant Company under Section 77 of the Indian Railways Act?
- 2 Whether there is any such station of B D Railway by the name of Karlaghat?
- 3 Whether the Railway starts from the eastern bank or the western bank of the Teesta?
- 4 Whether the defendant Company were bound to deliver the consignment at the Station Karlaghat? If so, where was that station at the time when the consignment was booked?
- 5 Are the defendant Company liable to the plaintiff Company for any damages, and if so, how much?

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v
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The learned Munsiff has decided the 1st issue in favour of the plaintiff Company and the other issues against them and has dismissed the suit. I fully concur with him in all the conclusions he has arrived at.

Section 77 of the Indian Railways Act does not cover a case like this. The compensation claimed was not for the loss, destruction or deterioration of the goods consigned to the defendant Company, but was for breach of contract in not delivering it at the destination to which it was booked. It was not therefore necessary for the plaintiff Company to prefer any claim for compensation in writing. Even if it be conceded that it was necessary for them to do so, the claim preferred by the plaintiff Company in their letters marked Exts 2 and 7 is, in my opinion, sufficient for the purpose. It was argued that the letters ought to have been addressed to the Railway Company and sent to their Agent. But the words used in the Section are "Railway Administration" and, as the Manager and Engineer in Chief represents the Railway administration at the head quarters of the Railway Company, I think the letters addressed to him are sufficient within the meaning of the Section. The cross appeal must therefore be dismissed.

The main contention between the parties with regard to the merits of the case is as to whether the parcel of seeds should have been delivered on the western high bank of the river Teesta at the place known by the name of Karlaghat, situated at the confluence of the river Karla with the river Teesta or at the booking office on the char. It is argued on behalf of the plaintiff Company that the consignment of the seeds was booked to the Karlaghat Station on the western high bank of the river Teesta, that this Karlaghat is a Railway Station and that therefore the defendant Company were bound to deliver it at that station, the plaintiff Company not being bound to take delivery of it at any other place. The greater part of the argument addressed to me on both sides for days together referred to the question as to whether Karlaghat was a Railway Station or not and references were made to the Coaching Tariff, the Goods Tariff and the Time and Fare Table of the E. B. & N. Railway to establish this point in favour of the plaintiff Company. In spite of what these pamphlets and the goods receipt note filed by the plaintiff Company may contain, I am convinced that Karlaghat on the western high bank of the river Teesta is not a Railway Station and is not a permanent station at all. That this is so will appear from the following facts —

The defendant Company, under a contract entered into with the Secretary of State for India in Council, undertook to construct a Railway from the eastern bank of the river Teesta opposite the

town of Jalpaiguri, the terminus of this Railway being on the said eastern bank. By Clause 5, para 1 of the Agreement the Secretary of State granted them "the sole and exclusive right to establish and work a ferry across the river Teesta between the terminus of the said grantee's Railway on the eastern bank of that river opposite the town of Jalpaiguri and the terminus of the Northern Bengal State Railway on the western bank, the said Secretary of State hereby undertaking, and agreeing to construct and maintain at his own cost a branch line as siding from the present Jalpaiguri Station to the western bank of the said river."

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This clearly shows that the terminus of the B D Railway was on the eastern bank of the river Teesta and not on the western bank of it. A commission was given to the Railway Company to maintain and work the ferry across the river, and for the purposes of working it they established a booking office on the western high bank of the river. So long as the depth of the river was sufficient to allow the ferry boat to ply up to this bank the ferry booking office stood there, but it shifted with the course of the river. At first it was on the southern bank of the river Karla. It was then shifted to the northern bank of it and, when the boat could not come up to the shore, the office was held in a steamer. In 1902 the river Teesta shifted its course and receded towards the eastern bank leaving a high *char* in the middle and a shallow channel on the west of it which almost dried up in the cold season leaving only a shallow part of water at one part of it. It was then physically impossible for the ferry boat to ply on the western side of the *char*. The Railway Company therefore removed this booking office to the *char* and for the convenience of the passengers put up a bridge of boats on the western channel at the place where there was a small quantity of water. The effect of the drying up of this channel was not only the removal of the booking office from the high bank to the *char*, but the through booking which the Northern Bengal State Railway had established with the B D Railway by constructing a siding from the main station of Jalpaiguri up to the western high bank of the Teesta, was discontinued from 12th August 1902.

As under the contract entered into by the B D Railway Company with the Secretary of State they have simply to work the ferry on the river Teesta they can work it only on the navigable part of it where the ferry boat can ply and therefore they have a right to remove this ferry office to the ferry ghat whenever for the time being it may be the Secretary of State being bound under the contract to extend the siding of the Jalpaiguri Station up to the said ghat.

It was argued that under sub-section 4 Section 3 of Act IX of 1900, a Railway includes a ferry and that therefore the

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ferry on the Teesta is a part of the defendant B. D. Railway and Karlaghat, a Railway Station. I think the word "ferry" used in the Section means a "ferry" within the limits of the Railway. As the B. D. Railway commences from the eastern bank of the river Teesta, the ferry to the west of it cannot be considered to be a part of the Railway. Had it been a part of the B. D. Railway, the fare of the passengers and the freight of goods would be regulated according to the fare and freight of the Railway, but under their contract the defendant Company cannot charge more than one anna for every passenger to whichever class he may belong, and 6 pies for every man and of goods whatever its nature may be. This conclusively proves that the Teesta ferry is not a part of the B. D. Railway. Had it been a part of the Railway and had Karlaghat been the western terminus of it, the arguments of the learned pleader for the appellants that the defendant Company are bound to carry goods and passengers by animal and other power up to Karlaghat under clause 9, para 11 of their agreement with the Secretary of State would hold good, but, as it is, it has no force whatever, the clause evidently referring to an interruption within the limits of the Railways.

It was then argued that a ferry includes a bridge of boats under Section 3, Sub section 2 of Act IX of 1890, that the bridge of boats put up by the defendant Company on the western channel must be considered as a part of or as an approach to the ferry and that therefore they were bound to carry the parcel over the bridge of boats to Karlaghat. This argument may appear to be plausible, but does not seem to me to be correct. The bridge of boats, pontoons, &c, mentioned in the Sub section referred to, I think, is the bridge of boats, &c, across the ferry, i.e., on the navigable channel of the river where the ferry boat plies, and mean the bridge of boats, &c, put up instead or in the place of the ferry boat. There cannot be a ferry in the place where there is no water or where a boat cannot ply. The bridge of boats was put up by the defendant Company for the convenience of passengers under Section 51 of the Railway Act.

But then it is argued that when the defendant Company agreed by their receipt note to carry the parcel to Karlaghat they were bound under the contract to convey it to that place whether Karlaghat is a Railway Station or not. This argument seems to me to be merely a quibble. The simple answer to this argument is that the ferry ghat booking office on the char was to all intents and purposes the *de facto* Karlaghat for the time being. That this was so was known not only to the public, but, to the employees of the plaintiff Company also, who had passed and repassed over the ferry several times before the consignment was booked. They knew full

well that the passengers booked for Karlaghat were landed at the ferry ghat, and that the goods were kept and delivered at the ferry ghat booking office, knowing this full well they deliberately and persistently declined to take delivery of the parcel at that booking office. From this conduct, it seems clear to me that this parcel of Tea seeds was booked and despatched by Mr Daunt with the premeditated intention of bringing this suit the alleged requirements of the Dengnaghar Tea Concern being merely a pretence. Before booking the Tea seeds Mr Daunt used to come to Jalpaiguri every month as a passenger of the B D Railway. But every time he came here he refused to deliver his ticket at the ferry ghat booking office saying that he would deliver it at the Karlaghat Station, but when he found that there was no office or clerk there, he carried the tickets with him without delivering it to anyone.

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Immediately after the consignment reached the ferry ghat booking office, the booking clerk wrote a post card to the consignee, N Biswas to come and take delivery of it but although N Biswas knew fully well that there was no office on the western high bank of the river, he sent his peon here instead of sending him to the office on the *char* and the peon also after coming all the way from Dengnaghar did not go to the *char* office but returned from the high bank of the river and reported that there was no office or clerk there to give him delivery of the parcel. This farce was repeated more than once before a claim for compensation was preferred. This conduct is explicable only on the theory that everything was thought out and planned from before.

Having considered all these facts, I have only one other argument to notice, and it is this. Referring to Section 20 of Act IX of 1890, it was argued that the B D Railway Company had no right to change their Station from Karlaghat to the *char* without the previous sanction of the Government of India. This is an argument which has been carried a little too far. There cannot, I think be any reasonable doubt that the Section refers to the change of a Station within the limits of a Railway system where new lines of Railway has to be laid, and has no reference to a change of a ferry ghat office necessitated by a change in the course of the river.

Having given my best consideration to the case, I think the plaintiff Company has no right to claim any compensation from the defendant Company either on the grounds of equity or law.

I, therefore dismiss the appeal with costs and interest at 6 per cent per annum. The cross appeal is also dismissed.

Case No. 22

In the Court of Munsif at Gauhati

Suit No 988 of 1900

1 JALIM SINGH KUTHARI,
 2 PROSAN CHANDRA KUTHARI, } OF MURSHIDABAD

v.

1 THE RIVERS STEAM
 NAVIGATION COMPANY }
 2 THE EASTERN BENGAL
 STATE RAILWAY } OF CALCUTTA

1901
 July, 15

Wrongful delivery of parcel—Identity—Liability of Railway Company

In a suit against the defendants for wrongful delivery of a parcel, it was dismissed on the ground that from the evidence it was clear that the parcel offered for delivery at the destination was the identical one which was booked by the plaintiff

CLAIM for Rs 551 for value of certain Endi cloths

The case for the plaintiffs is that their agent here at Gauhati booked a package of Endi cloths at the Gauhati Steamer Station of the defendants No 1 for carriage to the Sealdah Railway Station of the defendants No 2, and for delivery there to the plaintiffs firm that the consignee made in due course repeated demands for delivery of the parcel in the Sealdah office of the defendants No 2 but that no parcel was delivered to them, that thereafter on the plaintiffs having given to the defendant's notice of their claim on the 14th May 1900, the defendants No 2 wrote to them on the 20th August to ask for taking delivery but that when a man of the plaintiffs firm went for the purpose to the Sealdah office of the defendants a wrong parcel was offered to them

The defendants No 1 admit to have received and booked for Calcutta the parcel mentioned in their way bill No 5/102 dated the 2nd January 1900, and the other defendants admit to have received it from them at Gorakhpore and carried it to Calcutta in due course. The defendants No 2 allege that the same parcel was offered to the consignee, but that it was refused on the ground that it had no plaintiffs' mark and that it weighed less than the weight noted in the parcels receipt note of the defendants No 1 No 102 of the 2nd January 1900 referred to above. The defendants have also claimed

non liability on certain legal grounds, which I do not think in the view I take of the facts of the case necessary to enter into

The plaintiffs' statements of facts, as made in the plaint, does not appear to be quite correct. It would appear from the plaint that no offer of delivery was at all made in the Sealdah office of the defendants No. 2 despite repeated demands for it until long after they had been served with a notice by the plaintiffs, while it appears from the evidence of the plaintiffs' men Moolchand and Munilal that offer was made as soon as a demand for delivery was made. Moolchand says that he made the demand the day after receipt of the bill of lading (presumably the parcels receipt note referred to above) by the consignee but, that he refused to take delivery of the parcel offered as it did not contain the marks "M M" of the firm. He admits that it was packed up in gunny cloth in the customary manner of the firm that the superscription was in red ink and that there was then no other handle of the sort in the parcels godown at Sealdah. From the evidence of Brojendra Nath Bose Parcel clerk Sealdah Railway Station, it appears that that demand and offer were respectively made on the 7th January 1900. The evidence of his fellow clerk Binod Behari Das shows that the parcel had been received in their office on the 5th idem, so there appears to have been no justification for the imputation suggested by the statement in the plaint referred to above. Now the important question that arises is as to whether the parcel offered to the consignee at the Sealdah Parcel office of the defendants No. 2 was the right or a wrong one. What evidence has been adduced for the defendants on this point viz., that of the two parcel clerks named above corroborated as it is substantially by that of the plaintiffs witnesses, Moolchand and Munilal sufficiently shows that no other parcel of the sort arrived in Calcutta with the way bill covering the parcel booked by the plaintiffs' Gauhati agent. This point might perhaps have been better cleared up by the evidence of the Railway Guard, who took charge of the parcel from Ganendra Nath Ganguli at Gorulondo and made it over to Binod Behari Das at Sealdah. The evidence of Ganendra Nath Ganguli might perhaps be also made clearer than what it now is. But despite these defects, it appears sufficiently clear that the parcel offered to the plaintiffs' man Moolchand on the 7th January was the only parcel of the kind that accompanied the way bill for the plaintiffs consignment. The parcels consignment note (F & A) bearing the signature of the consignor does not show that it was marked "M M" as now alleged by the plaintiffs agent's agent Swaimul. The parcel offered in the Sealdah office was brought down here and opened in Court before that agent, and it was found to have been packed up exactly in the manner he is said to have packed his own and to contain exactly the quantity of cloths, he says, he had packed up and booked. He dis

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putes however that they were of the same manufacture and quality. His another allegation in respect of the superscription made by him on the parcel goes however, unsupported by his own documentary evidence. He says the address written by him was 'Maisingh Rai Meghraj Babadoor' but his Parcel's Consignment note (Ex A) shows that it was simply "Mysing Meghraj" is, in fact it is the style of the plaintiffs' firm. His allegation that the cloths booked by him were of better stuff and manufacture is not supported by any evidence that could safely be relied upon. The deficiency in weight as found of the parcel offered compared with what is given in the parcels receipt appears to be the only point in favour of the plaintiffs' case. But the weight noted in the receipt was expressly subjected to corrections, and it is not impossible that there was a mistake made in the weighment or in its entry in the parcel receipt note, which seems to have been the basis of subsequent entries in this respect in other documents concerned. That such a mistake was made by the plaintiffs Garkati agent is apparent from the alteration made in this respect in his Parcel's Consignment note (Ex A). The weights of the parcel was first entered as 1 maund 27 seers, and the entry was subsequently altered to 1 maund 10 seers. The evidence adduced clearly shows that a reweighment is not made when the custody of a parcel changes hand unless there appears something to raise a suspicion so it is not impossible that the entry of weight as made in the Parcel's Receipts note (Ex 2) was a mistake and that it was not detected until the parcel was reweighed at the instance of the consignee in the Sealdah office. Such an error in weighment appears to be more probable than that the cloths booked should have been stolen by somebody in the employ of the defendants No 2 and pieces of the same stuff, which by the way is peculiar to a place (Assam) far beyond their access and to the same number should have been so promptly substituted as is suggested by the plaintiffs' case. I do not therefore find sufficient ground for finding that the parcel offered to the plaintiffs Calcutta agent was not the identical one consigned by their Garkati agent Swaimal. So I am not at all satisfied that the plaintiffs had a just cause of action against the defendants. The suit will accordingly be dismissed with cost. The plaintiffs will pay the defendants costs.

Case No. 23.

In the 4th Court of the Munsif at Dacca.

SIT No 585 of 1901

MEGHNAD SAHA BANIKYA NISANE BY HIS CERTIFIED
NEXT FRIEND WIFE SREMATI NAVA KUMARI DASSYA,
PLAINTIFF,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,
DEFENDANT

*Railway Company, liability of—Loss of goods—Plaintiff's right to claim—
Jurisdiction of Court—An joinder of the Manager of Railway—Limita-
tion—Notice of claim—Gunny Receipt, loss of—Delivery to a wrong
person—Identification—Negligent conduct of the plaintiff*

1902
June, 7

In a suit against a Railway Administration for compensation for the loss sustained by the plaintiff by wrongful delivery of his goods to a third person on production of the bill of lading which the consignee had lost, it was held (1) that the plaintiff as owner of the goods, had a cause of action against the defendant and that the consignee was merely his agent, (2) that the Court at Dacca had jurisdiction to try the suit, (3) that there was no defect of party in the suit by the fact of the Manager of the defendant Company not having been included as a defendant, (4) that notice of claim alleged to have been given by the plaintiff was not sufficient notice to the Manager as required by Section 77 of the Railways Act, IV of 1890, (5) that the suit was not barred by limitation (6) that it was it for him for the Railway officers to ask the persons who apply for delivery of goods on production of Railway receipt or bill of lading for their identification (7) that it was the duty of the plaintiff to see the bill of lading safely delivered to the consignee instead of having sent it in an ordinary prepaid letter and when the receipt was lost the plaintiff took no immediate steps to stop delivery of the parcel to any other person.

The plaintiff asks for a decree for a sum of Rs 746 5 0 against the Secretary of State for India in Council, alleging that he consigned, at the State Railway Station at Dacca, on the 14th October 1898, for delivery at the State Railway Station at Scaldah to his agent at Calcutta, named Behari Lal Chowdry 15 maunds and 27 1/2 seers of wax worth Rs 784 1 anna packed in gunny bags worth Rs 240 and got bill of lading No 131, that the bill of lading was lost and the Railway authorities were informed of the loss and told not to deliver

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pletes however that they were of the same manufacture and quality. His another allegation in respect of the superscription made by him on the parcel goes, however, unsupported by his own documentary evidence. He says the address written by him was "Mansingh Rai Meghraj Bahadoor" but his Parcels Consignment note (Ex A) shows that it was simply "Mysing Meghiraj" as, in fact it is the style of the plaintiffs firm. His allegation that the cloths booked by him were of better stuff and manufacture is not supported by any evidence that could safely be relied upon. The deficiency in weight as found of the parcel offered compared with what is given in the parcels receipt appears to be the only point in favour of the plaintiffs' case. But the weight noted in the receipt was expressly subjected to corrections, and it is not impossible that there was a mistake made in the weighment or in its entry in the parcel receipt note, which seems to have been the basis of subsequent entries in this respect in other documents concerned. That such a mistake was made by the plaintiffs Gauhati agent is apparent from the alteration made in this respect in his Parcels Consignment note (Ex A). The weights of the parcel was first entered as 1 mownd 27 seers, and the entry was subsequently altered to 1 mownd 15 seers. The evidence adduced clearly shows that a reweighment is not made when the custody of a parcel changes hand unless there appears something to raise a suspicion, so it is not impossible that the entry of weight as made in the Parcels Receipts note (Ex 2) was a mistake and that it was not detected until the parcel was reweighed at the instance of the consignee in the Sealdah office. Such an error in weighment appears to be more probable than that the cloths booked should have been stolen by somebody in the employ of the defendants No 2 and pieces of the same stuff, which by the way is peculiar to a place (Assam) far beyond their access and to the same number should have been so promptly substituted as is suggested by the plaintiffs' case. I do not therefore find sufficient ground for finding that the parcel offered to the plaintiffs' Calcutta agent was not the identical one consigned by their Gauhati agent Swainmal. So I am not at all satisfied that the plaintiffs had a just cause of action against the defendants. The suit will accordingly be dismissed with cost. The plaintiffs will pay the defendants' costs.

Case No. 23.

In the 4th Court of the Munsif at Dacca.

SUIT No 585 OF 1901

MEGHNAD SAHA BANIKYA NISANE BY HIS CERTIFIED
NEXT FRIEND WIFE SREMATI NAYA KUMARI DASSIA,
PLAINTIFF,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,
DEFENDANT

*Railway Company, liability of—Loss of goods—Plaintiff's right to claim—
Jurisdiction of Court—Arrest of the Manager of Railway—Limita-
tion—Notice of claim—Railway Receipt, loss of—Delivery to a wrong
person—Identification—Negligent conduct of the plaintiff*

1902
June, 7

In a suit against a Railway Administration for compensation for the loss sustained by the plaintiff by wrongful delivery of his goods to a third person on production of the bill of lading which the consignee had lost, it was held (1) that the plaintiff is owner of the goods, had a cause of action against the defendant and that the consignee was merely his agent, (2) that the Court at Dacca had jurisdiction to try the suit (3) that there was no defect of party in the suit by the fact of the Manager of the defendant Company not having been made defendant, (4) that notice of claim alleged to have been given by the plaintiff was not sufficient notice to the Manager, as required by Section 77 of the Railways Act IX of 1890, (5) that the suit was not barred by limitation (6) that it was not feasible for the Railway officers to ask the persons who apply for delivery of goods on production of Railway receipt or bill of lading for their identification (7) that it was the duty of the plaintiff to see the bill of lading duly delivered to the consignee instead of having sent it in an ordinary prepaid letter and when the receipt was lost the plaintiff took no immediate steps to stop delivery of the parcel to any other person.

The plaintiff asks for a decree for a sum of Rs 786 5 0 against the Secretary of State for India in Council, alleging that he consigned, at the State Railway Station at Dacca, on the 14th October 1898, for delivery at the State Railway Station at Scaldah to his agent at Calcutta, named Behari Lal Chowdry 15 maunds and 27, seers of wax worth Rs 784-1 rupee packed in ganny bags worth Rs 240 and got bill of lading No 131, that the bill of lading was lost and the Railway authorities were informed of the loss and told not to deliver

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the wax to any one *excepting* the consignee, that afterwards on asking for delivery of the wax, the Railway authorities at Sealdah gave out that somebody had taken delivery of the wax on production of the bill of lading, that the Railway authorities had no right to deliver the said wax to anyone except the real consignee, that on the 21st November 1898 and on the 4th January 1899, notices were served on the Traffic Superintendent at Calcutta under Section 77 of the Indian Railway Act, and that the authorities have neither delivered the wax nor made good the loss suffered by him

The defendant contends that the plaintiff has got no cause of action that this Court has no jurisdiction to try this suit, that this suit is defective and not maintainable as not being brought by and against proper party, that the defendant was not aware in any way, before the notice under Section 424 C P C, that the plaintiff was in any way interested in the goods claimed, that the plaintiff's suit is liable to fail under law inasmuch as no notice of claim has been given by him or on his behalf, according to Section 77 of the Railway Act, that the suit is barred by limitation, and that the defendant should not be held liable for the plaintiff's claim inasmuch as the officers concerned in making delivery of the goods from Sealdah station have delivered them to the holder of the bill of lading, believing him in good faith to be the consignee

The following are the points that have been pressed by the defendant's pleader in this suit

- 1 Whether the plaintiff has got any cause of action?
- 2 Whether this Court has any jurisdiction to try the suit?
- 3 Whether there is any defect of party in this suit?
- 4 Whether the plaintiff has given notice of claim under the provisions of Section 77 of the Railway Act. If not, is this suit maintainable?
- 5 Whether limitation bars the suit?
- 6 Whether the defendant is liable for the plaintiff's claim?

DECISION

1st point It is admitted that the plaintiff despatched certain quantity of wax for being conveyed by the State Railway from Dacca to Calcutta. It is proved that the plaintiff has a right to the wax, that the consignee is merely his agent in Calcutta, and that if wax has not been delivered to his agent. He has therefore a cause of action against the defendant. Whether the defendant is liable for the plaintiff's claim or not is another question

2nd point The Government Pleader contends that this suit on its face to have been brought in Calcutta. The goods were delivered at

Dacca Station within the jurisdiction of this Court for transmission to Calcutta. The defendant has put in a risk note to show that there was a special contract that the defendant would not be responsible for loss, deterioration or destruction of the goods. As the claim has arisen out of a contract, the plaintiff may sue the defendant here vide Explanation III of Section 17 of the Civil Procedure Code. I think the objection regarding jurisdiction is not legally sustainable.

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3rd point. The Secretary of State is the only defendant in this suit. The Government Pleader argues that the Manager of the Eastern Bengal State Railway is also a necessary party. No authority has been shown in support of this argument. The Manager is merely an officer administering the Railway belonging to the State. He is not therefore a necessary party to this action.

4th point. In para 4 of the plaint, it is alleged that notices were repeatedly served on the Railway authorities under Section 77 of the Indian Railways Act. The defendant in para 5 of his written statement denies this allegation of the plaintiff.

Under the provisions of Section 77 of the Indian Railway Act notice regarding claim to compensation for loss, destruction or deterioration of goods is to be preferred in writing by the person claiming the compensation or by some one on his behalf, to the Railway Administration within six months from the date of the delivery of the goods for carriage by Railway. Railway Administration is defined in Section 3 (b) of the said Act as meaning the Manager of the Railway and including the Government in the case of a Railway administered by the Government. The notice is therefore to be served on the Manager. There is no documentary evidence to show that notice regarding the plaintiff's claim has been served on the Manager. The last witness examined by the plaintiff says that he serves under the plaintiff and that he wrote a letter to Bara Sahel. If by Bara Sahel, the Manager is meant by him there is nothing to show that the letter was sent or delivered according to the provisions of Section 140 of the Railway Act. This Section lays down that the notice may be served by delivering it to the Manager or by leaving it at his office or by forwarding it by post in a prepaid and registered letter. The plaintiff has failed to prove that any notice was served on the Manager in any one of these ways nor is there any clear allegation in the plaint that any notice was served on the Manager. The evidence regarding a letter having been written to Bara Sahel is not satisfactory. Plaintiff's witness No. 4 cannot say by whom the letter was written. He has not kept a copy of that letter. He says that he sent it by post 10 or 15 days after he had attended the Saidah Railway office along with his attorney,

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one Apurva Babu. But in his examination-in-chief he says that he went with Apurva Babu to the Railway office after he had written the letter to Bara Sahab. No definite and consistent statement regarding service of notice of claim has been made by him. If he had really addressed a letter to the Manager, he would have probably kept its copy. In these circumstances I am not inclined to believe that any notice regarding claim was served on the Manager according to the provisions of Section 77 of the Indian Railway Act.

It is a fact that the plaintiff's attorney Babu Apurva Coomra Ganguly wrote on the 21st November 1898 a letter to the Supervisor of the Sealdah Goods shed making enquiries as to whether his clients claim for the loss of wax would be settled. He again wrote to the Supervisor on the 4th January 1899 saying that unless the wax in question were restored to his client, he would have the "painful necessity of putting the matter into Court." The defendant's pleader admits the genuineness of these letters. The date of delivery of the wax for carriage to Calcutta is 14th October 1898. Both these letters were written six months of this date of delivery. Another letter was written by the plaintiff's servant, Behari Lal Chowdry who is the consignee, to the District Traffic Superintendent on the 5th April 1899. In reply he was informed that the consignment was delivered to him "on clear receipt." The letter to the District Traffic Superintendent is also within six months from the date of delivery of the wax for transmission to Calcutta. In September and December 1899, the Traffic Superintendent was written to for prompt settlement of the claim regarding the loss of the goods and letters Ex K. and Ex I. These letters are not within six months from the aforesaid date of delivery.

The Government Pleader has cited the ruling reported in (*The Secretary of State for India in Council v. Dipchand Poddar*, 11 R., 21 Cal page 306) to show that notice to the Manager is necessary. The plaintiff has failed to prove that any notice was served on the Manager or any notice or letter addressed to the Shed Supervisor or District Traffic Superintendent reached the Manager within six months from the date of the delivery of the goods.

The plaintiff's pleader argues that Section 77 of the Railway Act does not apply to this case, as the goods in question have not been lost and that there was virtually a wrong delivery or conversion of the goods. It is proved that the real consignee did not take delivery of the goods, that the bill of lading was lost and that another person on presentation of the bill of lading took delivery of the goods. Of course, delivery of the goods to a person who is not really entitled to the same is a conversion of the goods. Conversion does not appear to be defined in the Railway Act. I think loss includes conversion.

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for the goods are lost to the real owner by reason of the conversion Section 77 of the Railway Act seems to be applicable to this case

The plaintiff cannot therefore maintain this action, as he has not complied with the provisions of the aforesaid Section of the Railway Act

As the suit fails on the 4th point, it is unnecessary to record any findings on the other points raised in this case. But, in order to make this Judgment complete, I briefly record my findings on these points as follows

5th point The learned Government pleader contends that the suit is barred by limitation, as it has not been brought within two years from the date of the loss of the goods. He relies on Article 30 of the Second Schedule of the Limitation Act and on the ruling reported in (*Great Indian Peninsula Railway Company v Rawsett Chand Mall and another*) I L R 19 Bom page 165. The learned pleader for the plaintiff has cited the case reported in (*Danmall v British India Steam Navigation Company*) I L R 12 Cal page 477. The facts of this case do not tally with those in the cases cited. Besides, these cases were decided when the old Railway Act IV of 1879 was in force. This Act has been repealed by Act IX of 1890. According to the provisions of Section 72 of the present Act, the responsibility of a Railway Administration for loss of goods delivered to the Administration to be carried by Railway shall, subject to the other provisions of this Act be that of a bailee under Sections 151, 152 and 162 of the Indian Contract Act. The defendant has attempted to prove that by virtue of a special contract as shown in the risk note, Ex D, he is not responsible for the loss of the goods. The claims of the nature set forth by the plaintiff are really based on contracts or quasi contracts. The plaintiff does not base his case on any allegation of loss nor does he expressly say that the defendant has committed breach of contract. But, from the plaint it appears that the goods were delivered to the Railway Administration for carriage by rail on receipt of a bill of lading and that the goods have not been delivered to the consignee. The principal terms and conditions applicable to the carriage of the goods by Railway are set forth on the back of the bill of lading. It seems that the Railway Administration accepts goods under certain conditions and terms. The present case seems to be one for breach of the conditions for delivery of goods to the real consignee and, as such, Article 115 of the Limitation Act will apply to it. Article 30 of the Limitation Act applies to private and common carriers. Government is not a common carrier, *vide* definition of common carrier in Section 2 of Act III of 1865, nor is Government a private carrier. Article 30 will not therefore apply to this case. As

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this suit has been brought within three years from the date of the loss of the goods it is not barred by limitation

6th point The plaintiff despatched the goods in question from Dacca. The goods duly reached Sealdah Station which was the place of destination. The Railway receipt, i.e., bill of lading that the plaintiff got on delivery of the goods to the Dacca Station was sent by him in an ordinary prepaid letter to the consignee. The letter did not reach him, it seems that it went into other hands. It is not improbable that certain postal officers in league with thieves or swindlers have aided the missing of the letter containing the bill of lading. However, a third person somehow got the bill of lading and presented it to the Sealdah office, once on the 19th October 1896 when an endorsement was made on it by the Register clerk of the office to the effect that the goods had not arrived. It was again presented on the following day and a certain person who signed his name in Kayeti character took delivery of the goods. It has been established by the defendant's evidence that the usual practice is to make delivery to the person who presents the bill of lading that no identification of the consignee is required by the Railway officers and that 400 or 500 deliveries are daily made and that it is not feasible to ask for identification in so many cases. The plaintiff has not, it seems, exercised due care and caution in the matter of the sending of the bill of lading to the consignee. He ought not to have sent it in an ordinary prepaid letter. I think that under the circumstances already referred to, the Railway officials are not to blame for making delivery of the goods in question in the way they have done.

The plaintiff's pleader urges that under rule 3 quoted on the back of the bill of lading the signature of the real consignee ought to have been taken by the Railway officials and that the Government is to blame for not employing a sufficient number of men, so that they may have time to insist on identification and make enquiries as to whether the real consignee takes delivery or not. But it is proved by the defendant that goods are delivered to the holder of the bill of lading and that if he falsely says that he is the real consignee there is nothing in the existing practice to prevent that. The usual care and caution that the Railway Administration takes in respect of goods seem to have been taken. Of course by the employment of a greater number of officers better care and caution can be taken. But that is not the question in this case.

The plaintiff has alleged that, after the loss of the bill of lading came to the knowledge of the consignee he told certain officers of the defendant not to make delivery to any one excepting himself. This allegation is not satisfactorily proved. The date of delivery is

the goods to the Dacca Station is 14th October 1898, corresponding to 29th Assvin 1305. The Darga Paja in 1305 took place on the 5th Kartic corresponding to 21st October 1898 and three following days. The consignee in his deposition says that enquiries regarding the goods were made on the 1st Kartic and also 3 or 4 days after that date, and that in the latter date Gabardan and Bagu Biswas were present. These two persons have been examined by Commission. Bagu Biswas says in his examination in chief that 3 or 4 days after Paja he went to Sealdah with the consignee. He then corrects his statement and says that this was 3 or 4 days before Paja. Again, in his cross examination he says that he made enquiries after Paja and at that time he came to know that the goods had not arrived. But it is a fact that the goods were delivered before Paja. That any Railway official was told about the missing of the bill of lading before the date of delivery is not proved sufficiently by the evidence adduced by the plaintiff. No letter was addressed to any Railway official regarding the missing of the bill of lading before the date of the delivery of the goods. The loss of the bill of lading which relates to goods worth Rs 786 and odd is not an insignificant thing. No prompt steps seem to have been taken for staying delivery of the goods. No telegram is said to have passed between the consignee and the plaintiff regarding the missing of the bill of lading. It is not improbable that the consignor and the consignee were corresponding with each other about the bill of lading and that in the meantime the delivery was taken by a person who falsely personated the consignee.

The defendant's pleader has urged that even if the goods had been lost on account of the negligence of the Railway Administration his client, i.e., the Government would not have been responsible for the loss as the plaintiff had signed the risk note Ex D, agreeing to hold the Railway Administration 'harmless and free from all responsibility for any loss, destruction or deterioration of the goods, under Section 72 (2) (b) an agreement purporting to limit the responsibility of the Railway Administration is to be void, if it is, otherwise in a form approved by the Governor General in Council.' The defendant's witness No 1 admits that the agreement is in form B, but that it ought to have been in form A. In the B note it is stated that, in consideration of a special reduced rate for the consignment, the risk note is signed. The defendant's witness No 1 admits that the goods in question were not sent at a special low tariff rate. The risk note is not in due form nor was it made for the consideration stated therein. The special agreement cannot therefore stand.

What has been already found shows that the delivery was made to the holder of the bill of lading in conformity with the existing

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practice of the Railway office The freight for the goods was unpaid
The holder of the bill paid that and got delivery I don't think the
defendant can be held responsible

The result is that the suit be dismissed with costs bearing interest
at 2 per cent per annum till realisation

Case No. 24.

In the Court of the Additional Judicial Commissioner
in Sind.

Suit No 154 of 1906

THE DELHI AND LONDON BANK, LTD, (PLAINTIFF)

v

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,
(DEFENDANT)

1907
March, 4

*Railway Administration, liability of—Wrongful delivery of Goods—Railway
Receipts—not instruments of title—Effect of endorsement—Not negotiable—Right of the endorsee to sue*

In a suit against the defendant Railway Administration for compensation for wrongful delivery of goods to the consignees without production of Railway receipts which had been deposited to the plaintiffs having been endorsed in their favor as security for money advanced the suit was dismissed on the ground that the Railway receipts are not instruments of title and they are not negotiable that the assignment and endorsement of the receipts did not place the plaintiffs in immediate contractual relations with the defendants and so enabled to sue on the original contract evidenced by the receipts

JUDGMENT —On the application of the defendants, the following further issue was raised, viz —

5 Can plaintiffs as such assign receipts? And as much as a finding on this issue against the plaintiffs would necessarily involve the dismissal of the suit, arguments were heard on it before proceeding further Since the hearing of arguments, the plaintiffs have put in an application praying that they may be allowed to rely on the correspondence between the parties and the conduct of the defendants, as establishing priority of contract, and as estopping defendants from pleading that plaintiffs had no cause of action against them, and to make necessary amendments in the plaint, and also to

add in it a prayer for relief in the alternative against the defendants for damages by reason of their misdelivering the goods

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Prior to the amendment of the issues the evidence of Mr Rose, the Manager of the Karachi branch of the Delhi and London Bank, had been taken and practically all the documents relied on put in. In connection with the plaintiff's application, the evidence of the District Traffic Superintendent, the Station Master and the delivery clerk has been taken

The questions which I am now called on to decide are, whether plaintiffs have any right of action against the Railway Administration on the grounds set forth in the plaint, even if they be permitted to rely on the correspondence and the conduct of defendants as establishing priority of contract or as creating an estoppel, and whether plaintiffs can be permitted to so amend the plaint as to claim damages as for misfeasance

The material facts as disclosed by the evidence on the record are as follows. Harnam Singh and Co, who are now insolvents, formerly carried on a large business in Indian produce. By an arrangement with Messrs Donald Graham and Co, of Karachi, all produce consigned to Karachi from up country by the North West Railway was forwarded to a private siding of this firm known as 'Graham's Siding' and when unloaded was stored in godowns belonging to the firm. Harnam Singh and Co being unable to obtain all the financial assistance they required from Graham and Co, commenced in May 1905 to borrow from the Delhi and London Bank. The Bank used to advance money against goods in transit on deposit of the relative Railway receipts. The Railway receipts on being deposited were ordinarily endorsed in Bank. On the arrival of the goods Ramj Dass, Manager in Karachi of Harnam Singh and Co used to obtain the Railway receipts from the Bank on giving an acknowledgment in the form of Ex 30, which runs thus —

Received from Delhi and London Bank, Limited, Karachi, the following Railway receipts, goods of which have arrived at Graham's Siding

(Here follows numbers of receipts)

(Sd) RAMJIDASS,

Manager, Harnam Singh and Co

Mr Rose seems to have been under the impression that goods were never handed over by the Railway until the Railway receipts were produced. But the evidence of the Station Master and the delivery clerk shows that the goods addressed to the siding of an European office are always and for the last 20 years, always have

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been delivered without production of the receipts. It is probable that in every case, when Ramji Das went to the Bank to obtain a particular lot of receipts, the relative goods had already been delivered or were in process of being delivered. Having obtained the receipts, Ramji Das used to pay the freight out of the money already advanced. The goods were opened, aired, rebagged and placed in one or more of the godowns put at the disposal of Harnam Singh and Co., by Messrs Graham. These godowns were locked and the keys were handed over to the Bank, who released the goods only on receiving the amount advanced against them.

The Bank hold a letter of hypothecation, dated the 23rd May 1903 which purports to evidence an agreement relating to the pledge of produce for the security of any advances that may be made from time to time. This document is not mentioned in the plaint and the claim in suit is in no way based on it. It has not been relied on in argument. It requires therefore no further notice.

On the 6th February 1906, the Bank advanced to Harnam Singh and Co., the sum of Rs 31,000 against 2,844 bags of which 2400 in respect of which the suit is brought formed part. The Bank also advanced further sums on the same and the following days against other goods. By way of security for the advances made on these two days, 22 railway receipts were deposited, of which 14 related to the 2450 bags. Contrary to the usual practice, these receipts were especially endorsed, that is to say, over the signature of Harnam Singh and Co., the words "Deliver to the order of the Delhi and London Bank, Limited" were impressed with a rubber stamp. Contrary also to the usual practice the Manager of the Bank wrote on the 8th February to the District Traffic Superintendent, requesting him not to deliver any of the goods relative to the 22 receipts except on production of the receipts with the Bank's endorsement thereon and stating that they were holders for value of the receipts. This letter was received in the office of the District Traffic Superintendent on the same day at 13-20, its contents were almost immediately made known to the Station Master, who issued orders that all waggons covered by the 22 receipts should be stopped. It was ascertained however that all of them had already been delivered at Graham's Siding.

In the afternoon of the same day, the Bank wrote a second letter to the District Traffic Superintendent, in these terms (Ex. 31)

DEAR SIR,

With reference to our letter of date, kindly arrange for the goods referred to therein to be unloaded at the usual unloading Railway

yard, as there is not sufficient godown accommodation at Graham's Siding. Please advise us of all arrivals.

Yours faithfully,

(Sd) W C ROSE,

Manager

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This letter was received at the Traffic Superintendent's office at 17-15 or 18 15. On the following morning the Assistant District Traffic Superintendent sent a copy of the Bank's letter to the Station Master with orders to carry out the instructions (Ex 38) and replied to the Bank as follows —

DEAR SIR,

With reference to your letter dated 8th February 1906, I beg to inform you that the Station Master, Karachi City, has been asked to unload the consignment if the Railway receipt is presented complete in every respect.

Yours faithfully,

(Sd) I S SCOTT,

for District Traffic Superintendent

In the course of the same day, the 9th the Station Master wrote officially to the District Traffic Superintendent informing him that the waggons now in dispute had been already delivered (Ex 39). It is clear that Ex 6 was a reply to the Bank's second letter (Ex 34) and that, at the time of writing it the District Traffic Superintendent had not received the Station Master's letter.

On the 10th, Mr Rose learnt that the goods relative to the 14 receipts were in possession of Grahams. On the 13th he called on Captain Freeland, the District Traffic Superintendent who at his request, wrote to Messrs Graham and Co, as follows — (Ex 9) 'The Agent, Delhi and London Bank, desires me to request you to hand over to him the following goods which have been delivered to you at your godown by mistake, and the Railway receipts of which are endorsed in his favour, I shall be obliged if you will kindly comply.' To this Messrs Graham and Co replied (Ex 13) that delivery had been taken by Messrs Harnam Singh and Co and that they should be requested to do the needful. Reference was then made to Harnam Singh and Co, whose manager gave the Railway a letter addressed to Messrs D Graham & Co requesting them to hand over the goods to the Station Master. On the 17th February Captain Freeland wrote to Messrs D Graham and Co as follows —

DEAR SIR,

In reply to your letter of the 16th instant I beg to inform you that I have referred the matter to Harnam Singh and Co and I enclose their authority to hand over the goods to the Railway.

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I depute the Station Master, Karachi City, to take over the goods and request that you will allow him to do so on Monday morning February 19th

I would again remind you that you have placed obstacles in the way of my delivering these goods to the rightful consignee and have refused to allow the goods to be removed from your godowns, in spite of the fact that the Railway receipt was produced duly endorsed

I shall therefore hold you entirely responsible for any claim that may hereinafter arise and I beg to inform you that the question of delivering any goods whatever into your sidings in future prior to production of the Railway receipts and payment of freight will be considered

At the same time, a letter (Ex 18) was sent to the Bank informing them that it was proposed to hand over the consignment to them on the 19th February

Messrs D Graham and Co, however, refused to give the goods up, and on the Bank's claiming the value of the goods from the Railway the District Traffic Superintendent wrote as follows —(Ex 23)

In reply to your letter of the 13th March, I beg to refer you to Harnam Singh and Co, to whom the consignments were delivered in good faith by the Railway and whose receipt is held for them

The "Merchants Siding Tally Book" has been produced in Court and from that it appears that one Gulabrai said by the delivery clerk to have been a Mehta of Harnam Singh and Co installed the book in token of having received delivery of all the goods in dispute. The delivery clerk has deposed that delivery was given in the usual course at Graham's Siding to Gulabrai, as representing Harnam Singh and Co. It has been proved beyond reasonable doubt by the evidence of the delivery clerk and the Station Master that all goods relative to the 14 receipts were delivered at Graham's Siding before noon on the 8th February. It has not been yet shown in evidence under what circumstances Messrs Graham and Co got possession of the goods, but Mr Dipchand has, on their behalf, stated that they received the goods from Harnam Singh and Co, having a framed money against them and having no notice of the Bank's claim when they took the goods

The plaintiffs rely on the following allegation in their plaint as establishing a cause of action against the Railway

(a) The Railway received from Harnam Singh and Co 2450 bags of rapeseed to be carried to Karachi and delivered to Harnam Singh and Co on payment of freight and pressed to them 14 full way receipts

(b) Hanuman Singh and Co assigned the said Railway receipts for value by way of pledge to the plaintiff

(c) The railway receipts are in law, as also under custom and usage, documents of title representing goods, the property in which passes to the consignees or holders

(d) As assignees of the Railway receipts plaintiffs were entitled to demand and receive from the Railway the said goods on payment of freight

(e) On the 12th February the plaintiff tendered freight produced Railway receipts and demanded delivery but defendants failed to give delivery

It is to be noted that there is no mention in the plaint of the letter of hypothecation no allegation that there was an equitable mortgage or that there was attachment by the Railway, or a *notatio* effected or that there were circumstances creating an estoppel or that there was on the part of the Railway a misfeasance that is, an active wrong doing as opposed to a mere nonfeasance a breach of contract. The plaintiffs date the cause of action on the 19th February, when defendants failed to give delivery, not on the dates when the Railway gave delivery. They claim the full value of the goods as being their value not as damages for a wrong done. The plaintiffs have, in fact, based their suit on the special contract, which is alleged to have been affected between the Railway and themselves by the transfer of the receipts. Though the application recently filed by the plaintiffs suggests that there were inadvertent omissions from the plaint, a consideration of the difficulties, which must have presented themselves when the plaint was being drafted, leads me to suppose that the very able and experienced pleader who is responsible for the conduct of the plaintiffs' case, has not omitted anything which could have materially advanced his clients' interests.

Mr Tekchand has in argument contended that railway receipts are "Mercantile documents of title" that even if they are not "instruments of title" under Section 103, Contract Act as held in *G I P Railway v Hanuman Dass* (I L R 14 Bom 57), they are nevertheless documents showing title to goods within the meaning of Section 108 and that assignment of the receipts operates to transfer the property in the goods to which they relate. He contends that the Railway is obliged by law to withhold delivery of goods until the receipt is produced arguing that the words "May withhold delivery" of Section 57 Indian Railways Act have a mandatory force that the assignees of the receipts are in law the consignees and that the Railway are bound to deliver to them and to no one else that their contract could not be fulfilled even by delivery to Hanuman Singh and Co. He offered to produce local Bank Managers and local

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Managers of large European firms to prove that there was a custom to treat Railway receipts as documents of title on the strength of which money could be borrowed

He referred to *Eagleton v E I Railway Co*, 17 W R 532, *Coventry v C E R Co*, 11 Q B D 776, *Seton Laing v Loforal*, 1 G Q B D 68 Bristol and *West of England Bank v Midland Company*, (1891) 2 Q B 653, *G I P Ry v Hanmandas Ramkishan*, 1 L R XIV Bom 57, *Velu Harji v Bharmal Shripal*, 1 L R XXI, Bom 287, *Jethmal v B B and O I Railway*, 3 Bom L R 260, *Mekean v McJor*, L R 6 Ex 36, *Brown v Manchester Railway Co*, 10 Q B D 200 *Cork Distilleries Co v Great Southern Railway* and *Joggomohan v Mamchand* 7 M I A S to the nature and amount of evidence necessary to establish a mercantile usage. He also referred to the English Factors Act 1689, Act II of 1920, and Angell on Carriers pp 286, 290 and 364

Let us first consider what the Railway receipts given in this case intrinsically are. If any one desires to consign goods from up country by the N W R, he must fill up a Consignment Note which is in effect a request to the Railway to receive and forward certain goods therein specified to the person and station therein named. In the ordinary course, the mere acceptance of the goods with their Consignment Note by the Railway would effect a complete contract to carry and deliver. But the Railway give notice on the back of the Consignment Note, that they will not be accountable for any articles unless a receipt is given for them. The receipts exhibited in this case contain the following statement, partly printed and partly written —

Received from Harnam Singh and Co the undermentioned goods for conveyance by goods train to same at Kanich City station off Grahm's Siding

At the back of each receipt is printed a notice containing eleven clauses of which No 3 runs thus —

3 That the Railway receipt given by the Railway Administration for the articles delivered for conveyance must be given up at destination by the consignee to the Railway Administration or the Railway may refuse to deliver and that the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery

If the consignee does not himself attend to take delivery, he must endorse on the receipt a request for delivery to the person to whom he wishes it made and if the receipt is not produced the delivery of the goods may, at the discretion of the Railway Administration be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the Railway Administration

The contract by the Railway, as evidenced by these receipts, was to deliver the goods to Harnam Singh and Co, at Graham's Siding in Karachi in the usual or ordinary course of delivery (see *Macpherson's Law of Indian Railways* p 196). There is no undertaking given or statement made, that the Railway will not deliver except on production of the receipt, and the duty to carry and deliver can be fulfilled even though the receipt be never produced at all. No doubt the person who tenders a receipt in proper order is ordinarily treated as entitled to delivery, unless the goods be stopped or there be other good reason. But it is clear from the terms of Section 57 of the Railway Act, and of the third clause of the notice, that the position which the Railway take up and are legally entitled to take up, is that if the receipt is not forthcoming they may refuse delivery even to the consignor until an indemnity has been given. It is clear, also, that the authority to refuse delivery until production of the receipt is conferred on the Railway for their own protection for, if they gave delivery to a person having no claim to the goods, they would be responsible to the person really entitled to them, and it is impossible to construe "may withhold" on the ground that the authorisation is for the good of others, or for the public good as Mr Tekchand would have me do. The Railway receipt, then is intrinsically a receipt, and nothing more. It is not the contract though it is evidence of the contract. It is documentary evidence against the Railway of liability, and as a precaution in their own interest they may, when they discharge their liability under the contract insist that the evidence of their liability do not remain outstanding.

But have these Railway receipts by law or by custom, a value which does not intrinsically attach to them? Now it is quite certain that a Railway receipt, in the form at present in use with the North-Western Railway, is not a negotiable instrument. The goods do not even purport to be deliverable to order or to order or assigns and it is doubtful whether even a bill of lading wherein these words are omitted is a negotiable instrument. (See *Henderson and Co v. The Comptoir D'Escompte de Paris*, L R 5 P C 203.)

But Mr Tekchand, while repudiating for it any claim to be a negotiable instrument contends nevertheless that a pledge of a railway receipt is equivalent to a pledge of the goods and that a transfer of the receipt transfers the property in the goods and the right to sue in respect of them and he relies on the analogy of a bill of lading.

We will make the extreme assumption that the receipt has all the qualities which a bill of lading possesses apart from special registration. There is no view more favourable to the plaintiff than that I can take of it. But the endorsee of a bill of lading even though he be vested with the full ownership of the goods has none of the rights of

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contract of the original shipper or owner, apart from the Bills of Lading Act (See *Houard v Shepherd*, XIX L J C P, 240 and *Thompson v Doming*, 14 L J N S Ex 320, and the Preamble to Act IX of 1856) a pledgee to whom the full ownership of the goods has not passed but only the special property of a pledgee, has no right of suit even under the Bills of Lading Act (*Bardick v Sewell*, 10 A C 74) and there is no authority whatever for contending that by a mere pledge of a bill of lading, or by its endorsement the property in the goods necessarily passes. The property in the goods never passes except where there is an intention to pass it, and such an intention cannot be presumed where the transaction intended to be effected is a pledge only (see Scutton Bill of Lading page 142). The evidence of *Mr Rose* makes it clear that there was no intention that the Goods should on the deposit and endorsement of the receipts become the property of the bank. The plaintiffs cannot therefore, establish a right of suit as on the contract to carry and deliver, by appealing to the analogy of a bill of lading.

Again, we will assume that the receipt is a document showing title to goods within the meaning of Section 108 Indian Contract Act and a "document of title to goods" within the meaning of Section 178. What then, is the effect of taking an advance against it and endorsing and pledging the relative documents of title not being actually bills of lading? In England under the Factors Act 1899 a pledge of the documents of title to goods is deemed to be a pledge of the goods but the definition of 'pledge' under that Act is not strictly comprehensive and includes "Any contract pledging or giving a lien or security on goods." There was a similar provision in the old Indian Factors Act (XX of 1844), but this Act has been repealed by the Indian Contract Act. Under Section 108 of the Contract Act a person, who is by the consent of the owner in possession of any document showing title of goods may transfer the ownership of the goods to which such document relates, to a buyer acting in good faith and without notice. Under Section 178 a person in possession of a document of title to goods may make a valid pledge of such document, but there is no provision that by the pledging the document of title he is to be deemed to pledge the goods. Having regard to the definition in the Contract Act of 'pledge' as the pledging of goods as security for payment of a debt (Section 172) it is physically impossible to "pledge" goods that are still in transit for a bailment cannot be effected without putting the bailee in possession of the goods. All that a person borrowing money can do is to promise to pledge such goods or to create a charge on them by way of mortgage or equitable mortgage. It may be assumed for the purpose of the present case that a good equitable mortgage was effected on the goods. But the promise to

pledge goods of the creation of an equitable mortgage on them does not transfer the property in them (*Seuall v Bardick*, 10 A C 74 p 96, Ghose Mortgages 3rd Edition 372) nor does it transfer possession, nor does it in any way shatter the contractual relations between the Railway and the consignee. The bank has possession of, and control over, the receipts, the receipts are pledged. But before the goods can become then property, they must foreclose before they can be pledged of the goods or be in possession of them they must obtain delivery, the Railway must attorn to them before they can be even in constructive possession of the goods, (*Coventry v Gladstone* L R 6 Eg 44) they must effect a complete *novatio* before the liability to deliver is transferred from the consignee to themselves. The mere pledging of the railway receipts even supported by an equitable mortgage of the goods can give no right to the Bank to sue the Railway for non delivery of them.

But special reliance is placed on the fact that the receipts were assigned and endorsed over to the Bank it is in fact, a delivery order. A delivery order, even if communicated to the Railway, would not of itself establish contractual relations between it and the Bank (*Gryffiths v Peery*, 28 L J Q B 205). For though the Railway can fulfil then contract by giving delivery to a person presenting a receipt endorsed in his favour such person in demanding delivery exercises a right, not his own but of the person with whom the Railway contracted and unless the receipt or the endorsement possesses some magic quality the mere writing of a delivery order on the back of a receipt uncommunicated to the Railway cannot accomplish a change in their liability, or alter the ownership or the possession of the goods.

This magic quality it is contended attaches to a railway receipt because it is a symbol to the goods. Now by the Law founded upon the general custom of merchants of all European countries a bill of lading is deemed to be a symbol of the goods to which it relates. He who is in possession of the bill of lading is deemed to be in possession of the goods themselves. It is a fiction, which owing to the impossibility of a purchaser or lender seeking the master of the ship when in high seas and requiring him to attorn to his rights found universal acceptance among bankers and merchants from time immemorial and was recognised as part of the law. It is to this fiction that the bill of lading owes its very special qualities. But up to 1877 English Courts of appeal resolutely refused to recognise any other document of title whatsoever as having this special quality, notwithstanding that for three quarters of a century the merchants of London were declaring that they treated dock warrants warehouse certificates and similar documents as symbols of the goods and special juries insisted on giving verdicts in accordance with this view.

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(See Benjamin on Sales 2nd Edition 677) By the Factors Act 1877 all documents of title to goods were apparently put on terra cuncta with bills of lading so far as stoppage in transit was concerned, though it is doubtful how far the legislature has really succeeded in interfering with the position of the bill of lading as the only symbol of goods while in transit (See Scrutton Bills of Lading p 157) But this Act has never been applied to India and it has been held by Sir Charles Sergeant in the case of *G I P Railway v Hanmandas*, (1 L R XIV Bom 57) that Railway receipts in India are not symbols of the goods. No authority can be produced to justify my holding that Railway receipts have in this country received legal recognition as symbols of the goods to which they relate.

Mr Telchand has however offered to produce evidence of local bankers and merchants to show that Railway receipts are in Karnata treated as representing the goods. I have considered it unnecessary to hear this evidence for the following reasons. In the case of *G. I P. Railway v Hanmandas*, there was an actual finding by the Small Cause Court that the receipts of the Railway concerned were in Bombay considered as representing the goods and as entitling the last endorsee to delivery. The form of receipt in that case contained these words, "This receipt must be produced by the consignee or the goods will not be delivered." But in spite of this finding of fact and of the emphatic declaration by the Railway, Sir Charles Sergeant refused to give in to the alleged custom on the face of law. In England, as already mentioned, the Courts, in face of what appears to have been overwhelming evidence of custom, persisted that bills of lading were the only documents of title that were in law symbols of the goods. They evidently regarded the question as something more than one of local custom and they left it to the legislature to deal with. The question involved in this case does not concern merely the local merchants and bankers, it concerns every person who comes into contact with Karnata from any part of India and it is to the Imperial Legislature and not to the law courts that appeal must be made. It would be little less than ridiculous for me, sitting here as a District Judge to hold that an important change in the law affecting all India has been accomplished by the action of a few members of the local mercantile community.

I will now consider the further points raised by Mr Telchand in his application. He contends, in the first place, that the correspondence between the parties and the conduct of the Railway established a privity of contract with the Bank. Before the Court can hold that such privity was established it must find that the Railway in consideration of Harnam Singh & Co releasing their rights under the contract, definitely agreed to deliver to the Bank. So far as the goods in suit are concerned, there is no evidence upon which the Court

could have such a finding. It has been proved that the Bank's request to the Railway to return to them arrived too late for the Railway to accede to it, the goods had already been delivered. All that the Railway did was to express their willingness to do all in their power to get the goods back from Graham and Co. and then to hand them to the Bank. But these services were not offered in fulfilment of the original contract, but with a view to remedy what the Bank alleged to be and the Railway apprehended might be a breach of contract.

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Nor does the conduct of defendants establish an estoppel. Though Captain Freeland did act for several days as if he recognised the Bankers' right to call on the Railway to recover the goods from Graham's and give them delivery it is not alleged that the Manager of Bank did or omitted to do anything in the belief that the Railway were responsible.

Lastly, Mr. Tekchand would have his plaint so amended as to claim damages for misdelivery, i.e. he would have the suit treated as being in the alternative in tort. Having regard to the fact that the Court refused to join Messrs. Donald Graham and Co. as defendants because the suit was not in tort it would be improper to now allow an amendment such as asked. But there is clearly no case in tort. The Bank were never owners of the goods and the Railway never owed any duty to them other than such as was included in the contract with Harnam Singh and Co., whatever the rights the Bank had were rights transferred to them by Harnam Singh and Co. and were purely contractual rights and the obligation of the Railway under the contract was their only obligation. An action, which in substance depends upon a breach of contract, cannot be brought by any person not a party to the contract even though it be presented in the form of an action for tort. If the Bank cannot prove that property of contract with the Railway was completely effected they have no ground for claiming relief (See *Hua v. Sheikh* 1 A.L.J. C.P. 24, pp. 254-255 Pollock on Torts 6th Edition 516 Decey on Parties pp. 20 and 370 and *Earl v. Lubbock* (1905) 1 K.B. 253 p. 256).

It remains only to distinguish such of the cases relied on by Mr. Tekchand as appear to justify plaintiff's suit. In *Bristol and West of England Bank C. v. Midland Railway* 2 Q.B. 1891 653 the plaintiffs were found to be the owners of the goods, they were also endorseees under bills of lading and also consignees to whom the Railway had undertaken to give delivery. In the case of *Egleton v. East India Railway C.* XVII W.R. 532 the plaintiffs were held to have a right of suit because they were owners of the goods, it having been found that the goods had been consigned to them with the intention of passing the property to them. In *Cootney v. G.E. Railway* Q.B.D. 776 the Railway Co. issued two separate delivery orders for the same goods and it was held that they were estopped

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from denying that there were two separate lots. In *Seton & Co v Inford*, 19 Q B D 68, the defendants, who were wharfingers, had wrongly parted with the possession of the goods but nevertheless represented that the goods were still in their possession. It was held that they were estopped from denying that they had possession of the goods as against the plaintiffs, who had purchased in reliance on their representation. In *Velpi Huzar v Bhuramal Shrivastava*, 1 L R 21, Bom 287, it was held that the consignee of goods who had made specific advances against them, and held the Railway receipts, had a better claim to the goods than a creditor or consignor who sought to attach them. In *Jethmal v B B and Co*, 1 L R 3 Bom L R, 260, it was held that the Railway were estopped from denying that the goods appearing in the receipt had been received by them. None of these rulings is an authority for contending that the circumstances of the present case give plaintiffs a right of suit.

I have now, I believe considered not only every plea put forward in the plaint, but every plea that has since been suggested by Mr Tekchand as possibly establishing a right of suit. To sum up. The receipts issued by the North Western Railway are receipts and only receipts. They are not negotiable instruments, they are not symbols of the goods to which they relate. When Harnam Singh and Co borrowed money against the goods and deposited the receipts they were thereby pledged and an equitable mortgage payable created on the goods (See *Ghun v Bolehow Vaughan & Co*, L R 10 Ch 491, p 502). The Bank obtained a limited control over the delivery of the goods, a control, which by timely notice to the Railway might have been strengthened into complete security. But the Bank were not, by virtue of their specific advance against the goods, or by the assignment and endorsement of the receipts placed in immediate contractual relations with the Railway and so enabled to sue on the original contract evidenced by the receipts. They obtained no right of action otherwise, for such rights as they had were merely detached from the general contractual rights possessed by Harnam Singh and Co. They did not become owners of the goods or pledgers of the goods nor were they put in possession of the goods actually or constructively.

I have made no definite finding as to the existence of an equitable mortgage, as this is a matter which may be in litigation between the Bank and other persons not parties to this suit.

As I have found that the plaintiffs have no cause of action against the defendants I have no alternative but to dismiss the suit.

The suit is dismissed. Plaintiff will bear all costs.

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In the Court of the District Judge, Nadia.

MONEY DEBT No 70 of 1909

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(DEFENDANT), APPLICANT,

v

ROSTON ALI RISVAS (PLAINTIFF), RESPONDENT

Loss of Goods—Damage by fire—Burden of proving negligence

The plaintiff sued the defendant for compensation for the value of a consignment of Jute damaged by fire while in transit. A decree was given for the plaintiff as the defendant failed to prove that the damage was not caused through his negligence. On appeal by the defendant the Lower Court Judgment was confirmed.

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JUDGMENT.—Plaintiff sued for damages for loss of Jute consigned to the E B State Railway for conveyance to Calcutta on 17th October 1907. The defence was that the Jute though received in an apparently dry condition must in reality have been damp as the Jute while in the Railway wagon and under conveyance was damaged and nearly all of it consumed the next day by fire, the result of spontaneous combustion. The loss or damage of goods delivered to a Railway Administration is under Section 76 Railways Act, *prima facie* evidence of negligence and the burden of proof, therefore, to disprove negligence lies on the Administration. In this case the Railway Company have given no evidence that their suggestion of spontaneous combustion is anything more than a theory and they have given no evidence of the condition of the wagon at or about the time at which the Jute was conveyed in it.

The evidence as to the condition of the wagon is as to its condition some ten months after the occurrence. The evidence shows that the fire when discovered was at the top of the Jute, and I think it is not an unfair inference that a spark from the engine must have found its way into the wagon and set the Jute on fire. The condition of the Jute when taken charge of was, admittedly, to all appearance dry.

Under the circumstances the burden lay heavily on the defendants to free themselves from liability for its loss.

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from denying that there were two separate lots. In *Selon Laing v. Inford*, 19 Q B D 68, the defendants, who were wharfingers, had wrongly parted with the possession of the goods but nevertheless represented that the goods were still in their possession. It was held that they were estopped from denying that they had lost a sum of the goods as against the plaintiffs, who had purchased on their representation. In *Polk Hurst v. Marumid Shripal*, 1 L R 21, Bom 287, it was held that the consignee of goods who had made specific advances against them, and held the Railway receipt had a better claim to the goods than a creditor or consignee who sought to attach them. In *Jithmal v. B. B. and C. I. Railway*, 3 Bom L R, 260, it was held that the Railway were estopped from denying that the goods appearing in the receipt had been received by them. None of these rulings is an authority for contending that the circumstances of the present case give plaintiffs a right of suit.

I have now, I believe, considered not only every plea put forward in the plaint but every plea that has since been suggested by Mr. Tekchand as possibly establishing a right of suit. To sum up: The receipts issued by the North Western Railway are receipts and only receipts. They are not negotiable instruments, they are not symbols of the goods to which they relate. When Harnam Singh and Co. borrowed money against the goods and deposited the receipts they were thereby pledged and an equitable mortgage probably created on the goods (*Sao Ghanu v. Bilekar Vaughan & Co.*, L R 10 Ch 491, p 502). The Bank obtained a limited control over the delivery of the goods, a control, which by timely notice to the Railway might have been strengthened into complete security. But the Bank were not, by virtue of their specific advance against the goods, or by the assignment and endorsement of the receipts placed in immediate contractual relations with the Railway, and so enabled to sue on the original contract evidenced by the receipts. They obtained no right of action otherwise for such rights as they had were merely detached from the general contractual rights possessed by Harnam Singh and Co. They did not become owners of the goods or pledgers of the goods nor were they put in possession of the goods actually or constructively.

I have made no definite finding as to the existence of an equitable mortgage, as this is a matter which may be in litigation between the Bank and other persons not parties to this suit.

As I have found that the plaintiffs have no cause of action against the defendants I have no alternative but to dismiss the suit.

The suit is dismissed. Plaintiff will bear all costs.

Case No 25

In the Court of the District Judge, Nadia.

MONEY APPEAL N 70 of 1909

SECRETARY OF STATE FOR INDIA IN COUNCIL

(DEFENDANT), APPLICANT,

v

ROSTON ALI BISVAS (PLAINTIFF), RESPONDENT

Loss of Goods—Damage by fire—Burden of proof—Negligence

The plaintiff sued the defendant for compensation for the value of a consignment of Jute damaged by fire while in transit. A decree was given for the plaintiff as the defendant failed to prove that the damage was not caused through his negligence. On appeal by the defendant the Lower Court Judgment was confirmed.

JUDGMENT—Plaintiff sued for damages for loss of Jute consigned to the D B State Railway for conveyance to Calcutta on 17th October 1907. The defence was that the Jute though received in an apparently dry condition must in reality have been damp as the Jute while in the Railway wagon and under conveyance was damaged and nearly all of it consumed the next day by fire, the result of spontaneous combustion. The loss or damage of goods delivered to a Railway Administration is under Section 76, Railways Act, *prima facie* evidence of negligence and the burden of proof, therefore, to disprove negligence lies on the Administration. In this case the Railway Company have given no evidence that their suggestion of spontaneous combustion is anything more than a theory and they have given no evidence of the condition of the wagon at or about the time at which the Jute was conveyed in it.

The evidence as to the condition of the wagon is as to its condition some ten months after the occurrence. The evidence shows that the fire when discovered was at the top of the Jute, and I think it is not an unfair inference that a spark from the engine must have found its way into the wagon and set the Jute on fire. The condition of the Jute when taken charge of was, admittedly, to all appearance dry.

Under the circumstances the burden lay heavily on the defendants to free themselves from liability for its loss.

The Delhi
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from denying that there were two separate lots. In *Selom Lai v. Jaford*, 19 Q B D 68, the defendants who were warehousemen had wrongfully parted with the possession of the goods but nevertheless represented that the goods were still in their possession. It was held that they were estopped from denying that they had possession of the goods as against the plaintiffs who had purchased on their representation. In *Lohji Harji v. Bhawanil Shrivast* 1 L R 21, Bom 287, it was held that the consignee of goods who had made specific advances against them, and held the Railway receipts had a better claim to the goods than a creditor or consignor who sought to attach them. In *Jethmal v. B. B. and C. I. Ry.* 3 Bom L R, 260, it was held that the Railway were estopped from denying that the goods appearing in the receipt had been received by them. None of these rulings is an authority for contending that the circumstances of the present case give plaintiffs a right of suit.

I have now, I believe, considered not only every plea put forward in the plaint but every plea that has since been suggested by Mr. Titchand as possibly establishing a right of suit. To sum up. The receipts issued by the North Western Railway are receipts and only receipts. They are not negotiable instruments, they are not symbols of the goods to which they relate. When Harnam Singh and Co. borrowed money against the goods and deposited the receipts they were thereby pledged and an equitable mortgage probably created on the goods (*Sco. Ghun v. Ryel. v. Laupham & Co.*, L R 10 Ch 491, p. 502). The Bank obtained a limited control over the delivery of the goods, a control, which by timely notice to the Railway might have been strengthened into complete security. But the Bank were not, by virtue of their specific advance against the goods or by the assignment and endorsement of the receipts placed in immediate contractual relations with the Railway and so enabled to sue on the original contract evidenced by the receipts. They obtained no right of action otherwise for such rights as they had were merely detached from the general contractual rights possessed by Harnam Singh and Co. They did not become owners of the goods or pledgers of the goods nor were they put in possession of the goods actually or constructively.

I have made no definite finding as to the existence of an equitable mortgage, as this is a matter which may be in litigation between the Bank and other persons not parties to this suit.

As I have found that the plaintiffs have no cause of action against the defendants I have no alternative but to dismiss the suit.

The suit is dismissed. Plaintiff will bear all costs.

Case No 25

In the Court of the District Judge, Nadia.

MONETARY APPEAL No 70 of 1909

SECRETARY OF STATE FOR INDIA IN COUNCIL

(DEFENDANT), APPLICANT,

v.

ROSTON ALI BISVAS (PLAINTIFF), RESPONDENT

*Loss of Goods—Damage by fire—Burden of proving negligence*1909
July 20

The plaintiff sued the defendant for compensation for the value of a consignment of Jute damaged by fire while in transit. A decree was given for the plaintiff as the defendant failed to prove that the damage was not caused through his negligence. On appeal by the defendant, the Lower Court Judgment was confirmed.

THE FACTS.—Plaintiff sued for damages for loss of Jute consigned to the E B State Railway for conveyance to Calcutta on 17th October 1907. The defence was that the Jute though received in an apparently dry condition, must in reality have been damp as the Jute while in the Railway wagon and under conveyance was damaged and nearly all of it consumed the next day by fire, the result of spontaneous combustion. The loss or damage of goods delivered to a Railway Administration is under Section 76, Railways Act, *prima facie* evidence of negligence and the burden of proof, therefore, to disprove negligence lies on the Administration. In this case the Railway Company have given no evidence that their suggestion of spontaneous combustion is anything more than a theory and they have given no evidence of the condition of the wagon at or about the time at which the Jute was conveyed in it.

The evidence as to the condition of the wagon is as to its condition some ten months after the occurrence. The evidence shows that the fire when discovered was at the top of the Jute, and I think it is not an unfair inference that a spark from the engine must have found its way into the wagon and set the Jute on fire. The condition of the Jute when taken charge of was, admittedly, to all appearance dry.

Under the circumstances the burden lay heavily on the defendants to free themselves from liability for its loss.

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Upon the evidence I agree with the Munsif that they have entirely failed to do so. The appeal is dismissed with costs.

There is a cross appeal as to the freight having been deducted from the damages and the balance only decreed to the plaintiff. The plaintiff in his plaint deducted the freight from the amount of his claim. I do not think that the fact of his having been granted a slightly smaller sum as damages than he actually claimed is a sufficient ground for giving him allowance which he did not originally claim. The cross appeal is dismissed but without costs.

Case No. 26.

In the High Court of Judicature at Bombay

ORDINARY ORIGINAL CIVIL JURISDICTION

Suit No 449 of 1909 *

LAKHICHAND RAMCHAND AND ANOTHER, PLAINTIFFS,

v.

THE G I P RAILWAY COMPANY, DEFENDANTS

1911
March, 6.

Railway Company, liability of—Damage to cotton caused by fire—Duty of the Company towards the Goods consigned—Negligence—Onus of proof—Indian Railways Act, IX of 1890, Sections 72, 70—Carriers Act 1 of 1865, Section 9—Indian Contract Act, IX of 1872, Section 151

The second plaintiff delivered to the defendant Company 90 bales of full pressed cotton for conveyance to Bombay and delivery to the first plaintiff. They were despatched by a Goods train duly loaded in covered wagon. On arrival at Viramgam Station, the wagon was found to be on fire and it was detached and put on a siding. Endeavours were made to get the cotton out of the wagon and extinguish the fire. But out of 100 bales in the wagon only 37 were left in a damaged condition while the remaining bales were destroyed. They were transhipped into another wagon and sent to Bombay. The plaintiffs refused to take delivery and sued the defendant Company for the price of 90 bales entrusted to them for carriage. The suit was dismissed on the ground that the defendant Company established that they in the carriage of the consignment took as much care of it as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value and the damage could not have been caused by their negligence.

* For Judgment in appeal, see ante page 297

JUDGMENT PER ROBERTSON J—The plaintiffs in this case sue to recover from the defendants the sum of Rs 10 488 8 0, being the market price on the 17th of April 1909 of 90 bales of cotton, which were delivered to the defendant Railway Company for delivery from Malkapur to Bombay on the 3rd of March 1909. They say in the plaint that the defendants were unable to deliver the said bales of cotton and that they ultimately were informed by the defendants that the said bales had been destroyed by fire at Varangaon. They state in para 5 of the plaint that they have no knowledge as to whether the said 90 bales were really destroyed by fire, but they charge the defendants that, if the said cotton bales were destroyed by fire, the said destruction must have been due to the negligence of the servants and agents of the Company and to some act of default or carelessness on the part of some of such servants of the Company. But their main contention is as stated in the last part of para 5 of the plaint that the defendants were bound to deliver the 90 bales of cotton in Bombay in the condition in which they were entrusted to them and that in default of their doing so they were liable to make good the value of the bales to the plaintiff.

The defendants in their written statement say that 37 of the bales arrived in Bombay in a damaged condition and that the plaintiffs refused to take delivery of them. They deny that there was any negligence on the part of themselves and their servants or agents in respect of the 90 bales of cotton or that there was any default or carelessness on the part of their servants, and that the fire by which the bales were destroyed must have been occasioned by some cause which cannot be attributed to negligence, default or carelessness on their part. They subsequently deny their liability as set out in para 5 of the plaint and submit that they have taken that amount of care in respect of the said bales which is imposed upon them by law. In a supplementary written statement, they say that the 37 bales which arrived in Bombay were sold by public auction and realized Rs 3 210 10 9 and that they are willing, to pay to the plaintiffs such part of the said sum as may be found due to the plaintiffs. The 90 bales of cotton belonging to the plaintiffs were placed in a wagon along with another consignment of 19 bales of cotton belonging to another consignor. It was found impossible to distinguish to which consignor the 37 bales or any of them belonged, as the marks had been obliterated when the bales arrived in Bombay, and the defendants were therefore unable to determine what portion of Rs 3,210 10 9 belonged to the plaintiffs and what portion belonged to the owner of the other 19 bales.

At the outset of the case Mr Bunning, who appeared for the defendants, admitted that the onus of showing that the defendants had performed their duty under Section 151 of the Contract Act

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lay on him. The only issue the onus of which lay on the defendants was as to damages. I propose to deal with the question of damages after having disposed of the main questions in the case. The onus which was accepted by Mr. Binning, he defined as being that which required him to show that the defendants had taken as much care of the goods as a man of ordinary prudence would take of his own goods. He was himself unable to say on what principle the onus was thrown upon him, but he considered that the decided cases were so clear on the point that it was useless to contend otherwise. Before calling his evidence, he stated that he proposed to show that the goods had, throughout the time that they had been in the possession of the Company, been looked after by them with all due care and at the conclusion of the case he contended that the evidence on the record showed that that was so.

On the other hand, Mr. Fowles contended that the onus that was thrown upon the defendants in a case of this character could be traced through the history of the English common law as to carriers and that the legislation in India on the subject showed that as a rule until the passing of the last Railway Act all that had been done was to add additional exceptions to those available to a common carrier under the common law. He contended that a common carrier under the common law of England was an insurer of goods and that he could only escape from his liability by showing that the loss or destruction of the goods had been caused either (1) by the act of God, or in other words by an unavoidable accident (2) by the King's enemy, or (3) by the inherent defects or vice of the goods or animals carried. He suggested that the Act VIII of 1854 Section 11, only relieved the carrier from his common law liability to a certain definite extent as set out in Section 11 of that Act, that in the same way Act III of 1865 the Carriers Act by Section 8 relieved the carrier from liability for the negligence or criminal act of their servant leaving the common law liability otherwise intact. He pointed out that the decision of Sir Michael Westrop in I L R 3 Bom 109, to the effect that the law of carriers was after the passing of Contract Act determined by the provisions of that Act had been disavowed by the High Court of Calcutta in I L R 10 Cal 166, and that the view of the Calcutta High Court had been adopted by the Privy Council in the case of *The Irrawaddy Flotilla Company v. Buganilas* in I L R 18 Cal 428 the same case being reported in 18 Ind App 121. He further pointed out that the Railways Act, Act IV of 1879, Section 13 contained provisions which were intermediate between Section 9 of the Carriers Act and Section 76 of the present Act, and he further suggested that many of the expressions contained in the case to which I am about to allude regarding the onus thrown upon the carrier are to be

explained by the fact that Carrier's liability was regarded as remaining intact except as modified by the Legislature.

However that may be, it appears to me clear that under the present Act, Section 72, sub clause (3) the common law of England and the Carriers Act of 1865 can have no bearing whatever upon the responsibility of the Railway Company, because that section provides in so many words that nothing in the common law of England or in the Carriers Act 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods shall affect the responsibility as in this section defined of a Railway Administration. I do not think therefore that any good purpose would be served in referring at any length to any of the earlier Indian cases that were cited to me regarding the onus thrown upon the carrier. But coming to the later decisions, the two chiefly relied upon by the defendants were the (1) case of *Nanku Ram v The Indian Milland Railway Company* reported in I L R 22 Allahabad at page 361. In that case, as in this bales of cotton were loaded on a train for conveyance by the Railway and were burnt in transit. The two Lower Courts decided in favor of the Railway Company, but on appeal to the High Court, BAKER and ALKMAN JJ reversed the decision of the Lower Courts and held the Railway Company liable on the ground chiefly that the Lower Courts had based their decision on an entirely erroneous view as to the onus. That suit was decided in the year 1900 under the present Indian Railways Act, Act IX of 1890. In their Judgment, they say "By Section 72 of the Railways Act, the responsibility of a Railway Administration for the loss or destruction of goods delivered to it to be carried by railway is subject to the other provisions of the Act, that of a bailee under Sections 151 152 and 161 of the Indian Contract Act." They then proceed to say that the passages quoted from the learned Judges Judgment (that is, the Judgment of the Court below) show that he overlooked the important provisions of Section 76 which casts not on the plaintiff but on the Railway Company the burden of establishing the circumstances which, under Sections 151 and 152 of the Indian Contract Act would exonerate the bailee from liability. With great submission to the learned Judges who decided that case I am unable to take this view of the Section. Section 76 of the Indian Railways Act merely provides that in any suit against a Railway Administration for compensation for loss, destruction or deterioration of animals or goods delivered to a Railway Administration for carriage by railway, it shall not be necessary for the plaintiff to prove how the loss, destruction or deterioration was caused. This of course in so many words, relieves the plaintiffs of the necessity to prove how the loss occurred. But it does not impose any liability upon the carrier.

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The next and more important case is that reported in I L R 24 Calo at page 786. It is true that this case is earlier in date than the Allahabad decision and was governed by the provisions not of the Railways Act of 1890, but by the Carriers Act III of 1865. But the principles laid down by their Lordships of the Privy Council in deciding the case are no doubt of the greatest importance in considering how this case ought to be decided. The trial originally took place before Mr Justice SALE, who held that the defendants had discharged the onus cast upon them by law by showing that there was no negligence on their part. The circumstances of that case were as follows: Jute in drums to the number of 433 was delivered by the plaintiff to the defendant Company for carriage from Shernagunge to Calcutta. The goods were delivered for carriage on board a flat at Shernagunge and it arrived in Calcutta in due course and was anchored off Princep's Ghat. During the night the jute and the flat in which it was stored were entirely destroyed by fire. Mr Justice SALE decided the point entirely on the evidence which he held had satisfied him that there had been no negligence whatever on the part of the defendants. But this view did not commend itself to the Court of Appeal at Calcutta, and the Chief Justice Sir FRANCIS MACLEAN, in his Judgment at page 813, says — "The question arises whether the mere occurrence of the fire arising as I think it must be taken to have arisen, from some cause within the flat which was under the management and control of the defendants or their servants, is, in the absence of explanation by the defendants *per se* evidence of negligence. So far as the cases cited before us show there is no very express authority upon the point. Then he discusses such authorities as were available and at page 814 says "In all cases the amount of care to be taken must be proportionate to the degree of risk likely to be run." On discussing the evidence he found affirmatively that it was very clear that the defendants had been negligent not only in allowing the jute to catch fire but in having failed to have at hand proper and effective appliances to extinguish the fire when it had taken place and he finds as a fact that the ineffective condition of the appliances on board the flat for extinguishing the fire satisfied him that those precautions which an ordinarily prudent man would adopt were not taken by the defendant's servants, and this he held amounted to negligence. Mr Justice MACPHERSON says at page 819 — "The effect of the 9th Section of the Carriers Act is to make the loss of the goods evidence of negligence which the carrier must displace. The plaintiff is not required to give any evidence of negligence, and the carrier must account for the loss in such a way as to get rid of the presumption of negligence arising from it."

Section 9 of the Carriers Act is in the following terms — 'In any suit brought against a common carrier for the loss damage or non delivery of the goods entrusted to him for carriage it shall not be necessary for the plaintiff to prove that such loss damage or non delivery was owing to the negligence or criminal act of the carrier his servants, or agents' It will be noticed that these words are extremely similar to those of Section 76 of the Railway Act which governs this case. But the observations, which I have already made regarding the decision of the Allahabad High Court where they deal with Section 76 of the Railway Act, apply equally to Section 9 of the Carriers Act.

This case went on appeal to the Privy Council, and the report of their decision is to be found in I L R 26 Calc page 398, and L R 26 Ind App page 1. Before their Lordships of the Privy Council, the Respondents were not called upon to reply, and from the dates given in the margin of the report in 26 Ind App it is clear that the arguments were heard and judgment delivered at one sitting. The view taken by their Lordships of the Privy Council was that no case had been shown to alter the Judgment pronounced by the High Court of Calcutta in Appeal. But great reliance was placed by Mr Lowndes upon certain observations of Lord Morris as to the onus that was thrown upon the carrier. At page 401 of the Calcutta report, he is reported as having said — "A fire took place and it is the common case that it does not arise from spontaneous combustion. It therefore, must have arisen from some cause either external to the flat or internal in the flat. If it occurred from a fire within, it would appear that the onus is not discharged by the defendants, because they had the control of the flat. If the fire took place inside, they must have done something or other, or something must have happened on vessel inside of the flat, which led to the fire." Then after discussing the improbability of the fire having been caused by any outside agency, he proceeds at page 402 to say — "Therefore it appears that the fire must have originated from some cause inside. If the cause was inside, as has been said, the onus is not discharged, because the whole of the flat was under the control and management and care of the defendants. It is urged, therefore, that these words go to show that in the opinion of the Privy Council it was necessary for the defendants to prove what the cause of the fire was and that it was not caused by their negligence. If the decision had stopped there, this contention would have greater force, but in fact the Judgment proceeds to discuss the evidence and to find that in fact the defendants were guilty of what in the opinion of their Lordships was very distinct and positive negligence and I cannot help thinking that the observations of Lord Morris, to which I have referred, must be taken as strictly limited to the circumstances of

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that particular case, and that it was not intended to lay down any such general proposition as is contended for by the plaintiffs. Had that been intended, it is to the last degree unlikely that it would not have been clearly stated in a considered Judgment. In the report in 21 Cal 786 of the hearing before the Calcutta High Court a note is appended of the decision of Sir COMPTON PATTERSON and Justices PRATT and MACHERSON in the case of *Central Catcher Tea Company v. Rivers Steam Navigation Company*. That was a case where damage had been caused to a cargo of tea by reason of the grounding of the boat upon which it had been stored. The case was governed by the Carriers Act, and in the course of his Judgment Sir COMPTON PATTERSON says (page 791) — "It is no doubt the case that by Section 9 of the Carriers Act, the loss is evidence of negligence as against the carrier, but where, as is the case here the parties have placed all the evidence on which they rely before the Court it is for the Court to say upon that evidence whether or not the loss was caused by the negligence of the carriers or their servants. And at page 793, the conclusion of the Judgment he says — "There can, I think, be no doubt that if the burden had been upon the plaintiff to prove negligence, they would, upon this evidence have failed to discharge it and as all the evidence on which the parties rely is before us, I think that, as nothing appears to have been done which was inconsistent with due care and skill the presumption of negligence is rebutted, and the defendants are entitled to have the action dismissed."

This question of onus has been discussed in various English cases which, although none of them are precisely in point, throw some light upon the method in which all cases of this kind ought to be approached. In the case of *Nugent v. Smith*, L. R. 1 Common Pleas Div. at page 423 which is the case of a common carrier by sea Mellish L. J. says at page 441 — "It is not necessary for the carrier to prove that it was absolutely impossible for him to prevent the loss, but that it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented. In *Welford's case*, L. R. 4 Q. B., 693 it was held that the mere fall of a roll of zinc through the roof of the station platform which was being repaired was no evidence of negligence, or at any rate that it did not establish negligence on the part of the Railway Company. But in *Kearney's case* L. R. 6 Q. B. 759, it was held that the falling of a brick out of an archway built by the Railway Company and which they were bound to maintain was evidence of negligence. Again in *Scott v. London Dock Company*, 3 Hurlstone and Collins 196, where certain bags of sugar fell out of a warehouse and injured the plaintiff it was held that where the thing doing the injury was under the management of the defendants and that the accident

would not happen in the ordinary course if proper care was used, the happening of the accident was in itself reasonable evidence of want of care

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It, therefore, appears to me that it is not necessary to seek for any particular principle of law under which or in consequence of which the onus is thrown in cases of this kind on the bailee. No doubt it would be possible to imagine circumstances, where on the pleadings themselves the facts disclosed might be such as to throw the onus in the first case on the plaintiff but in such a case as this, where goods admittedly in proper conditions are delivered to a carrier and either do not arrive at all at their destination or arrive in an extremely damaged condition, it is only reasonable that the carrier, who has had them in his charge, should be called upon in the first instance to show that he has fulfilled the obligation imposed upon him to exercise in the carriage of them that degree of prudence, which can be reasonably expected of him. It would be obviously, contrary to all natural sense of justice if a carrier was to be allowed to say "It is true that the goods were delivered to me in good condition but I am unable to deliver them to you. But I decline to compensate you for their loss unless you establish against me that they were lost owing to my negligence." On the other hand it appears to me that no decision goes the length of saying that in all cases where the exact cause of the loss is unknown the carrier is necessarily liable for the loss. The true rule appears to me to be that the proof of the loss or injury ordinarily establishes a sufficient *prima facie* case against a bailee to put him on his defence. Thus, when chattels are delivered to a bailee in good condition and are returned in a damaged state or not returned at all, the law will ordinarily presume negligence to have been the cause and cast upon the bailee the burden of showing that the loss did not occur through his negligence, or, if he is unable to do this affirmatively, that at least he exercised a degree of care sufficient to rebut the presumption of negligence.

Mr Lowndes suggested that there were three views which might be taken of the liability of a bailee under each circumstances as those of the present case. First that the bailee was bound to prove the cause of the loss affirmatively and that he stated to be his contention. I have already said that I do not consider that this contention is borne out by the authorities. Secondly, he contended that the defendants must at least prove that it was impossible that the fire could be caused by their negligence and thirdly that the defendants must prove that in all matters concerning a thing bailed to them they had taken reasonable care. I have considerable doubt whether there is any real difference between the second and third of these propositions. Such difference as there is seems to me to depend

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upon the use of the word "impossible" in the second proposition. It for "impossible" is read "improbable," it appears to me that the two propositions are really identical. The second proposition as it stands involves 'be proof by the defendants of an universal negative and in such a case as this such proof is I take it absolutely impossible. For the reasons I have already given, I do not think that either of these three alternative propositions is the correct one, but that the true rule is to be found in some such proposition as that I have already set out.

It remains now to consider how the rule as I have stated it is to be applied to this case.

The defendants have laid their case very fully before the Court. They have called with one exception, with which I shall deal later on, practically everybody in their employ, who could throw any light upon the question as to whether they had acted prudently in the carriage of these goods, and Mr Lowndes in his address to the Court said that, if the first two of his propositions were not accepted by the Court then it was for him to show under the circumstances of the case where and how the defendants failed in their duty. To take the suggestions that he made in their order, I will deal first with what is known in the course of the case as the biddi theory. That theory is shortly that the cause of the fire may have been due to the carelessness of the Company's servants during the loading of the wagon.

It would be convenient here to set out shortly the history of this cotton while in the custody of the defendant Railway.

On the 3rd of March 1909 the 2nd plaintiff delivered to the G I P Railway at Malkapur 30 bales of fully pressed cotton to be carried to Bombay and there deliver to their agents the first plaintiff. The cotton was weighed and loaded at the loading platform along with 19 other fully pressed cotton bales belonging to another consignor in wagon No 15646, at some time between 5 and 7 p.m. the same evening. When the loading was finished the doors were closed and sealed according to the usual practice. After the sealing the wagon was shunted into the siding up to the dead end.

The wagon was attached the next day March 4th to the 310 Up Goods Train and left Malkapur at 1.50 p.m. It arrived at Bodwad at 2.33 p.m. leaving again at 2.55 p.m. Nothing wrong was noted about this wagon up to Bodwad, indeed the Engine Driver M Hard says his attention was drawn to this wagon by its number which reminded him of a band at Cribbage, that he learnt against it with his hand behind his back and noticed no excessive heat. At Bodwad 5 vehicles and an Incline Brake were added to the front part of the train—15646 from having been next to the Engine thus becoming 7th

On approaching Varanasi smoke was noticed coming out of the wagon, which was immediately detached and put in the S Up siding. Endeavours were made to get the cotton, which was found to be on fire, out of the wagon and to extinguish it. These efforts were not attended with any great measure of success and in the end out of the 109 bales only 37 were left in a very damaged condition. These were subsequently placed on another wagon and forwarded to Bombay, where they arrived on March 24th. The plaintiffs having refused to take delivery of them they were sold by public auction on June 13th 1910, and fetched Rs 3,210 10 9.

To return now to the suggestion that the fire may have been caused by carelessness during loading.

In dealing with this particular point, it must be remembered that if my view of the law is correct I have not to decide yes or no whether the cause of the accident was due to the carelessness of the Railway Company's servants in loading the wagon, there is absolutely no evidence that they were either careless or negligent. But what I have to see is whether the Company took reasonable precautions against their servants being careless or negligent that is to say, to see whether the Company in this particular respect behaved with prudence. I have to see whether the Company took as much care of the goods as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods hailed.

As regards all suggestions that have been made as to possible negligence or carelessness or failure of the Company to perform their duty, it is necessary to bear in mind certain general considerations.

The amount of cotton carried by the Railway Company every season is very large indeed averaging over 5,000,000 lbs per annum during the last 4 years, bringing in the gross revenue of something over a crore of Rupees to the Company and I take it that the prudence which they are bound to exercise towards that cotton generally is the prudence which would be exercised by a reasonable man desiring to place that cotton on the market for which it is destined at a cost which would enable him to make a reasonable profit on it. If this cotton is regarded as a particular consignment separately as to which there was a special obligation upon the Company to exercise special care, a different series of considerations would arise. But probably the consignors of the cotton would themselves be the first to object if such elaborate precautions were taken against fire as would render it impossible to carry the cotton at such a price as would enable it to be put on the market at a reasonable profit. For instance it is quite clear that it is possible that if a high officer and a number of highly

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paid officials were stationed at Malkapur and if the hamals employed to load the wagons were all specially selected and paid very high wages, and subjected to a very much greater and more skilled supervision the possibilities of their carelessly setting fire to the cotton would be greatly reduced, but in that case it would be necessary for the Railway Company to charge an altogether prohibitive rate for carrying the cotton. The precautions therefore the Railway Company are bound to take must be precautions reasonable under the circumstances of the case.

Applying that test it appears to me that they have done all they can to prevent carelessness in smoking and use of lights during the handling of cotton while loading. They have watchmen whose duty it is to be on the watch day and night. They have a Station Master whose duty it is, when he is not engaged with passengers to supervise the loading and unloading of the wagons at his station. They have a Foreman whose sole duty it is to supervise the loading. Their Rules and Regulations prohibit smoking on the loading platform. All the witnesses who have been called the Station Master, the Foreman and the Hamals all say that smoking is not allowed and does not take place. It appears further that a broker Raghunath, who acted as the carrying agent of the plaintiffs was present during the loading of these bales. If there had been any carelessness actually at the time of loading, there is no reason to suppose that he would not have been called to prove it or, if there had been habitual carelessness in the loading of cotton he would have been the proper person to give evidence for the plaintiffs of such carelessness. This Raghunath is described by the Foreman Vishwanath as being a person who takes goods from the station and delivers them to the consignees and he also acts for consignors sending goods to the station. He got the Railway Receipts from the Station Master on behalf of the plaintiffs in this case. I cannot see, therefore, on that state of evidence how I can find that there is any reasonable precaution which had been neglected by the Company. It is true the Station Master made a mistake when he said that there is no written rule against smoking. But I do not think that really prejudices the Company's case on this point for it would appear from that that the rule was so well known that the fact that it was contained in a book had been forgotten by the Station Master. At any rate, there is no doubt that it is in the book and the receipt of that book had actually been acknowledged in writing by the Station Master. In this connection it is not without significance that questions were put to the Foreman Vishwanath which clearly show that two hamals whom the defendants had intended to call had given information to the plaintiffs. Vishwanath says — "I know that Krishna Yessu and Sidu Sada, the latter

of whom was a mucedam of the hamals, came with us to Bombay, but I do not know where they are now" In his cross examination this question was put to him, "If the hamals say that the wagon was cleaned with sand, are you prepared to deny it" His answer was "I cannot say it was not as I do not remember" And a little further on a question was put "Is it not the fact that the bottom of this wagon was wet with oil before it was loaded?" A—"I cannot say that" Q—"If the hamals say it was wet with oil, can you deny it?" A—"Why not?" "If they say so I say they are telling an untruth" It is obvious from those questions that the information on which the cross examination was based must have been obtained from these hamals themselves. It was evidently the intention of the defendants to call them. They disappeared. They gave information to the plaintiffs, and they were not called by the plaintiffs. I cannot help drawing the inference that they were not prepared in any way to support the plaintiffs case, or if I do not go as far as that, at any rate, it is clear that the defendants intended to call them, and that the responsibility for their not being called and then evidence not being now before the Court cannot be laid on their shoulders, but should rather be laid on the shoulders of the plaintiffs. On the whole, therefore I see no reason to suppose that there was any negligence on the part of the defendants in taking precaution against fires being caused by smoking or using lights carelessly by the servants of the Company at Malkapur. The suggestion that it was carelessness not to put a notice upon the platform forbidding smoking does not commend itself to me. In all probability the hamals, for whom benefit this notice was suggested to have been put up, would not be able to read it. As to the outsiders, there is only a faint suggestion that outsiders did go to the loading platform, and there is evidence that when they did go they were turned out.

The same considerations apply to the suggestion that the fire was caused by matches used by the coolies getting in through the cotton. It is, of course, quite possible that a match did get in, but I cannot find anywhere in the cross examination of any responsible officer any suggestion that there were any possible means by which the Company could secure absolute immunity from this danger.

The next point which was made was that this fire might have been caused by friction that is, by the friction of the iron bands round the bales either against another band on another bale, or against the side or floor of the wagon causing sparks to be emitted which set fire to the bales of cotton and so caused the damage. It appears to me if this was the cause of the fire, as it may possibly have been, that it would be unfair to the Company to hold them

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liable for it. The responsibility for tying bales of cotton by iron or steel bands is with the consignor, and it has not been suggested that it would be possible so to load cotton bales in a wagon that all the chances of friction against each other or against the sides would be eliminated. Here, I use the word 'possible,' or 'impossible,' in the sense that the expense of taking such precautions would apparently be altogether prohibitive. If every bale of cotton was loaded in a wagon so as to be separated by dunnage from its neighbour, or from the side, roof or floor of the wagon and stored so that it could not be moved, the time occupied by loading would be very excessive and the cost would necessarily have to be very greatly increased. At any rate, so far as the possibilities of loading cotton so as to prevent friction is concerned, the evidence is all one way, and no evidence was called by the plaintiffs to rebut the evidence of the defendants on that point. It was not suggested that any such precautions were taken on any other Railways.

The next suggestion that was made was that this fire may have been caused by a spark from the engine, either from the funnel or from the ash pan. As to that the evidence is very voluminous and the matter was argued out in great detail. It was suggested first that the type of wagon in use for the carriage of cotton was defective. This cotton was loaded in wagon 15646 described by Mr Bell as being a covered wagon of the type A 6, the body of which is entirely constructed of iron or steel and the roof of corrugated iron. Ex 13 is a model of a portion of the roof showing how it is attached to the side of the wagon, and this shows that the corrugation of the iron roof left a hole between it and the top of the side of the wagon of a superficies of about an inch and a half square. It is through these holes that it is suggested that the spark might have entered. The responsible Officials of the Company—I particularly refer to Mr Bell, Mr Sarjant and Mr Rumbold—all asserted that they considered this particular type of wagon to be spark proof. It is obvious in one sense this cannot be so. The orifices left between the corrugated iron and the top of the side of the wagon were amply large enough to admit sparks in greater numbers, but it was contended that the overhanging portion of the roof prevented them getting in and that such draught as there was through these orifices was a draught outwards and not inwards. Elaborate experiments were made and spoken to by Prof Turner to show that this was so. But the general evidence as to these wagons satisfied me that they are used not only by the G I P Railway but by the other Railways in India for carriage of cotton, and the statistics, which were called for by the defendants, and which were embodied in a summary prepared by Mr Bell Ex 5,

show that the number of fires occurring in the case of cotton goods in wagons of this description is roughly in proportion to the number of fires in the case of cotton stored in what are called round top wagons. That is to say, there are 6,872 corrugated non-roofed wagons of this particular type in use on the G I P Railway and some 2,582 of the round top wagons, and the proportion of fires in the case of each type of wagon is just about 4 to 1 in the case of wagons belonging to the G I P Railway and of 25 to 20 in the case of all wagons running over the G I P line. There is, however, no evidence to show what the proportion is between corrugated and round topped wagons belonging to other lines running over the G I P line. No evidence was called by the plaintiffs to show that these wagons did not possess the practical protection from sparks that was claimed by the authorities called on behalf of the Railway. On the other hand, the Railway witnesses were all agreed that the ventilation afforded by the opening in the corrugation was a distinct advantage although in some wagons of a later type these corrugations have almost entirely been filled up. That was done, they said, because the new wagons were made broader than the old wagons and the amount of the roof left projecting was not sufficient to enable the roof to be bound firmly to the top of the wagon without the use of a steel band inside which steel band almost entirely closed these orifices. There is no doubt that this part of the case presents considerable difficulty because though the expert evidence called on the part of the Company certainly shows that those best entitled to an opinion considered that these wagons are practically spark proof it is impossible to disregard the fact that there are these numerous openings, amounting to 120 in all, from which sparks might find their way into the wagon. But in the absence of any evidence on the other side, I find it impossible to hold that the use of the wagon of this kind, which had been in use for a great number of years on the G I P and on other lines in India was an act of imprudence on the part of the Railway. No instance has been proved of any spark actually having got into these wagons from these orifices. The round top wagon contains none of them and yet as appeared in the evidence the number of fires occurring in the round top wagons is at least approximately proportionately the same as in the corrugated iron roofed wagons. No suggestion was made that any other type of wagon could be adopted which would more effectively prevent fires from sparks than the round topped wagon.

Then again there seems to be no reason for doubting that the means used to prevent sparks from the Engine are the most efficient known at present, and it is not suggested, so far as I know,

I ask Richard that there was any intention to prevent sparks from the engine
 Richard which could or should be used by the Railway which they have
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A point was made that up to Boward this wagon was next to the Engine, but the rule which forbids certain classes of vehicles carrying certain classes of goods from being placed near the Engine clearly does not apply to this type of wagon. It shows however, that the Company is alive to the danger from sparks in certain cases and it is their deliberate opinion that the danger which arises in such other causes from proximity of a particular wagon loaded with particular goods to the Engine does not arise in the case of wagons of this type loaded with cotton. And it must be remembered in this connection that up to now the Railway Company has been in the habit of paying compensation practically in all cases of cotton fires occurring on their lines so that their interest was very vitally concerned in preventing these fires if by any reasonable precaution they could do so.

As to the history of the wagon, I consider this is only relevant as regards one phase of the discussion on spontaneous combustion as the possible cause of this accident and I propose to deal with it when dealing with that topic. But before going to the question of spontaneous combustion, I propose to deal with the arguments that were adduced on behalf of the plaintiffs on another point, namely, that assuming that the defendants were not liable for having caused the fire, they were liable for not having taken the proper steps to meet the emergency and in not having sufficient appliances at hand to extinguish the fire. As regards this point, Mr Binning strenuously urged that no evidence ought to be allowed on it as it was not pleaded in the plaint or made a specific head of charge but it is to be observed that in para 5 of the plaint the plaintiffs do say that the destruction of the cotton bales must have been due to the negligence of the servants and agents of the Company. I think those words are sufficiently wide to cover a claim based on a failure of the Company to provide adequate means for extinguishing fire should any occur either with or without default on their part. At the same time it must be remembered that although the words of the plaint are wide enough to cover this claim there is no reason to disbelieve the defendants when they state they were misled into supposing that no such claim would be made, and their evidence in this respect must be considered in the light of the fact that the attention of their servants was not directed to the point till long after the occurrence had taken place and until a time at which many of the records bearing upon the point had been destroyed. As regards the failure to have more efficient appliances at Varangaon station for the extinction of the fires it must be remembered that Varangaon is a station

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of the very smallest class. So far as the evidence goes, no other fire has ever occurred at Varangaon and the supply of water appears to be of the scantiest. The evidence shows that the nearest well had water in it only at a depth of 20 to 25 ft. The cross examination of the defendant's witnesses on this point to my mind altogether failed to bring home to the Company any want of prudence in not having provided more elaborate appliances for putting out fires than those actually provided at Varangaon. The entering of it in Ex 31 as a watering station is obviously due to a mistake and I drew no adverse inference to the defendants from that mistake having been made.

It was suggested to a number of witnesses that there were certain chemical appliances for putting out fires which would have cost very little, and with which the station might have been supplied. Absolutely no evidence has been called to show that any of these appliances would have been suitable to such a station as Varangaon, or that they would have been of the slightest assistance in putting out a fire such as occurred in this case.

Then it was suggested that there were a number of acts of negligence on the part of the Company's servants at the time of the fire. One of these was the opening of the door on the windward side. It appears when the wagon was first put into the siding that the door on the south side, which was also the lee side, was first opened. On its being opened volumes of smoke issued from the door and the Station Master and those who were assisting him found it impossible to get the cotton out of the wagon. Accordingly they very naturally opened the door on the other side in order to see if they could push out the hales from that side. No doubt as soon as the door was opened and a through draught was made the cotton, which was already smouldering very freely burst into flames but it has not been suggested that, if that door on the lee side only had been opened it would not have been possible to get the cotton out at all. At any rate, I am not prepared to hold that there was anything unreasonable or careless or even imprudent in the opening of the door on the windward side.

Then it was suggested that the wagon might, in the first instance, have been put near the well close to the siding on the Down side. That is a square well 3 ft 9 in across and at the best on that day could not be holding more than a few hundred gallons of water at a depth of about 25 ft from the surface. I am extremely doubtful whether, if the wagon had been placed as near as possible to that well, any serious difference would have been made in the amount of cotton damaged by the fire. Be that as it may the obvious thing to do when the wagon was discovered to be on fire was to detach it

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as soon as possible and isolate it in a siding. The getting of the wagon on the siding on the Down line would have involved very considerable delay and somewhat complicated the manoeuvres on the part of the Station Master, whose chief intent probably was to save the rest of the train from being damaged by the fire in this particular wagon, and who would be naturally anxious to get it out of the way at as early a moment as possible.

It is next suggested that a hose and a pump might have been sent for from Bhusaval. But it is certainly extremely doubtful whether if it had been sent for, it would have been of the slightest good. The wagon was some 150 to 200 yards from the well and the water in the well was, as I have said, some 25 feet below the surface and there was only very limited amount of water in the well even at that depth. It would clearly have involved, according to the Station Master at Bhusaval, the sending of practically the whole of the hose available. Bhusaval is a very large station of its appan-
serious effects, had :

must be admitted that the evidence of the Station Master at Varangaon and the Station Master at Bhusaval regarding the actual messages issued between these two stations is not altogether satisfactory. But, as I have said, this point was apparently not present in the minds of those investigating matters until a comparatively recent date, and it is impossible to expect a clear recollection of the actual messages that passed after the lapse of so long a time. I see no reason to doubt the broad fact that the question of sending the pump from Bhusaval to Varangaon was considered and the conclusion was come to that it would be useless to do so, and so far as I can judge by the evidence that conclusion was perfectly justified.

Then it was suggested that the burning wagon might have been sent on burning to Bhusaval or to Bodwad. But as to this the experts, who have been called, Mr Sargent and Mr Rumball although their reasons did not altogether agree, were both quite clear that either of those courses would have been unwise, and it is obvious that, once the windward door was opened the idea never occurred to anyone to send the burning wagon down the road with the possibility of its being detained for a long time outside Bhusaval and of doing damage to anything it met with on the way of its being derailed and causing a block of the line or even of its derailing the engine. I think that in the absence of some expert evidence this would be a practical plan, I must accept the statement of a high officer of the Company such as Mr Rumball that he with all his experience would not have considered either of these plans feasible.

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It is not necessary to discuss shortly the question of spontaneous combustion and its bearing on this case. It is put forward by the defendants as a possible cause of the fire, and as such I think it takes its place along with the number of other possible causes, which have been suggested and which go to diminish the strength of the inference of negligence on the part of the defendants to be drawn from the mere happening of the accident. Regarding it from this point of view, I consider it of very little weight. Although much evidence was given and a number of text books were referred to to show that cotton under certain favourable conditions will spontaneously ignite, the broad fact remains that, in spite of the enormous quantity of cotton that is carried on all the Railways in the world every year, no authenticated case of spontaneous combustion in a pressed bale of cotton appears to be known to any of the text writers or practical men who have to deal with the subject. Mr Todd who was called as a witness by the plaintiffs and whose practical experience in matters of cotton fires is probably as great as that of anybody in Bombay, distinctly stated that in his opinion spontaneous combustion in a pressed cotton bale was impossible. The importance of that statement does not lie on its being made by an expert so far as the chemical and physical properties of cotton are concerned, but it seems to me to be extremely important as showing that instances of such fires are unknown to the very person most concerned to know of them if they in fact existed. And therefore, it appears to me that it would be altogether waste of time to examine in detail the scientific expert evidence on this point. Undoubtedly, on the evidence as placed before me it is possible that this fire was caused by spontaneous ignition of the cotton. But that possibility appears to me to be purely a theoretical one not based on any actual experience and a possibility the extent of which it is impossible to gauge. That is to say that on the evidence it would be out of the question for me to determine whether the chances of this fire having been caused by spontaneous combustion were as 1 to 100 or 1 to a number closely approximating to infinity. On the other hand Mr Lowndes, after having strenuously argued that the whole question of spontaneous combustion was irrelevant and that evidence as to it should not be admitted argued that if the fire had been caused by spontaneous combustion the condition favourable to spontaneous ignition had been brought about if at all, by the carelessness and negligence of the Railway Company. The considerations, which have led me to the conclusion that this suggestion that the fire might have been caused by spontaneous combustion is one which is of no use to the defendants equally leads me to the conclusion that it can be of as little service to the plaintiffs. It would be, I think, absurd to hold the provisions made by the defendant Company to prevent bales being stained with oil were insufficient

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and betrayed lack of reasonable prudence in relation to the risk of spontaneous ignition of the cotton when as a matter of fact the plaintiffs' own witness lays it down as being impossible that spontaneous ignition of cotton in pressed bales can take place at all. The passages of Mr Todd's evidence to which I specially allude are as follows (page 371) — "I claim to know what the risks of spontaneous combustion are from insuring very large quantities. We do not insure against spontaneous combustion. In my opinion spontaneous combustion is impossible in cotton. Then further on he says in re-examination "When I said spontaneous combustion was impossible in cotton I refer of course to fully pressed bales. Beyond that qualification he showed no desire in re-examination to further qualify his extremely general answer in cross-examination. I am, therefore, of opinion that I cannot possibly hold that the Railway Company have been guilty of any negligence in not taking special precaution against an accident, which is never shown to have ever occurred before in the history of the carriage of cotton. It is therefore unnecessary for me to discuss the question as to whether under the circumstances attending the summons for further and better interrogatories, which was taken out by the plaintiffs and the attitude of the defendants assumed by them at the opening of the case, when no mention was made of the subject of spontaneous combustion, I ought or not to have allowed the evidence to be placed before me. Certainly, if I had known before the evidence was given that it would lend to so little as it has done, I should have excluded it, but I felt at the time I was asked to admit it, that, although it was very unlikely to have any substantial weight with me in deciding the case finally, it ought not to be excluded, and the more so (and I may say that this consideration frequently influenced me in the course of the case in deciding whether or not to admit evidence) that I was informed that this case was being treated as a test case and that a very large number of claims against the G I P Railway Company would be determined one way or another by the result of this suit, and accordingly on any occasion when I would otherwise have been tempted to exclude evidence I admitted it in order that every possible piece of evidence that could have any bearing on the decision should be before the Court.

Before dealing with the last phase of the case I think it as well to mention that, although the Railway Company undoubtedly placed their evidence before the Court with great fulness and so far as I could discover without any attempt whatever to keep back any evidence that might have been bearing upon the facts of the case yet in my opinion they made one mistake, or perhaps I should say apparently made one mistake, in not calling Mr Bonner, at one time I was of opinion that this failure was of considerable import

ance, but on further consideration, although I still think it regrettable that he was not called, I do not think any seriously unfavourable inference ought to be drawn against the defendants on that ground. The question which elicited the name of Mr Bonner was put to Mr Sargant by the Court at the end of the day on the 16th January. The answer is in these terms — "The person in the G. I. P. most capable of answering all questions as to the frequency and causes of fires and who is in charge of the routine branch in my office, is Mr Bonner." That was at the very close of the case of the defendants for Mr Sargant was the last witness that the defendants then proposed to call. It was only in consequence of some observations which fell from the Court at the close of the hearing on the 16th of January that any further witness was called. The witness who was called was Mr Rumboll, the General Traffic Manager, and it may well have been thought that calling him was at least equivalent to calling Mr Bonner and that any opinion that Mr Bonner would have on these points would necessarily be communicated to Mr Rumboll and could be spoken to by him. Mr. Rumboll was not cross examined as to Mr Bonner's knowledge on these points, and it is of course possible that all that Mr Sargant meant was that he would be the person most conversant with the actual figures regarding the number of fires and the causes suggested for them, matters of course which have been very fully placed before the Court by the other witnesses in the case.

This brings me to the final considerations of the case and in particular to that part which has caused me the greatest doubt and difficulty. I have discussed and dealt with all the suggestions of failure on the part of the defendants which were made by Mr Lowndes on behalf of the plaintiffs and have held that in my opinion none of the suggestions are founded upon sufficiently strong grounds to enable me to hold affirmatively that the defendants have been guilty of any specific act of carelessness or neglect or in other words that they have not been shown in reference to any particular act to have acted imprudently or failed to act prudently. But in spite of that being so, the fact remains that cotton, handed to them admittedly in good condition and in a fit and proper state for carriage so far as could be judged by the outward appearance of the bales, was when in their charge consumed by fire. There are numerous cases in which it has been held that the mere occurrence of the accident is in itself evidence of negligence, I have already in the earlier part of this Judgment referred to several of such cases, and the point that I have to decide here is not merely whether as regards any specific act there has been a failure of duty on the part of the defendants, but whether they have sufficiently met the presumption which arises by the mere fact of the fire having taken place while

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the cotton was in their charge. This to my mind is by far the most difficult question arising for decision in the case. It is one that cannot be decided by the adoption of any particular view regarding any one portion of the evidence. It must, therefore, be decided on a review of the whole of the evidence, from first to the last, and I have to ask myself whether the impression made on my mind by the whole of the evidence, whether that for the plaintiffs or that for the defendants, is sufficient or not sufficient to lead me to hold that the presumption, which arises against the defendant Company by the mere fact of the goods being burnt while in their possession, has been rebutted or not.

There are at least three possible explanations of the fire (1) that it was due to carelessness or negligence on the part of the Company (2) that it was due to carelessness or negligence on the part of some person not in the Company's service, (3) that it was due to some cause other than (1) or (2) such as inevitable accident inherent vice or natural defect or some other unknown cause against which it would be unreasonable to hold that either party was bound to provide.

After carefully going over the evidence again with this point specially before me, I have come to the conclusion that the Railway Company have succeeded in rebutting the *prima facie* presumption that arises against them.

I have been largely influenced in coming to this conclusion by the fact that, so far as I can judge, the defendants have made every effort to place all the evidence at their disposal before the Court. I have already stated that I do not now attach the importance I was at one time inclined to do on the failure to call Mr. Bonner and I accept the statement made by the defendants' Counsel that Mr. Traill was in England at the date of the trial as indeed I understood that it was accepted by the plaintiffs' Counsel. Though one or two documents which might have been more or less relevant were not produced, there was nothing in the circumstances of their non-production to lead me for a moment to suppose that they were in any way being improperly kept back from the Court. No doubt many of the records had been altered and irregularly kept but after considering most carefully the criticisms of Mr. Lowndes I feel confident that they were not 'faked' in any way for the purposes of this case though I think it possible that in one or two cases they may have been corrected by the Railway servants to conceal their own mistakes.

I have endeavoured, rightly or wrongly, to dismiss from my mind all considerations of the possible consequences of a decision on this point either way. I have found it the easier to do so as the moon

venience appears to be about equally balanced. To hold in favour of the carrier might indeed lead to carelessness on his part, but if such accidents became more than normally frequent, that fact would itself be strong evidence in support of the ordinary presumption arising against him. On the other hand, to hold the carrier liable in all cases, unless he is able to affirmatively prove the cause of the fire and that it was not due to his negligence, might offer great temptations to unscrupulous consignors.

It is common ground that cotton is a commodity particularly liable to catch fire from causes which it is impossible to definitely ascertain and, although this consideration undoubtedly cuts both ways, yet when I have once come to the conclusion, that so far as it was possible to go, the defendants have established that they in the carriage of this cotton took as much care of it as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value, then I think that this consideration tells in favour of the defendants. I have already pointed out the reasons why the Indian decisions quoted by Counsel do not afford much assistance on this part of the case and indeed it is purely a question of fact, and my conclusion must be based solely on the evidence. Perhaps the English case most analogous to this is *Kendall v London and South Western Railway Company* L R 7 Exch 373, when Lord Bramwell boldly held that it was impossible that the injury could have been caused by the negligence of the Railway Company. I am not prepared to go so far in this case, and I do not consider that it is necessary as the onus on the Railway Company is not the same. I merely hold the presumption of negligence has been sufficiently rebutted. As this case will probably be carried further, I think it desirable to record my views of the evidence adduced on the question of damages.

The main dispute between the parties is as to the date the market price on which should determine the value of the cotton.

The defendants say the 24th March is the proper date, the plaintiffs say the 17th April. The evidence shows that the price of similar cotton rose between those dates from Rupees 213 to Rs 236.

There is no doubt that the cotton arrived in Bombay on the 24th March and there is equally no doubt in my mind that had the cotton arrived in the ordinary course, the plaintiffs would in accordance with the regular practice followed have been at once informed of its arrival through the Carting Agent Muncherji Wadilal. But the cotton did not arrive in the ordinary course, and therefore I do not think the defendants can properly ask that the inference that notice was given which in ordinary cases would undoubtedly arise arises in this case. On the other hand the evidence of Luxmondas Jugraj was to the last degree unsatisfactory. He pretended he had never heard

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of Muncbery Wadilal, a firm that does almost the entire business of carting cotton from the Colaba Depot. He admits that he knew before the 19th April (the day the defendant's letter of the 17th April giving notice of the loss was actually received by the plaintiffs) that the cotton had been burnt, but does not know how long before or how he came to know it whether through the muncadum whom he was constantly telling to enquire whether the cotton had arrived or whether through some one else. The conclusion I have arrived at is that the plaintiffs knew perfectly well that the cotton had been burnt, within a very short time of its arrival in Bombay but that they were not officially informed of it till they received the letter of the 17th April from the Company. Both parties appear to me to be to blame. The plaintiffs for lying by on a rising market and making no demand though they knew what had happened, defendants in giving no official notice of the loss until the 17th April. Acting as a jury I should have little hesitation in splitting the difference and fixing the rate at Rs 225 8 0 on the basis that the rate on March 24th was Rs 213 and on April 17th Rs 238. In the Supplemental written statement the defendants admit that the sale proceeds of damaged bales amounted to Rs 3,210 10 9 and expressed their willingness to pay to the plaintiffs such part of the said sum as may be found to be due to them. As the marks on the bales were obliterated there is absolutely no means of ascertaining how many of the 37 bales belonged to the other consignor, except that it could not be more than 19 of them. If the other consignor had been before the Court, the matter would probably have been settled by an agreement to accept a sum proportionate to the number of bales consigned by each. The Railway Company however have not interpleaded or taken other steps to bring the owner of the 19 bales before the Court. There is nothing before the Court to show that the consignor of the 19 bales has made any claim or ever will make any claim. Under these peculiar circumstances the only possible order is that the whole sum should be paid to the plaintiffs.

My findings on the issues are as follows —

- 1 In the affirmative
- 2 In the negative
- 3 In the affirmative
- 4 In the negative
- 5 Not necessary
- 6 The whole
- 7 In the negative
- 8 Decree for plaintiffs for Rs 3 210 10 9
- 9 No finding
- 10 No finding
11. It was a possible cause

Case No 27

In the Court of the Agent to the Governor,
Kathiawar.

APPEAL No 53 OF 1903 1904

THE MANAGER, B G J P RY (DEFENDANT), APPELLANT

v.

THAKAR MULCHAND MADHAVJI, (PLAINTIFF), RESPONDENT

*Railway Company, right of, to reweigh goods and collect undercharges—
Laen—Detention of portion of consignment—Wharfage*

1904
Sept 8

This was a suit for the recovery of the value of 1, out of 215 bags of cotton seeds detained by the defendant Company for undercharges due by the plaintiff on the whole consignment. The Lower Court gave a decree for the plaintiff. On appeal, the Judgment of the Lower Court was reversed and it was held that the defendant Company was entitled to reweigh the consignment and collect the excess charge for the excess weight at the destination and to detain and sell the goods, if the undercharge was not paid and credit the sale proceeds towards the undercharge and the demurrage then due by the plaintiff.

This action was instituted by the plaintiff (present Respondent) to recover from the defendant Railway (represented here by its Manager) the value of 1, bags of cotton seeds estimated at Rs 62 5 6 together with interest at 6% amounting to Rs 14 6 from 9 9 1902 to the date of the suit.

The plaintiff, a resident of Dhrangadra, has alleged that he on the 3rd September 1902 consigned from Dharangam 215 bags of cotton seeds. Of these 200 bags were on the 6th September 1902 delivered to him by the Station Master of Dhrangadra. The remaining 15 bags were received by the latter on the following day, but detained by him until the plaintiff paid an undercharge unlawfully demanded by him. The plaintiff then sent notices to the Station Master, the Traffic Superintendent and the Manager but yet was unable to recover the 15 bags. He therefore filed the present suit to recover their value.

The defendant Railway has replied that the undercharge was a perfectly lawful demand and that as the plaintiff unlawfully refused to settle the claim and take delivery, the Company after duly serving

R G J P R J him with notice sold the bags by public auction and credited that amount towards the undercharge and the demurrage then due from him

Thakar
Mulchand
Madhavi

The Lower Court raised 5 issues and found (1) that the weight of the bags consigned to the plaintiff was 371 maunds and 31 seers (2) the defendant Railway was not entitled to any undercharge (3) that the plaintiff was entitled to claim delivery of the 15 bags without paying the said undercharge (4) that the defendant Railway was not entitled to demurrage, wharfage, etc., and (5) awarded the plaintiff Rs 3380

Against this finding the defendant has appealed. The grounds of the Manager's appeal are — (1) The Railway's action was strictly in accordance with Section 55 of the Railways Act which prescribes fully its powers in cases of this nature (2) The Railway having full power, under Clause 6 of the Railway Receipt form prescribed by Government to reweigh and — (3) The Railway's actions acted legally within their full freight due on 371 maunds original plaint nor in the previous correspondence did the consignee complain that his goods were damaged, although even then he would have been bound to take full delivery on payment of freight due

At the hearing Mr. Anon appeared for the Appellant and Mr. Nanchand for the Respondent

The following issues arise from the pleadings — (1) Was the actual weight of the bags received at Dharangadi 371 maunds and 31 seers? (2) If so, was the Railway entitled to any undercharge? (3) If so was the Railway entitled to act in the way that it did? (4) Is the plaintiff entitled to any relief?

I find (1) in the affirmative, (2) and (3) in the affirmative (4) in the negative

The real question at issue appears to me to have been lost sight of both by the Lower Court and the plaintiff. The question is not what the cotton weighed when it left the station Dharangam, but what it weighed when it reached Dharangadi. Had the claim been one for damages for shortage, such as in the case quoted at X K I R page 287, the importance attached by the Lower Court to the figures in the Railway receipt would have been perfectly justified and after careful consideration I see no reason to differ from the views that I then expressed. But here there is no question of pilfering but that the goods weighed. It is admitted by both sides that it was the rainy season and that if goods such as those involved in this case get wet their weight increases. It is moreover claimed by the

plaintiff that these particular goods did get wet and on that account weighed more. That to my mind is the very reason why they should be charged more. Their weight before they started does not affect the question. The point is what the weight was that the Railway had to carry. This can only be properly ascertained at the end of the journey. Perhaps this view will be more clearly appreciated, if I state the converse case. If the goods had been shipped wet and had dried on the way, the Railway would, as Mr. Nissen has contended and Mr. Nanchand not denied, have refunded the overcharge. It is therefore only fair that, when by reason of the absorption of moisture by the goods they weigh more and consume more coal to transport, the Railway should be indemnified. I do not therefore propose to discuss the evidence for it, all seems to me to point to the one conclusion. The goods were dry to start with, they got wet and remaining in the station yard or godown dried again and when sold resumed their former weight. Under these circumstances the Railway Company was within its rights to charge excess fare for the excess weight of the damp goods. I have shown this by a discussion of the equities of the case, but as a matter of fact the rights of the Railway are down in black and white. Clause G of the notice at the back of the consignment note runs as follows:—"That the Railway have the right of remeasurement, reweighment, reclassification and recalculation of rates terminals and other charges at the place of destination and of collecting before the goods are delivered any amount that may have been omitted or undercharged."

Mr. Nanchand has said nothing to meet this Clause which, as it appears to me, is conclusive.

If the Railway Company have the right under this Clause to collect undercharges they have the right under Section 53 of the Railway Act to detain the consignee's goods if the undercharge is not paid, and of course if delivery is refused to charge demurrage.

Section 55 runs as follows:—"(1) If any person fails to pay on demand made by or on behalf of a Railway Administration any rate terminal or other charge due from him in respect of any animals or goods, the Railway Administration may detain the whole or any of the animals or goods, or, if they have been removed from the Railway any other animals or goods of such person then being in or thereafter coming into its possession." The subsequent sale of the goods by the Railway was justified by the second Clause of the same section. "(2) When any animals or goods have been detained under Subsection (1) the Railway Administration may sell by public auction, in the case of perishable goods at once and in the case of other goods or of animals on the expiration of at least fifteen days' notice of the intended auction, published in one

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B. G. J. P. Ry. v. Babar Mulchand Madhavji. "or more of the local newspapers sufficient of such animals or goods to produce a sum equal to the charge, and all expenses of such detention, notice, and sale including, in the case of animals the expenses of the feeding, watering and tending thereof"

It has not been contended that the requirements of this section have not been fulfilled

For the above reasons, I hold that the Railway Company acted strictly within their rights and that the plaintiff is entitled to no relief

The Lower Court's finding and decree is reversed All costs in both Courts should be defrayed by the plaintiff

Appeal allowed

Case No 28.

In the Court of the Agent to the Governor,
Kathiawar,

APPEAL No 1 of 1902-1903

SHAH NATHUBHAI MANEKCHAND & Co (PLAINTIFFS)

APPELLANTS

v

1 THE MANAGER, MORVI RAILWAY, } (DEFENDANTS)
2 THE MANAGER B. G. J. P. RAILWAY } RESPONDENTS

1903
January, 31

Terminal charges levy of—Jurisdiction of Courts—Authority to order interest charge and demurrage

The plaintiffs sued the defendant Companies for recovery of excess freight and demurrage on various goods booked by the plaintiffs at intervals. The Lower Court found that the charges had been correctly levied and dismissed the suit. On appeal the Lower Court Judgment was confirmed and it was held that the Court had no jurisdiction to try the suit that the defendants were justified in recovering the excess charges and demurrage after delivery and that the circular by which the rates objected to by the plaintiffs were levied was authorized by law and issued in time.

Original Claim, Rs 194-10-0

In appeal Claim Rs 194-10-0

THIS action was instituted by the plaintiffs to recover Rs 194-10-0 alleged to have been levied by the B G J P. Railway Company and the Morvi Railway Company as excess freight and demurrage on various goods sent by the plaintiffs at intervals between the 24th October 1900 and the 5th June 1901

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The defendants pleaded that the Lower Court had no Jurisdiction to hear the case, that the plaintiffs not being the consignees except as regards the last consignment had no right to sue, that the freight charges and demurrage had been correctly levied

The Lower Court found that the charges had been correctly levied and dismissed the suit

Against this finding the plaintiffs have appealed and their grounds are *inter alia*

The rates levied were in excess of those sanctioned by Government and could not be enforced without their sanction

The circular by which the rates were levied were not duly published

As the old rates were levied from the appellants at the time of despatching the goods, they were stopped from afterwards charging higher rates

Mr Gulabchand appeared for the Appellants and quoted I L R XVI, Bom 534

Mr Nissen appeared on behalf of both Railways and relied on I L R, XV Bom, 537, I L R 13, Mad 211, I L R XXIII Bom, 22

From the pleadings the following issues arise

- (1) Has this Court jurisdiction to hear the case?
- (2) Was the circular by which the rates objected to were levied authorized by law? and if so whether it was actually issued as alleged by the defendant respondents?
- (3) Whether the defendant respondents were justified in recovering the excess charges after delivery?
- (4) Whether the defendant respondents were entitled to recover Rs 440 as demurrage?

I find (1) in the negative (2), (3) and (4) in the affirmative

The first issue has arisen in a somewhat curious way. The Lower Court framed a similar issue, but recorded no finding thereon for the reason that as it has noted the defendants representative Mr Nissen waived his objection to the Court's jurisdiction. Mr Nissen has now stated in this Court that this is incorrect. He never waived his objection to the Lower Court's jurisdiction, but

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that on the contrary he pressed it, but that as the Judge of the Lower Court made some enquiries into the merits of the case he Mr Nissen, being inexperienced in the management of legal affairs allowed matters to drift on until the preliminary enquiries assumed the form of a regular trial. I think that Mr Nissen's account must be accepted. It is certain that the Railway Companies, at any rate he represented, would never have consented to such a waiver. As a plea of jurisdiction can be raised at any stage in the case the case of *Keshav v Vinayak* (1 L R, XXIII, Bombay, p 22) I propose to treat it as if it had now been raised for the first time. The facts of the case have not been very clearly given either in the Lower Court's Judgment or by the parties, but so far as I understand them they are as follows — On the 10th October 1900 the B G J P Railway, with a view to establish what is called a block rate against the Morvi Railway, or in other words with a view to divert the through traffic that has hitherto travelled along the Morvi Railway on to its own line issued Circular No 6 by which it lowered the freight rates or carrying charges of goods but increased the terminal charges.

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24th October and the 27th October 1900 and on the 5th June 1901 the plaintiffs despatched a large quantity of goods from Wadhwan Civil Station to various B G J P Stations, but sent them over the Morvi line. Through inadvertence or, as alleged by the plaintiffs, because the Circular No 6 had not been sent to the Station Masters the rate levied was that in force before the Circular No 6 was issued. Neither the forwarding nor the delivering station staff detected the errors, which were eventually discovered by the Railway and its department. On the representation, it would seem of the Railway staff who would be held liable if the moneys were not recovered the plaintiffs paid the excess charges and brought the present suit.

Mr Nissen has contended that the present charges are terminal charges and that the present suit is barred by Section 41 of the Railways Act IX of 1890. The said section runs as follows — Except as provided in this act, no suit shall be instituted or proceeding taken for anything done or any omission made by a Railway Administration in violation or contravention of any provision of this Chapter (Chapter V) or of any order made thereunder by the Commissioners or by a High Court. Mr Gidder has however contended that the present charges are not really terminal charges but come under Section 47 (Chapter VI) and are included in Sub section (f), "the terms and conditions on which the Railway Administration will warehouse or retain goods at any station on

"behalf of the consignee or owner" The present charges have, however, nothing to do with warehousing goods, they are charges levied for the break of gauge at the Wadhwan Civil Station. But even if they were charges, as Mr Gulabchand has argued, for warehousing, they would still in my opinion be terminals. This term is defined at Section 3 Sub section (14) 'terminals include charges in respect of stations, sidings, wharves, depôts, warehouses, cranes and other similar matters and of services rendered thereat. Now, if the present charges are terminal charges they come within the limits of Chapter V for, at Section 45 it is laid down a Railway "Administration may charge reasonable terminals" and proceedings for infringements of Chapter V are barred by Section 41. This Court has therefore no jurisdiction.

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Issue 2 As the matter in dispute is not within my jurisdiction, no findings are really necessary on the remaining issues, but as the case may go further it will be convenient to record findings thereon.

Mr Gulabchand has contended that no alteration can be made in the rates without the sanction of the Governor General in Council. He has based this plea on Section 47 Sub section (3) but I have already pointed out that the charges now in dispute do not come under that section, and in any case it has come out in evidence that the change of the rates has been duly notified to the Government of India who have raised no objection to them.

The question whether the circular was ever issued on the date alleged is sufficiently answered by the evidence of the witness Amar chand, who has deposed that the circular No 6 was issued on the 10th October and came into force on the 20th October and that it was despatched to Gondal Dhoraj and Paidhari the delivering stations on the 19th October, so the circular must at any rate have been in the hands of the delivering Station Masters on the date the goods arrived at their stations.

Issue 3 Mr Gulabchand has relied on Section 18 and Section 19 of the Contract Act, and has contended that his clients were deceived by the misrepresentation of the Station Master and that therefore the Contract between the Railway and his clients was vitiated. But the deed of Contract i.e. the Railway Receipt contains a saving clause in favor of the Railway. Clause 6 runs — 'The Railway Administration have the right of remeasurement, reweighment, reclassification and recalculation of rates terminals and other charges at the place of destination and of collecting before the goods are delivered, any amount that may have been omitted or undercharged.' It is thus specifically stated in the deed of contract that the rates charged on the goods by the forwarding Station Master are not final but are liable to alteration.

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The 4th Issue The only ground for complaint that the plaintiffs have on the question of demurrage is that it was levied after the delivery of the goods. It has not been alleged that it was wrongly levied. Although, no doubt, the defendants might have refused to pay the amount and have compelled the Railway Company to file a suit for it once the defendants have paid a rightful charge I cannot see on what grounds they hope to recover it.

The appeal is dismissed with costs. Lower Court's decree and finding confirmed.

Case No. 29.

In the Court of Small Causes at Howrah

S C C Suit No 426 of 1911 *

SURAJ MALL, NAGAR MALL, (PLAINTIFF)

v

THE EAST INDIAN RAILWAY COMPANY, (DEFENDANT)

Demurrage charges—Claim for refund of—The Indian Railway Act if binding on the defendant Company—Terminal and demurrage charges distinguished—Rule for levying demurrage charges—Sanction of the rule by Government of India and its publication in the Gazette of India necessary

In a suit against the defendant Company for getting refund of the money collected from the plaintiffs as demurrage for delay caused in taking delivery of goods, it was held as follows —

- (1) That the Indian Railway Act is binding on the defendant Company
- (2) That the charges collected from the plaintiffs do not fall under the category of terminals, as alleged by the defendant Company, but they are demurrage charges that are levied for warehousing goods which are not taken delivery of within the prescribed time
- (3) That the rule, under which the demurrage charges were levied, was duly framed by the defendant Company and was sanctioned by the Indian Government and was published in the *India Gazette* as required by Section 47 (b) of Act IX of 1890, and the levy of such charges was therefore legal.

JUDGMENT — This is a suit for getting a refund of Rs 93-6 annas which the plaintiff was obliged to pay to the defendant Company as

1911
June, 27
—

demurrage for making a delay of about 9 days in taking delivery of 82 bales of pressed jute sent from Badshapur to Howrah by the plaintiff's Agent on the allegation that the levying of the charge was unauthorized and illegal as the rule under which the charge was levied was not framed by the defendant Company and not sanctioned by the Governor General in Council and not published in the *India Gazette* in the manner provided in Section 47 (b) of the Indian Railway Act (Act IX of 1890). The defendant's contentions are (1) that the East Indian Railway Company was incorporated under the Parliamentary statute 12 and 13 Victoria Chapter 93 and the proprietary right of the Company was purchased by the Secretary of State for India in Council under 42 and 43 Victoria Chapter 206, and hence the contracting power of the defendant Company cannot be limited or restrained by any Act of the India Council. I think this contention is not correct. The Indian Railway Act is as much binding on the defendant Company as it is binding on the other Railway Companies in India. It is not contended that the Indian Railway Act is on any point contradictory to the provisions of the statutes of the Imperial Parliament referred to above, I therefore decide this point in favor of the plaintiff.

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E I Ry

The next contention of the defendant Company is that the charges levied from the plaintiff are not demurrage charges really but fall under the category of terminal charges as defined in Section 3 Sub-section 14 of the Indian Railway Act of 1890 and hence under Section 41 of the Act, the Civil Court has no jurisdiction to decide whether the charges are excessive. But in my opinion the charges levied here are not terminal charges which mean charges other than carriage charges, which the Company levy for loading and unloading goods, for warehousing the goods before they are despatched and such charges have been mentioned in detail in Chapter I, Article 1 of the Goods Tariff of the defendant Company. In that publication wharfage or demurrage charges have been made distinct from terminal charges. Demurrage charges are those that are levied for warehousing goods, which are not taken delivery of within the prescribed time, and which the defendant Company is bound to warehouse as involuntary agent of the consignee. I therefore decide this point also in plaintiff's favour.

The last contention of the defendant Company is that the rule under which the demurrage charges were levied from the plaintiff was duly framed by the defendant Company and was sanctioned by the India Government and was published in the *India Gazette* within the meaning of Section 47 (b) of Act IX of 1890. The plaintiff on the other hand denies the correctness of this contention. The defendant Company has produced a mass of documentary

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evidence in support of its contention and after going through the voluminous evidence I came to the conclusion that the contention of the defendant Company is substantially correct. I need not dwell on all the documents produced by the defendant Company in details on this point. I may refer to a few only of them which are most important. It appears that a Railway Conference was held in 1899 which framed some draft rules under Section 47 (b) of the Indian Railway Act. The proceedings of the Conference was published in form of a book and the draft rules prepared by the Conference are to be found in Appendix 3 (Ex B 2) rule 4, a copy of the proceedings of the Conference was duly forwarded to Government which afterwards directed the defendant Company to frame its own rules under Section 47 (f) and Ex B 6 with its enclosure shows the rules that were framed by the Company, and the Company asked the Government to sanction the rules. That document is dated 25th June 1900. Exhibit B 7 is a reminder sent by the Agent of the defendant Company for sanctioning the rules, and it is dated 11th December 1900. Ex B 8 is the reply of the Government to that letter and it is dated 27th April 1901. From paras 3 and 5 of the letter, it appears that the rules that were framed by the defendant Company were not in conformance with the general rules prepared by the Railway Conference and that it would take long time to alter rules revised by the defendant Company so that the Government might sanction them. The Government further found that the Railway Company had been left too long unprotected in the matter of warehousing charges, and hence the Government recast the rules originally framed by the Conference and sent a copy of the rules to the defendant Company with the intimation that, if the rules were acceptable to the Company, it might request the Government to sanction them and publish them in the *India Gazette*. Rule 3 of these draft rules relates to demurrage and wharfage of the nature now in dispute. Ex B 9 is the reply of the Agent of the defendant Company and it is dated 7th August 1901. This letter shows that the defendant Company accepted the rules with slight modification. The difference was about the responsibility of the person who shall be liable for the safe custody of the goods when detained in the warehouse of the defendant Company. The Government wanted to put the responsibility on the Railway Company, whereas the defendant Company wanted to place it on the owner. It was ultimately settled as was suggested by the defendant Company that there should be no express provision in the rule as to which party will be responsible for the safe custody of the goods. The rules were then approved by Government and was finally published in the *India Gazette* by notification No 231 dated 3rd July 1902, vide Ex B 10 and its enclosures. Rule 3 of the rules so sanctioned and

published is relied on by the defendant Company as the authority under which they justify the charges levied from the plaintiff. The learned Vakīl for the plaintiff contends that the rule in question was framed by Government and not by the Railway Company. But I have already shown that the rules were originally drafted by the defendant Company which were approved by Government after making some modification. The wordings of the two rules are of course not identical but that is immaterial. The substance of both the rules is the same. It is next contended by the learned Vakīl for the plaintiff that the demurrage charge in dispute was levied under Rule 59 of the Goods Tariff of the defendant Company, which was never sanctioned by Government nor published in the *Gazette*. But under Section 47 (f) the Railway Company are to frame general rules only and those general rules only require to be sanctioned by Government and published in the Government *Gazette*. That rule fixed the minimum charges which could be levied as demurrage and the minimum time which the Company must allow as free time to the consignee for taking delivery of goods. Rule 59 is a rule about details and if it does not exceed the maximum limit of charges and the minimum limit of free time, it is quite legal. The charges payable for baled jute, hemp and flax do not exceed the maximum limit fixed by the rule so sanctioned and published, and hence the exaction of the demurrage in dispute is not illegal. No doubt the charges for loose jute, hemp and flax as shown in rule 59 exceed the maximum limit and hence those charges are illegal, but we have nothing to do with those charges in the present case. I therefore hold that the defendant Company is entitled to retain the demurrage charges levied by it from the plaintiff.

The learned Vakīl for the plaintiff drew my attention to the case of *Hari Lal Sinha v. The Bengal Nagpur Railway Company*, (15 C W N—page 195) but that case is not in all fours with the present case. There the Railway Company failed to produce any evidence to show that rules under which it levied the demurrages were framed by it and were sanctioned by Government and published in the Government *Gazette*. On the contrary the learned Attorney for the Company admitted that the rules were imposed in the Railways by the Government by their Notification No. 231 dated 3rd July 1902. But in this case the defendant Company has proved that the rule in dispute was framed by it and was sanctioned by Government with slight modification and was published in the *Gazette of India*. Therefore the requirements of the law have been fulfilled in spirit if not in letters. The suit is therefore dismissed with costs.

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Nagar Mall
v
F I By

Case No 30

In the Court of the Sub Judge at Saron.

APPEAL No 17 of 1893*

GANGA PRSHAD AND OTHERS, (PLAINTIFFS), APPELLANTS

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| | |
|------------------------------|-------------------------------|
| 1 AGENT, B AND N. W RAILWAY, | } (DEFENDANTS) RESPONDENTS |
| 2 AGENT, B N RAILWAY | |

Railway Companies—Damage to Goods—Claim for Compensation—I dan
Railways Act IX of 1890 Section 77

1894
 April, 17

A consignment of goods was delivered to the Bengal Nagpur Railway at Raipur Station for conveyance to Ravilgunge, a Station on the Bengal and North Western Railway. They were conveyed through the East Indian Railway and delivered by a third Railway to the Bengal and North Western Railway at Revelganj. A portion of the goods having been damaged the plaintiff refused to accept delivery and sued the Bengal and North Western Railway for their value. The Bengal Nagpur Railway were made parties to the suit only during the trial. The suit was dismissed. On appeal the Subordinate Judge confirmed the Judgment of the Lower Court, holding that no notice under Section 77 of the Indian Railways Act IX of 1890 was served on the Bengal Nagpur Railway and it could not therefore be made a party to the suit.

THE suit, which gives rise to this appeal was originally brought against the Bengal North Western Railway after notice on the 2nd of December 1891 to recover compensation for injury to goods to wit 91 out of 382 bags of food grain in the course of transit between Raipur on the Bengal Nagpur Railway and Revelganj on the Bengal North Western Railway portion of the way from Raipur lying also along the East Indian Railway between Assansole and Digha Ghat. The claim was laid at Rs 634 90 including interest and certain expenses incurred before suit. The goods were delivered for transit on the 23rd May 1891 and made over to the consignee (consignee) at Revelganj on the 9th June following. It should be noted that there was through traffic over the Nagpur, East Indian and Bengal North Western Railways.

On the 17th May 1892 after the case had proceeded in the First Court for sometime the plaintiff for the first time applied for making the Nagpur Railway a defendant in the suit and the Court granted the prayer on the 7th June 1892.

* For Judgment of the High Court see ante page 373

The Munsiff has, in substance, found all the issues in favor of the defendants, but made a decree in favor of the plaintiff severally against the two defendants for Rs 214 minus demurrage, and Rs 146 11-1 respectively without cost agreeably to certain admissions made by them. He has also, on a consideration of the truth of the defendants case, allowed them their respective costs.

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Pershad
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Ry.
B N Ry

The Munsiff has given good reasons for rejecting the claim of plaintiff against the original defendant the Bengal North Western Railway, and I see no reason for pronouncing those reasons to be bad or faulty. The Bengal North Western has not preferred any serious objection to the decree made by the Munsiff in respect of Rs 214 less demurrage and that decree should, therefore, stand.

I am satisfied that the defendant No 1 discharged the onus that was on him regarding the due exercise of diligence and ordinary precaution on his part. The goods reached the hands of the defendants No 1 in a deteriorated condition and the plaintiff brought his suit against the said defendant after a lengthy correspondence, which should have convinced him of the good faith of the latter.

Passing on to the case laid against the Nagpur Railway it strikes me as something strange that the plaintiff was allowed to proceed with his claim against a third party, because he had failed to make out any cause of action against the party elected by him.

Ignorance of law cannot be presumed and after the long correspondence, which had taken place between the plaintiff and the defendant No 1, the former was quite in a position to make out his proper course. Section 80 of the Railway Act IX of 1890, clearly lays down that where traffic is hooked through the person entitled to sue for loss has the alternative (a) of suing the contracting Company or (b) the Company on whose Railway the loss occurred. The plaintiff had the above section of law before him when he brought his suit and elected to sue the Bengal North Western Railway alone. After that it was not right to allow him to continue the same suit against the Nagpur Railway and also jointly against both Railways. In the present appeal the cause of action against the contracting Railway (Nagpur Railway) was not legally the same as that against the Bengal North Western Railway. If the plaintiff meant to sue both Railways on the same cause of action the East Indian Railway was a necessary party. The suit was misconceived from the beginning and the gradual array of parties and procedure was such as to render it legally untenable by reason of misjoinder of causes of action and nonjoinder of necessary parties. The contracting Railway was primarily liable for the loss, if any, and the plaintiff should have in the beginning laid his claim against the said Company.

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&
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The Bengal North-Western, East Indian and Nagpur were three distinct Railway Administrations within the definition given in Section 3 of the Railway Act, but *prima facie* one was not the agent of the other by reason of the existence of a through traffic over the three lines. When two Railway Companies are connected in business so that one of them receives goods to be conveyed over the line of the other, there is but one contract between the customer and the receiving Railway Company, and the liability of the latter is just the same as if they had been the owners of the whole way upon which the goods are to be conveyed. In the present case, therefore the contract was between the Nagpur Railway on the one hand as owner of the whole line between Raipur and Revelganj and the plaintiff on the other, and when the latter was apprised that there was no loss in the line between Digba and Ravilganje, his plain direct course was to sue the contracting Railway. Against the Bengal North Western Railway the plaintiff has no case and in this connection the case of *Katu Ram v Madras Railway Company* (I L R 3 Mad 243) may be referred to.

When the plaintiff applied for making the Nagpur Railway a party to the suit, more than 6 months had elapsed from the date of the delivery of the goods and within that time he had not made any application in writing to the Nagpur Railway Administration. Agreeably to the provisions of Section 77 of the Railway Act it cannot for a moment be contended that the Bengal North Western Railway preferred any claim on behalf of the plaintiff to the Nagpur Railway. The former was not the agent of the latter and the application made to the one could not be construed as a notice to the other. The plaintiff did not comply with the provisions of Section 77 when he laid his claim against the Nagpur Railway, but the Munsif has overlooked this non-compliance with the law on two grounds both of which are in my opinion erroneous.

He confounds the question of jurisdiction with that of right when he refers to Section 11 of the Civil Procedure Code and does not see that the Railway Act takes away the right or title to recover compensation on failure to comply with the directions contained in it.

The provisions of Section 77 are useful and wholesome in their operation and the object with which those provisions were introduced was brought before the Legislature on the 22nd of October 1888.

It is true that in course of correspondence, which took place between the plaintiff and the Bengal North Western Railway, the latter made certain enquiries of Nagpur Railway, but those communications could not I think be availed of by the plaintiff for the purpose of overriding the law and showing that the Nagpur Railway was

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made aware of his claim. The law does not make a knowledge of the claim sufficient. It distinctly requires the preference of a claim in writing. The Bengal North Western Railway never acted or professed to act as the agent of the Nagpur Railway in the matter of the claim laid against it. And the existence of a through traffic did not in the absence of proof of the conditions thereof (see I L R 3 Mad, p 240) make the two Companies joint partners or mutual agents so that notice upon one could be held as a good notice upon the other, *vide*, Sections 76 and 77 of the Railway Act. The application prescribed by Section 77 was an essential preliminary to the plaintiff's suit against the Nagpur Railway and without it the claim of the plaintiff against the Nagpur Railway could not be sustained.

The fact that the Nagpur Railway with a view to the making up of differences, offered to pay to the plaintiff through the Bengal North Western Railway a certain sum before the commencement of the suit could not, I think, legally confer upon the plaintiff the right to recover the sum offered in the course of the negotiation, for compromise. If the claim of the plaintiff is not enforceable in law, he cannot in the alternative recover against the wishes of the Nagpur Railway the sum which it offered through the B N W Railway before being dragged into this litigation.

On the merits, I agree with the Munsiff in holding that the Risk Notes are genuine and that the Nagpur Railway could only be blamed for the delay consequent upon the deviation of the goods from the direct route. The blame in the matter was attached also to the East Indian Railway, but the plaintiff has not chosen to make that Railway a party to this suit. It cannot, therefore, be ascertained as between the Nagpur and East Indian Railways what proportion of the loss, if any, should be charged upon each.

The suit against the Nagpur Railway should, however, fail on the ground of want of notice and the result is that the appeal of the plaintiff stands dismissed with costs and the cross appeal of the Nagpur Railway is allowed with costs and interest. The decree of the Munsiff will be modified as indicated above.

Case No 31.

In the Court of the District Judge, Karnal

CASE No 43 OF 1903

RAMJI DASS AND ANOTHER, PLAINTIFFS,

v.

THE AGENT, E I RAILWAY AND THE MANAGER O AND R
RAILWAY, DEFENDANTS1904
July, 13*Railway Company liability of—Loss of Goods—Notice of claim*

The plaintiffs consigned eleven bags of sugar at Dhampur a Station on O & R Railway for conveyance and delivery at Kharonda a Station on the E I Railway. Only nine bags were delivered. The plaintiffs sued both the Railways for the recovery of the value of the two missing bags. The suit as against O & R Railway was dismissed on the ground that notice of claim was not given to them and as regards the E I Railway it was found that this Company could not be held liable as the loss did not take place on their line.

CLAIM for Rs 54 0, value of two bags sugar and interest which accrued thereon

ORDER OF THE COURT

The plaintiff has put forward his claim for Rs 54 0 on the following grounds against the O & R and E I Railways that he booked 11 bags of sugar from Dhampur to Kharonda but out of them only 9 were received, so that two were missing hence the value of the two bags Rs 54 0 0 may be refunded.

The O & R Railway replied that the notice was not given within the 6 months' time and hence the claim was time barred and on this ground the claim was to be dismissed.

The E I Railway said that as the goods did not come to their possession, they were not responsible for the shortage. Now the following issues are framed —

1 Whether the goods were made over to the E I Railway or not?

2 If made over, what was the value?

3 As the plaintiff did not prove this that the bags were made over to E I Railway, and from the evidence of the Assistant Goods Clerk of Umballa Station who appeared as a witness for E I Railway, the defendants, it appears that the bags did not reach Umballa,

but the deficiency of the bags was noticed at Saharipur Junction, and here only 9 bags were actually made over to the E I Railway and the same were delivered to the plaintiff at Kharonda and therefore the E I Railway is not responsible to make up the deficiency as the goods were not made over to the E I Railway, hence the second issue appears to be unnecessary

Ramji Doss
E I Ry
&
O & R Ry

ORDERED

That the claim of the plaintiffs may be dismissed with costs and the case filed

Case No 32

In the Court of the Munsif of Amroha.

Suit No 1563 of 1907

NOOR MOHAMMAD, PLAINTIFF

1

MANAGER O & R RAILWAY, DEFENDANT

Misjoinder of parties—Short notice

The plaintiff sued the Manager and the Traffic Superintendent of the O and R Railway to recover the value of some bags not delivered. The suit was dismissed on the ground that it should have been brought against the Secretary of State and notice given to the defendants allowing 15 days only was bad.

1908
March, 27

This is an action to recover Rs 179 2 6, as damages against the Manager and Traffic Superintendent of the Oudh and R. B. Railway. The plaintiff says he sent some bags from the Amroha Station to Calcutta, but through the negligence of the Railway servants they were lost and not delivered to the addressee. He sent a notice to the Manager under Section 77 of Act IX of 1890 but to no effect.

Hence this suit

The defendants resist the claim on various grounds the two chief being that the notice given by the plaintiff was bad under Section 424, C P C, and that the O & R Railway is a State Railway and therefore the suit ought to have been brought against the Secretary of State for India.

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ISSUES

1. Was the notice allowing 15 days' time only bad?
2. Is the O. & R. Railway a State Railway and is the suit therefor against the defendants maintainable?

FINDING.

1st issue. The plaintiff admits that in the notice he allowed 15 days' time only. In my opinion, the notice was bad under Section 424, C.P.C. I don't agree with the learned pleader for the plaintiff when he says that no notice was necessary. I find this issue against the plaintiff.

2nd issue. It appears that the O & R Railway is a State Railway and therefore the suit ought to have been filed against the Secretary of State for India. I find this issue also against the plaintiff. The suit fails on these grounds and therefore there is no necessity of going into the facts. It is therefore ordered that the plaintiff's suit be dismissed with the costs of the defendants.

Case No. 33.

In the Court of the Munsif at Kurseong.

Suit No 3 of 1909.

AZIZUL HUQ OF KURSEONG, PLAINTIFF

v.

- (1) DARJEELING HIMALAYAN RAILWAY Co.,
- (2) GREAT INDIAN PENINSULA RAILWAY, Co.,
- (3) EAST INDIAN RAILWAY Co, DEFENDANTS

1909
Oct, 6

Non delivery of goods—Refusal to take delivery—Notice of claim—Railway Act, IX of 1890, S. 77—Demurrage and Wharfage.

The plaintiff sued the defendant Railway Companies for the value of a consignment of caps not delivered. The suit as against the G. I. P. and E. I. Railways was dismissed on the ground that the notice of claim was not given to them as required by S. 77 of the Railways Act, IX of 1900. As to the claim against the D. H. Railway, the suit was dismissed, as it was not proved that the loss took place on that Railway, but a decree was given to the plaintiff for the balance of the sale proceeds realised from the sale of the consignment after deducting from the gross amount the actual charge for demurrage.

THE admitted facts in this case are that plaintiff got sent to him from Bombay, per V P P a consignment of caps, at the end of April 1907, the box did not arrive at Kurseong Station till the end of June 1907. Plaintiff declined to take delivery as the box had been a long time in transit and he suspected that it might have been tampered with. The box was sent at Railway risk, at a special rate. The defendant D H Railway Company declined to give 'Open delivery,' i.e., to have the box opened and examined on Railway premises before giving it over to plaintiff, because the outward condition of the box was good and no sign of damage was apparent. Plaintiff declined to take delivery unless 'open delivery' was given, and a voluminous correspondence ensued. Finally, in April 1908, the box was opened by plaintiff in presence of Mr Savi, the local Traffic Superintendent. It was then found that some caps had been damaged by damp and were mouldy. This is not at all surprising considering that the box had been lying in the goods shed for over 9 months including a rainy season, that the number was 18 or 19 short, as compared with the invoice and that sand was found in the box. There is no evidence that the weight of the box was, or was not correct, according to the way bill. Some negotiations were then entered into with plaintiff and he agreed to accept Rs 25, in full satisfaction of all his claims against the Companies concerned. This provisional agreement was sent up for sanction to the General Manager, but apparently he did not sanction it, repudiating any liability. Finally, on 11th January 1909, after further correspondence, plaintiff sued the D H Railway Co for Rs 299 odd. The suit was dismissed on 22nd February 1909. On appeal, it was remanded for a further hearing on 18th May 1909. On 21st June 1909 (probably acting on a suggestion let fall by me) the F I Railway and G I P Railway were added as defendants. The Eastern Bengal State Railway was not added—probably as a month's notice should have been given first to the Secretary of State.

Now as regards the E I Railway and G I P Railway, they plead that they never received the notice to which they were entitled under Section 77 of the Railway Act, Section 140 of the Act clearly provides that such notice of demand should be served on the Agent in India of the Railway Administrations concerned. There is no evidence that Section 77 and Section 140 of the Act were complied with as regards these two Railways and so the suit as against them must fail.

It is argued that the D H Railway is the agent for the other Railways. I cannot see that it is in any way the agent within the meaning of Section 140 of the Act and reported cases hold that one Railway is not the agent for another in the less specialized meaning of the term 'agent' (See L R 26 Bombay, Page 62, &c.)

Azizul Haq
v
D H Ry
G I P Ry
&
E I Ry

Azizul Haq
 v
 D H Ry
 G I P Ry
 &
 F I Ry

Next, as regards to liability of the D H Railway, Section 80 of the Railway Act as applicable to this case is that a suit may be brought either against the Railway Administration to which the goods &c, were delivered by the consignor thereof or against the Railway Administration on whose Railway the loss, &c, occurred

Now there is no attempt made to prove that the loss occurred on the D H Railway, or on any other Railway at all. I am asked to presume that the loss occurred on the D H Railway. This is clearly a presumption that the law does not authorize me to make. Further, more Mr Savi plaintiff's witness, deposes that the damage from sand could not have occurred on the D H Railway, and this is not disputed. Hence, the suit must fail, as against the D H Railway for want of proof that the loss or damage occurred on this Railway.

The alternative remedy would be against the G I P Railway to which the goods were delivered by the consignor, but as shown above no suit can now be brought against that Railway Administration, in view of Sections 77 and 140 of the Railway Act.

Hence, I find against the plaintiff on issues (1), (2), (3), (4) and (5). The question of limitation of applicability of Section 31 or Section 115 of the Second Schedule of the Limitation Act has been raised, but in the view I have taken above of Sections 77, 80 and 140 of the Railway Act, it is unnecessary to discuss this part of the case.

Finally, defendants are sued for damages for failure to deliver over the box to plaintiff. This was strongly urged in argument scarcely touched upon in the plaint. It is perfectly obvious from the letters that passed between the D H Railway and the plaintiff that the latter was repeatedly pressed to take delivery, but he refused to do so except on his own terms. Finally, the box with its contents, was sold by auction, after due notice, to defray the expenses presumably under Section 55 (4) of the Railway Act. On issues (6) and (7) I find that the plaintiff is only entitled to recover from the Darjeeling Himalayan Railway Company the net balance of the sale proceeds realised from the sale of the consignment, after deducting from the gross amount the actual charges for demurrage. This sum has not been actually ascertained. Plaintiff's witness 2 states the approximate amount only. The defendant Company will be noticed to produce evidence on this point and a decree will be passed accordingly with proportionate cost when the sum has been ascertained.

Case No. 34.

In the High Court of Judicature at Madras.

ORDINARY ORIGINAL CIVIL JURISDICTION

Before The Honourable Mr Justice Moore

No 87 of 1903 *

RATILAL KALIDAS, (PLAINTIFF)

THE MADRAS RAILWAY COMPANY, (DEFENDANTS)

*Act XIII of 1855—Accident on a Railway—Compensation for family of deceased—Suit for negligence—Burden of proof*1904
March 24

The Mail train from Madras to Bombay precipitated into a stream after passing Mangapetram Station owing to a pier and spans of the bridge having been carried away with the result that many passengers died and Kalidas Ramchand the father of the plaintiff, was one among them.

A suit was brought against the defendant Company for damages by the widow of Kalidas Ramchand as the next friend of the plaintiff (minor) under Act XIII of 1855.

Held, that the defendant Company failed to prove that they were not guilty of negligence and that they were therefore liable to the plaintiff's claim for compensation.

CLAIM for Rupees 5,25,000, damages resulting to the plaintiff, the son and to Diwahibai, the widow of Kalidas Ramchand deceased, by the death of the said deceased caused by the wrongful acts, neglect and default of the defendant, and for costs of suit.

DEFENCE.

The defendant is not a Company registered under the English Company's Act and has not a registered office at Royapuram, but is a Corporation under IG, Victoria, Chapter XLIV, and has its head office in London. The defendant admits the allegation in para 3 of the plaint, but puts the plaintiff to the proof of the allegations in para 4, and of the statements made in paras 7 and 8 thereof. The defendant denies that it contracted to carry Kalidas Ramchand safely and securely, and says that it only contracted to use reasonable care and skill in the carriage of passengers. The defendant Company also denies that the death of the said passenger was due

* For Judgment in appeal, see ante page 605

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to any wrongful and unskilful acts or neglects or defaults on its part, and says that it was due to the collapse of the Katar bridge caused by a sudden and unprecedented charge of rain in the neighbourhood of the said bridge. The defendant denies that any cause of action arose to the plaintiff on the 12th September 1902, and says that the damages claimed are excessive.

ISSUES

The following issues were tried before this Court, that is to say —

First — Was the defendant bound to carry the deceased Kalidas Ramchand safely and securely on his journey, on the morning of the 12th September, 1902?

Second — Was the death of Kalidas Ramchand due to negligence or want of skill on the defendant, as alleged in paragraphs 5 and 8 of the plaint?

Third — Is the plaintiff entitled to sue as representative of the deceased Kalidas Ramchand?

Fourth — Is Diwalibai the widow and the plaintiff the legitimate son of the deceased Kalidas Ramchand?

Fifth — What amount, if any, is the plaintiff entitled to recover as damages from the defendant?

JUDGMENT — On the morning of the 12th September, 1902, the Mail train from Madras to Bombay (No 81) passed through Manapitum Station without stopping at 3.29 o'clock. On reaching mile No 205/7, the whole of the train, with the exception of the rear brake-van was precipitated into a stream owing to pier No 2 and the 2nd and 3rd spans of bridge No 665, called the Katar or Manapitum bridge having been carried away. This terrible disaster caused the death of between 70 and 80 persons, among whom was Kalidas Ramchand, a partner in a Bombay firm of Jewellers. The body of Kalidas has not been found, but it is admitted that he was one of the passengers who lost their lives on this occasion. The present suit has been brought under Act XIII of 1855 by the widow of Kalidas as next friend of the plaintiff, his minor son, a boy of some 4 years of age. This Act provides that whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act of neglect or default is such as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof, the party, who would have been liable if death had not ensued, shall be liable to an action or suit for damages notwithstanding the death of the person injured. The Act further directs that every such action shall be for the benefit of the wife, husband, parent or child of the person whose death shall have been

so caused and shall be brought in the name of the executor administrator or representative of the person deceased. The present suit is brought by the minor son for the benefit of himself and his mother, the widow of the deceased. Damages are claimed up to the amount of five lakhs and a quarter.

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The first issue which is as to whether the defendant the Madras Railway Company, was bound to carry the deceased Kalidas Ramchand safely and securely on his journey on the morning of the 12th September 1902, must be found in the negative as it is clear that there was no such obligation on the defendant.

The second issue, the most important in the suit is as to whether the death of Kalidas Ramchand was due to negligence or want of skill on the part of the defendant. This question has at the hearing of the suit been virtually confined to two points. Firstly, as to whether the disaster was due to faulty construction or negligent maintenance on the part of the defendant of the Katar bridge and secondly, as to whether after the bridge had fallen the Mail train might not have been stopped and the disaster avoided, if there had not been neglect on the part of the defendant with respect to the watching of the line. The Katar bridge was a skew bridge with 3 openings of 31½ feet each, the piers being of stone in lime masonry and the rails resting on girders each pair of which weighed about 22 tons. It has been clearly proved, and has indeed been admitted at the hearing that the masonry of the piers was excellent and was also in excellent condition at the time that pier No. 2 was carried away and that no fault could be found with the girders. It is however urged that the waterway was not sufficient and that the foundations of the pier at the time of the accident whatever they may have been when first constructed were wanting in stability. The bridge was opened for traffic in 1868 and it is clearly shown that from that time up to September 1902 it had never suffered any damage or injury, and that up to that date at all events the waterway had been found to be amply sufficient. There is evidence that the highest flood recorded as passing under the bridge up to the night of the disaster was only 4 feet 11 inches in depth while the evidence on record in the present case shows that on the night of the 11th and the morning of the 12th September 1902, it rose to the top of the girders or to about a height of 11 feet 8 inches above the bed of the stream. As to this, it may here be mentioned that there is some doubt as to the exact height that the water in the stream had risen when pier No. 2 went. Mr. Thompson the Chief Engineer Madras Railway Company, writes in Exhibit 17 that the flood rose to the upper flange of the girders. In his deposition (11th witness for the defendant) he states that when the water in the stream was up to the top of the girders, the waterway was sufficient to carry off

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17,000 cubic feet of water per second, and he adds that by the top of the girders he means the top of the top flange. He further deposes that taking the account that had been given to him of the manner in which the debris of the train lay in the stream after the accident (as to this vide Exhibits K K, L L and M M) he was of opinion that the flow of water through the bridge must have been greater before the accident than after, and that it is probable that the water after the accident topped the rails on the standing portion of the bridge. He adds in re examination that, from a consideration of Exhibits K K, L L and M M, he had come to the conclusion that by the fall of the train, the waterway was obstructed up to the extent of one third. Taking this opinion to be correct as I do, it follows that whatever may have been the case after the train had fallen it may be accepted as established that until then the water in the stream did not top the rails. According to Mr Guanaprakasam (1st witness for defendant) an Engineering Assistant, employed by the Madras Railway Company who was deputed immediately after the disaster took place to take levels in the bed of the river in various places in the catchment area in the bed of the large Mangapatnam tank and elsewhere, the volume of water that the Katar bridge (No 665) was able to discharge was 17,884 cubic feet per second, while the other small bridges and culverts in the same divide, i.e., Nos 666, 667 and 668 were able to discharge respectively 433, 461 and 122 cubic feet per second. The total discharge for the four would therefore be 18,900 cubic feet per second. He further calculated that the maximum flood water that could have had to cross the Railway line on the night of the disaster was 14,218 cubic feet per second and, as the bridges were able as already shown to discharge over 4,000 cubic feet per second more than that amount, he arrived at the conclusion that the waterway must have been blocked by debris brought down by the flood, Exhibit T. The following are the details of the calculations made by him to show the volume of water that had to pass under the bridge.

Water discharged by the Mangapatnam big tank

| | |
|----------------|------------------------------|
| Breach No 1 | 2,550 cubic feet per second |
| 2 | 336 " " " " |
| 3 | 1,790 " " " " |
| 4 | 3,203 " " " " |
| Surplus escape | 2,464 " " " |
| Total | 10,343 cubic feet per second |

Water discharged by the Mangapatnam small tank
Breach 631, surplus sluice 2,452.

| | | |
|--|--------------------------------|--------|
| Total 3,283 cubic feet per second | | |
| Total discharged by two tanks | . | 13 629 |
| Debit water due to rainfall | | 3,454 |
| <hr/> | | |
| Balance discharge due to impounded water in tanks | } 10 172 cubic feet per second | |
| He concludes this calculation as follows — | | |
| Flood due or rainfall from a catchment area of 9 square miles, 4 146 cubic feet per second | | |
| Flood due to impounded water in tank discharged . | | 10,172 |
| | Total | 14,218 |
| | | <hr/> |

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NB — This seems to be a mistake for 14 318 (Exhibit T)

The experts who have been examined accept the calculations of this witness as in the main correct. There was a considerable amount of discussion during the trial as to the alleged breaching of the Mangapatnam big tank and a quantity of evidence has been recorded bearing on this matter. Eventually the facts come out as follows. It is shown beyond all doubt that the bund of this tank was badly breached in two places on the night of the 11th September, but the evidence is not clear as to the amount of water that was ponded up in the tank at the time that the breaches occurred. The tank is a very old one and it is shown that at the time of the Pymash case, over 100 years ago it had been abandoned no doubt because the bed had silted up to such an extent as to make it better worthwhile to cultivate the bed than to use the tank for the storage of water. It is shown that a stream which runs down from the adjacent hills enters this tank, flows round it in a channel that it has carved out for itself inside the bund and is discharged by the surplus channel. The bund was in good order, but it is shown that it had for a considerable time been used as a cart track and as nothing has for years been expended on its repair it may, I think, be fairly presumed that portions of the bund had been worn down to a height considerably lower than what it rises to at its highest point. It is probable that it was at these places that the breaches took place. Considering this fact and also the very great extent to which the bed had silted up, I feel considerable hesitation in accepting the evidence of Gnanaprakasam as to the amount of water that was ponded up in the tank on the night of the disaster. I should be inclined to attach less importance than this witness does to the breaching of the tank and ascribe the extraordinary amount of water, that flowed through what he calls the confined section in the stream

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on the night of the 11th September, to an excessive rainfall one in fact exceeding the figure of 9 inches which has as a rule been accepted throughout this inquiry as the probable fall between 6 p.m. on the 11th September and 6 a.m. on the following morning and to the consequent sudden and violent rush of water that there must have been from the hills in the vicinity of the railway. As to this Mr Chatterton (2nd witness for the defendant) deposes as follows: "There is a range of hills practically parallel to the Railway and about four miles distant and heavy banks of clouds must have come up the Valley and emptied themselves against the ridge. There must have been a rainfall of a considerable number of inches to account for the enormous amount of water that came down. Mr Gnanaprakasam at the end of Exhibit T, having pointed out that the bridges were able to carry off some 4000 cubic feet per second more water than can have flowed down the stream, arrives at the conclusion that the reason why the waterway proved insufficient must have been because it was blocked up by the debris brought down by the flood. A heavy and sudden downfall of rain such as there was on the night of the 11th September must of course have brought a considerable amount of debris such as cholam stalks & down the stream but it must be held that the evidence to show that the waterway was in consequence blocked up to any serious extent is very meagre. The photographs taken by Mr Stoner show that some cholam stalks were found among the wreck of the train and similar evidence is given by other witnesses but this does not go far in support of the theory of obstruction. Mr Gnanaprakasam says that he saw a babool tree that had been carried down the stream and that he was told that 25 cart loads of cholam stalks had been washed away. The evidence of the ryots who have been called as witnesses does not however prove that any considerable number of ~~loads~~ stalks were carried away. The evidence as to this portion of the defence must be set aside as of but little value."

The question that has to be answered is why did the bridge give way? The answer given by Mr Thompson to this query is I believe the correct one and I accept it. Before I however proceed to set it out in detail a few words are necessary as to the foundation of pier No 2. This pier was resting on a bed of soft shale which takes the Rail level at 10000 stretched across the stream at the full water levels Kondapuram side abutment 81-95 Bridge No 1 81-76 and Mangapattanam side abutment 83-25 (Vide Exhibit 15). No trace of the foundations of pier No 2 could be found after this discovery but Mr Thompson points out that Exhibit 14 shows that the design of the bridge was that the foundations of both the piers should go to the same depth. Lying in the soft shale there was a bed of loose sand to the depth of from 3 to 5 feet but this bed, there can be no doubt,

was carried off as soon as the flood began to come down Exhibit 15 also shows that there was a bed of hard shale across the stream at the following levels 78, 92, 77, 09 75, 42, 79 09 and 79, 10 Mr Thompson further states that examining the wells in the vicinity of the bridge he found that below the surface soil there was a stratum of kankur over 3 feet in thickness overlying beds of shale and slate and also that he found some kankur on the south side of the bridge near the wing walls These facts show that it is most probable that at the time that the bridge was constructed there was a layer of kankur spread across the stream As to when however this kankur was carried away it is impossible to say It may have gone years ago, or it may have lasted till the night of this disaster If it did it must have been carried off as soon as the flood began to come down the river at as high a velocity as 10 feet per second (see deposition of Mr Thompson) Mr Thompson's evidence and his report (Exhibit 17) also prove to my satisfaction that there was no scouring worth mentioning under pier No 2, and that it was not such scouring that led to its fall The following are the more important portions of Mr Thompson's evidence, in which he explains only pier No 2 gave way He says

The conclusion that I came to was that the pier had slid on its foundations for a short distance when, owing to the girders being bolted down to the pier, the pull of the girders against the movement of the pier cracked the pier so seriously that the pressure against the girders and the pier caused a portion of the masonry of the pier to overturn, while another portion of the pier attached by the bolts to one of the spans of the girder was carried away by the flood. An inspection of one of the girders showed that it had been subjected to a heavy drag and it appeared to me that this was due to the movement of the pier that the rails had hold and that the movement of the pier down the stream had twisted the girder till ultimately the rails smashed and the girder floated down stream If the water rose above the bottom flange of the girders, the pressure of the water on the girders would be communicated to the piers and the direction of the flow of the water would be altered and would be discharged at right angles to the plane of the girders, instead of parallel to the axis of the river If the water had risen over the training wall but not up to the flange of the girders, there would have been a certain amount of spill, but the direction of the flow of the water could not have been altered When the water rose above the flange of the girders, the velocity would increase and the bridge would become a submerged sluice If the water rises in the case of this bridge as high as the flanges of the girders, the effect would be that it would press against the piers on the north side, that a hollow would be formed on the south side and that the pier would be subjected to side pressure in accordance with the difference of the level of the

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water on the two sides of the pier. This bridge is not designed to resist the amount of lateral pressure which it would be subjected to if the water rose to the top of the girders. It is not usual to design bridges that will resist such pressure. I calculated that the pier of this bridge that was carried away was capable of resisting side pressure up to about 45 tons. (The details of this calculation are given in the deposition of this witness.) If the water was flowing at a surface velocity of 21 feet per second which would give a mean velocity of 17 feet per second and the surface of the water against the pier was 2 feet higher on the north than on the south side, that would give a side pressure against the pier of 22 tons. To this must be added the pressure of the water against the girders and that with a mean velocity of approach of 11 feet per second would give a pressure against the length of girder which would affect No. 2 pier of 23 tons. The total pressure would be therefore 45 tons with the water up to the top flange of the girders. This evidence shows clearly that as soon as the water rose to the top flange, as it is clearly proved that it did on the morning of the 12th September, the pier would commence to slide on its foundation and the two girders and the pier would collapse in the manner described by Mr. Thompson. In order to guard against a similar disaster in the future, Mr. Thompson states in Exhibit 17, that he proposes in restoring the bridge to under in the masonry where necessary, to provide certain walls up and down stream with a masonry floor between, and to increase the waterway by lifting the girders 3 feet. Can it be held that, because the bridge was not originally constructed or subsequently modified as here proposed by Mr. Thompson, the defendant must be bound to be guilty of negligence, I am not prepared to arrive at such a conclusion. The bridge stood without sustaining any injury for 34 years and it eventually went because it was subjected to a pressure so utterly abnormal and excessive, that I do not consider that the Company's Engineers can be held to have been guilty of negligence because they failed to foresee and guard against it, in so far there fore as the original structure had maintenance of the bridge is concerned, I cannot find against the defendant on the 2nd issue.

The next question to be considered with reference to this issue is as to whether the Mail train might not have been stopped and the disaster avoided, if there had not been neglect on the part of the defendant with respect to the watching of the line. In the system of watching the line in force in this portion of the Railway on the night of this accident, it is necessary to refer to the several Exhibits which have been filed in order to show clearly what the existing system is and how it came into force. It appears that up to 1890 night watchmen were generally employed on the line. In December 1890 it was proposed, for financial reasons, that the night service of trains

in the Madras Railway should be discontinued and various other alterations made. In a letter from the Agent and Manager of the Railway printed in a Government Order of the 22nd December 1879, (Exhibit 21) it was suggested that night watchmen should be abolished and the Consulting Engineer for Railways in sending this and other proposals on to Government observed as follows: 'The estimated saving in the Engineering Department consists almost entirely in the abolition of night watchmen whose cost in wages and stores amounts to more than Rs 40 000 per annum. This item of expenditure is believed to be peculiar to the Railways in this Presidency, it being understood that night watchmen are not employed in other parts of India. Their abolition on the Madras Railway has been for some time under discussion and the Chief Engineer has recently proposed to dispense with them in the interests of economy. A Committee consisting of the Consulting Engineer, his Deputy, the Examiner of Railway Accounts, and all the leading officers of the Madras Railway, considered the various questions that had been raised and passed the following resolution on the 27th February 1880: "Resolved that in the opinion of the Committee the services of night watchmen employed in the Engineering Department may safely be gradually dispensed with as vacancies occur except the men employed on bridges, the safety of the line being provided for by the gang maistries being ordered to put on the most trustworthy men in the gang as watchmen whenever the weather is threatening and floods may be expected the men so employed being paid extra for the special service.' This proposal was approved of by Government on the 10th April 1880 (Exhibit 22). Shortly after this certain persons were prosecuted before the Sessions Judge of North Arcot for endangering the safety of passengers by placing pot sleepers on the Railway line. During the trial, it was stated that from the 1st January 1881, all night watchmen on the line from Jalarpet to Bangalore had been dismissed. Mr Plumer, in his Judgment observed that it appeared to him to be very false economy on the part of the Railway authorities to abolish such an obvious protection as that afforded by the employment of night line watchmen and to leave the line from 6 P M to 6 A M, to take care of itself and forwarded a copy of the judgment, Exhibit E 2, to the Chief Secretary to Government. His letter was sent to the Consulting Engineer for report, but he adhered to his opinion that night watchmen could safely be dispensed and nothing further was then done in the matter (Exhibit F). A considerable number of papers have been filed relating to the rules passed from time to time for the watching of the line since 1880. The first of these is Exhibit H H, the Circular (No 374) of the 25th May 1880 relating to the abolition of night watchmen. In it is stated that it has been decided to abolish permanent night watchmen and to employ during monsoon

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and stormy weather only selected men from the Permanent Way gangs who it was directed should be paid annas 2 pies 8 extra for every night that they were on duty. It was further ordered that each Permanent Way Inspector was on the approach of wet weather to arrange for a special gang cooly to perform the duties of the night watchmen for as many nights as he considered necessary. In the dry season and in fair weather it was directed that there were to be no night watchmen. On the 7th December 1893, a circular was sent out to Resident Engineers directing them to report as to the steps that they had taken to ensure that the terms of Exhibit H H were complied with, Exhibit 23. On receipt of the replies to this letter the Chief Engineer sent out a Circular No 1315 of the 15th January 1894 (Exhibit Z) in which he observed that his previous circular had elicited the fact that there was no uniform procedure with reference to the employment of night watchmen and after pointing out that the North West line between Cuddapah and Raichur was one of the portions affected by the South West Monsoon passed the following orders:—"It is therefore left to the discretion of the Resident Engineer as to whether during the continuance of the South West Monsoon they put on the day watchmen or coolies temporarily taken from the gangs. Inspectors should however at all times during doubtful weather warn the gangmaistries to be on the alert and patrol the line and if necessary turn out the whole gang for that purpose. The maistries should also be on the alert and patrol the line during wet nights taking as many of their coolies as may be required and the men should always be paid extra for night duty. Exhibit I and A A show the instructions given by the Resident Engineer to the P W Inspectors with reference to Ex 7. There were further discussions and correspondence with respect to night watchmen in 1898 which will be found in Exhibits 21, 22 and A, but which it is not necessary to refer to in detail. Eventually on the 15th June 1898 a circular (Exhibit B) was issued by the Chief Engineer which contains the rules which were in force at the time that this accident took place in the Third District. Special significance must be attached to the first paragraph of the circular, which is as follows:—"Night patrolling is ordered to commence on the 1st of October and to end on the 31st December on the portion of the District between Arkonam and Cuddapah and to commence on the 1st of June and to end on the 31st of August between Cuddapah and Raichur, but Permanent Way Inspectors are expected to see that night patrolling is carried on over their lengths at any time when wet or stormy weather is prevalent. This applies to the whole District. It will be observed that the system of having no night watchmen at any time throughout the year introduced from motives of economy in 1881 was abolished and that night watchmen were ordered to be

entertained during certain months of the year on certain portions of the line. For the portions of the line which includes the site of this accident it was directed that there were to be night watchmen from the 1st June up to 31st August but at no other time throughout the year. It is difficult to understand why it was decided that on the portion of the line running through Jammalamadugu Taluk, it was decided to stop all watchmen on the 31st August for it will be found by reference to Exhibit 35 that the month in which there has been the heaviest rainfall in that Taluk for the last 30 years is September, that the month with the next highest rainfall is October and that the average rainfall in both those months is considerably heavier than it is in June July or August. It is urged on behalf of the defendant that Mr West the Chief Engineer who signed Exhibit B had a lengthened experience of the Ceded Districts and that it must be assumed that he had good reasons for directing that night watchmen should be dispensed with at the end of August. That Mr West had very considerable experience of that part of the country is perfectly true and it is unfortunate that owing to his absence from India it has not been possible to examine him as to the reasons on account of which it was decided to stop the watchmen just before the commencement of the period of the year in which the heaviest rainfall was to be expected. It has also been urged that these rules received the sanction of the Consulting Engineer, who must have been well acquainted with the climatic conditions of the country through which the Railway passed. It will however be found by reference to Exhibit A that the dates on which night patrolling was to begin and end in the several districts were not filled up in the draft rules drawn up by the Consulting Engineer. This was a matter which it was no doubt thought should be left to those with special local knowledge. It is idle to inquire as to who is really responsible for the rule dispensing with the night patrols on the 31st August but that it has led to most unfortunate results in the present instance there cannot in my opinion be any reasonable doubt. If all the rules to be found in Ex B, and especially No 7 had been in full working order on this portion of the line on the night of the 11th September 1902, it is scarcely possible that intimation of the dangerous condition of the line would not have been given to the Station Master at either Mangapatnam or Kondapnam in time to stop the Mail train from Madras. It seems to me that it is impossible to avoid coming to the conclusion that the Railway Company was guilty of negligence in leaving this portion of the line absolutely without any attempt at watching or patrolling during the two wettest months in the year from the time the coolies and Permanent Way gang left their work at about sun set till they returned to work after sun rise, especially

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when it is remembered that the line North and South of Mangapatnam skirts for some miles hills from which sudden rushes of water may be expected in bad weather. It is however contended that the provisions in the rule that I have already quoted to the effect that Permanent Way Inspectors are expected to see that night patrolling is carried on over their lengths at any time when wet or stormy weather is prevalent, if properly carried out would be found to afford a sufficient safeguard against accidents. I have accordingly now to consider the manner in which the provisions of this rule were carried out on the night of the 11th September. In September 1902, Carrapiett (plaintiff's 1st witness) was the Permanent Way Inspector in charge of this portion of the line he had 40 miles of Railway line under his supervision and lived at Kondapuram the first station on the line to the North west of Mangapatnam. Gang No 4 under him consisted of six coolies and a maistry who worked from the 204¹/₂ to the 207¹/₂ mile, Tulukanam plaintiff's 2nd witness, was the maistry and he and two of his coolies Fakirgadu and Munigadu (11th and 12th witnesses for defendant) have been examined. Gang No 5 under John Maistry worked from the 207¹/₂ mile up to Kondapuram. The only member of this gang who has been examined is Santhayya (13th witness for defendant). It is unfortunately not possible to set out with positive certainty the movements of Carrapiett and the several gang coolies on the night of the 11th and the morning of the 12th September and the hours at which they started to inspect the line. It is clearly shown that Tulukanam and two of his coolies, Fakirgadu and Munigadu, left Mangapatnam Station on the night of the 11th September after it had begun to rain heavily, that they crossed the Katar bridge and that after dawn on the 12th September they were found on the North side of the bridge, which they were unable to recross, by Carrapiett. There is however, scarcely another matter connected with the movements and action of these men and also of Carrapiett, the evidence with respect to which is not unsatisfactory and conflicting. It is quite impossible to fix even approximately the hour at which Tulukanam and his two coolies left Mangapatnam. Train No 32 from Gooty left Kondapuram that night at about 12.33. When he had been under examination for some time Tulukanam stated that after he had crossed the Mangapatnam bridge he showed his white light to that train as it approached from the direction of Gooty. When, however, he first entered the box what he deposed was as follows. He said that he found Fakirgadu and Munigadu under a tamarind tree. They opened the tool box and took out the lamps. He adds "I can't say how long I stopped in the tool box. A coolie train came from Gooty, I went out to give the signal. It was then raining heavily. I then went towards the west, taking the two coolies with me. If this statement is true, and I attach greater

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weight to it than I do to the afterthought Tuluknam cannot have left Mangapatnam Station till after 1 A M It may be mentioned that there is no evidence of any weight in corroboration of Tuluknam's assertion that he showed the light to the train after he crossed the bridge as no one on the train neither the Guard nor the Driver nor the Fireman has been able to go into the witness box and state that he saw the white light The evidence of the Assistant Station Master, 9th witness for defendant who was on duty on the night of the 11th September throws but little light on the question as to the hour at which Tuluknam and his gang men started to patrol the line He says that he saw two gang men at the tool box at 9 12 P M but that they were not there at 12 30 P M This, however does not prove that the men were out on the line for Tuluknam deposes that when he first saw them they were not at the tool box but standing under a tamarind tree Tuluknam further states that having crossed the bridge he went along the line as far as mile 207/6 7, where he found that the Railway embankment had been washed away He left Mumgadu at about mile 207 and returned towards Mangapatnam When, however he and Fakirgadu got to mile 205/14 15 they found that the embankment had been washed away there also to such an extent that they were unable to get across the breach They waited there till dawn and then got across the water having enbarked to a considerable extent They walked on to the bridge and then saw that one of its piers had been carried away and that the greater portion of train No 81 was lying at the bottom of the stream Here again there is a considerable conflict of evidence When Mumgadu was first examined which was on the 14th September at the inquiry held at Mangapatnam regarding this disaster what he stated was as follows At 207 mile there was danger The line was breached We (i.e.) Tuluknam Mumgadu and Fakirgadu came back with the intention of stopping the Mail We returned to 205/15 mile and there was a gap I got hold of wire fence By the time we got to the bridge the Mail was wrecked at the bridge In the case of a man such as this an ignorant cooly on a pay of Rs 5 a month far greater weight should be attached to his first statement than to his subsequent assertions made after there had been time to concoct plausible stories If this man really was left behind at mile 207, it is most extraordinary that he should have stated at the enquiry that he came back to the bridge at once with the other men In this man's first statement it will also be remarked that nothing is said as to there having been any real difficulty in crossing the breach at 205/15 He appears to have got hold of the wire fence and got over without any serious delay, and this statement is corroborated by Section Master Subbarayalu (23rd witness for defendant) This witness states that he started from Konda-

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puram at 2 A.M. and walked towards Mangapatnam. He says "I went on towards Mangapatnam and found Tulukanam and Fakirgadu at the bridge. To get to them I had to cross a breach by walking on the pot sleepers. The water there was about 4 feet below the rails. It was dark when I got to the breach. It took me about 10 minutes to get across the breach. When I got to Tulukanam, the bridge was gone and the train had fallen into the river. It cannot well have been as late as 4 P.M., when this man crossed the breach, and he found no difficulty in doing so, and on arriving at the bridge found that Tulukanam and his cooly had been able to get there before him. The evidence given by Santhayya (13th witness for defendant) also proves beyond all reasonable doubt that the breach at 205/14-15 was not such as to afford any very serious obstacle to a cooly who wanted to get across. Santhayya states that he met Munigadu standing with a lantern near bridge No. 670. Santhayya took the lantern from the other man and told him to go on to Mangapatnam and inform the Station Master that there was a breach at bridge No. 692. Munigadu subsequently came back and told him that he had seen Tulukanam and Fakirgadu, and that they had informed him that the train had fallen down, and directed him to go and report this to Carrapiett. He says distinctly that Munigadu told him that he had seen the train after it had fallen and that shows that the man was able to get across the breaches at mile 205/14-15 and walk up to the Mangapatnam bridge with no great difficulty. The point is in reality not one of very great importance for it is clear to me from the evidence of Mr. Thompson that taking into consideration the wet and stormy state of the weather that night Tulukanam, even if he had got to the bridge before train No. 51 came up and had made the best possible use of the lamp with which he was provided, would not have been able to stop the train in time to prevent this disaster. The view that I take after a careful consideration of all the evidence is that Tulukanam got as far as the breach at 207/6-7, that he then turned back at once in order to give information of the breach at the Mangapatnam Station, that he was not seriously delayed by the breach at 205/15 but that all the same he did not arrive at the bridge till the train had fallen into the stream. If this view is correct, it follows that Tulukanam must have left Mangapatnam Railway Station at a much later hour than that at which he has tried to show that he started with his two coolies. The only evidence that it remains to consider with reference to these questions is that of Carrapiett, the Permanent Way Inspector. He states that on the night of the 11th September, he slept in the open air outside his bungalow. At about 11 P.M. it began to drizzle and he accordingly had his bed carried inside and went to sleep again. He was awakened by the rain at about 1.40 A.M. He awoke the Sec-

tion Maistry (23rd witness for defendant) and two coolies and at about 2 o'clock started along the line in the Mangapatnam direction. At about mile 208½ he met three of John Maistry's gang. They said something, he does not say what, to him about the state of the line and he pushed on to bridge No 672. There he found that the ballast on the South abutment had been washed away for a length of 30 or 40 feet and to a depth of 14 feet. The three coolies, whom Carrapiett had with him, then returned to Kondapuram but he states that he did not direct them to tell the Kondapuram Station Master to wire to Mangapatnam about the breach. The explanation given on the part of the defendant for the Inspector's neglect to hasten back to Kondapuram and inform the Station Master of the breach or at least to send an urgent message by one of the coolies to him is that it was unnecessary for him to do so as he had been told that information had already been sent to Mangapatnam, and that his duty was to take immediate measures for the repair of the line, so that train No 81 might pass over it without difficulty. It is impossible to accept this explanation, Carrapiett could not possibly have imagined that it was possible for him to repair the damage to the line before the arrival of the train, and even if he was satisfied that all that could be done to inform Mangapatnam had been done, this did not relieve him from the responsibility of sending the earliest possible information to the Station Master at Kondapuram (rule No 199 of the rules contained in Exhibit 28 extended to the Madras Railway by Exhibit 29). The point however, is not of much importance, as it is doubtful if Carrapiett starting from Kondapuram at 2 A.M. could after his arrival at bridge No 672 have sent or taken a message back to Kondapuram in time to enable the Station Master by a telegram to Mangapatnam to stop train No 81 before it left that station. It is, however impossible to avoid convicting Carrapiett of negligence of duty in not starting out long before 2 A.M. that morning. The rainfall that night was he says the heaviest he had ever known in those parts and the rain gauge in front of his office registered a fall of 62½ inches between 6 A.M. on the 11th September and 6 A.M. on the following morning. This downpour must have aroused the Inspector long before 2 A.M., and it is absolutely incredible that the Section Maistry lying in the open verandah of the bungalow could have slept calmly till that hour. Carrapiett however, in his deposition asks the Court to believe that, when he at last awoke at about 1.30 A.M., he had to awaken his maistry and the two coolies as they were all asleep. I have already held that the defendant, in stopping night watchmen on the 31st August regardless of the fact that September and October are the months in the year when the heaviest rainfall

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is to be expected in these parts, cannot be acquitted of negligence and I must for the reasons now given arrive at a similar finding with respect to the manner in which the rule, that Permanent Way Inspectors are expected to see that night patrolling is carried on over their lengths at any time when wet or stormy weather is prevalent, was observed on the night of the 11th September. Too great a responsibility was thrown on Tulukanam an elderly and ignorant cooly, receiving the wages of a horsekeeper. There was no one to see that this man and his coolies turned out in time on the night and the result was that they were too late to take effective steps by warning Kondapuram, and through Kondapuram Mangapatnam in time to stop the train. Cairnpuett was also in my opinion guilty of negligence. He ought to have turned out certainly not later than midnight, and if he had done so this disaster would almost certainly have been avoided. Whether it be the correct view to take that the rules were faulty or that they were inefficiently carried out or both, the result was that although in this short portion of the line from Mangapatnam to Kondapuram a bridge was carried away and the embankment was seriously breached in two places, information of what had happened was not given to the Station Masters in time to stop a train which was wrecked about four hours after the wild and boisterous weather accompanied by excessive rainfall which led to this disaster commenced. On the 2nd issue I must hold that the death of Kalidas Ramchand was due to negligence on the part of the defendant. I may here allude to a matter with respect to which some evidence has been given and there has been some discussion. Captain Hearn K E Esq Government Inspector of Railways, suggested that it might be found to be possible to warn trains approaching dangerous portions of the line by means of port fires and red flares. It has also been suggested that rockets might be used with advantage. I do not consider that it is necessary to give my opinion as to this evidence. It is admitted that red flares port fires and rockets are not used for such a purpose on any line in India or in Great Britain or Ireland. Mr Thompson is doubtful if it would be found possible to use such signals with advantage, and is of opinion that once train S1 had started, the only way that it could have been stopped before it got to the bridge was by detonators attached to the line and these Tulukanam could not put down as he was on the wrong side of the stream. As to the signals advocated by Captain Hearn all that I need say is that, as they are not used on any line in India or the United Kingdom, it cannot be held to show negligence on the part of the defendant that they are not made use of on the Madras Railway line.

The third and fourth issues must be found in the affirmative as there can be no doubt that the plaintiff is the son of Kalidas, that the plaintiff's next friend is the widow of Kalidas, and that the plaintiff is entitled to sue as the representative of his deceased father

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The fifth issue remains to be decided. But few decisions of Indian Courts passed, with reference to the measure of damages to be awarded under Act XIII of 1855, have been cited. Reference may be made to *Venayal Kaghunath v The G I P Railway Company* (7 Bombay High Court Reports 113) and *Ratanbai v The G I P Railway Company* (6 Bombay High Court Reports, 130). The decision of the Chief Justice from which this is the appeal will be found at page 120, note of the 7th volume. There are also some important decisions on the provisions of Statute 9 and 10 Victoria, Chapter 93, on which the Indian Act is based. These decisions lay down clearly that in assessing damages the pecuniary loss sustained by the family of the deceased is all that can be considered and that nothing can be allowed the survivors as compensation for mental suffering, etc. (*Blake v Midland Railway Company* 18, Queens Bench 93 and 21 L J Q B 234). In *Rouley v London and N W Railway Company*, where the person on whose behalf damages were claimed was the mother of the deceased, who had bound himself by a personal covenant to allow her an annuity of £200 during their joint lives, the majority of the Judges held that the principle of fixing as damages such a sum as would put the mother in the same pecuniary position as if her son had not met with the accident was sound (Law Report 8, Ex. 221 and 42, L J Ex 153).

It is shown that Parikh Kalidas Ramchand was a partner in a firm of jewellers trading in Bombay, under the name of Jhaveri Amuluck Khoobchand and Company, and that he was entitled to a 4/17 share of the profits of that firm (Exhibit J). The evidence as to the profits realised by this firm is by no means as clear and full as could be desired. No partner of the firm has been called as a witness. A book keeper (9th witness for plaintiff) of the firm has however produced a balance sheet (Exhibit K) showing the profits of the firm for the years ending the 11th November 1901 and the 30th October 1902, and the account books (Exhibits L 1, L 2, L 3 and L 4) from which the figures given in Exhibit K have been taken have also been produced. As there is at present no Gujaratti Translator in the High Court, these books have been examined by the Gujaratti Interpreter in the Office of the Collector of Madras, and his Report (Exhibit N) shows that the balance sheet has, with the exception of a few errors of no importance, been correctly prepared. These papers show that the

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profits of the firm for the two years that I have measured amounted to Rupees 78 161 6 3. If from this amount Rs being the interest at six per cent on the capital of the firm amounts to Rs 212,500 (*vide* Exhibit J) and has to be paid to the persons mentioned in paragraph 3 of Exhibit J he deducts the balance available for distribution among the partners. Now the first paragraph of Exhibit J will be Rs 52,661 6 3 for years or Rupees 26,330 11 1 a year, Kalidas 4 17 share of sum would be Rs 6,195 7 4 a year or Rs 516 and odd a year. It is by no means easy to determine the share of this monthly income of Rs 516 that I should hold the plaintiff and his mother would be likely to have had the benefit of, if his father had lived. The amount would have varied from year to year according to the wants of the boy and the whims and fancies of his father's decisions as might he expected afford but little assistance. The Court attempting to decide what proportion of his income a boy winner may be presumed to be likely to expend on those dependent on him. I think that, if I allow the plaintiff Rs 125 a month, a sum slightly less than one fourth of the income which the deceased was carrying at the time of his death, it cannot fairly be contended that the figure is unreasonably high or unduly low. Kalidas was 27 years of age at the time of his death, and Mr Chatterjee the Secretary of the Oriental Life Assurance Company (a witness for plaintiff) tells us that a native of this country of 27 years of age and of sound constitution, has an ordinary term of expectancy of life of 36 years. He has also calculated that a man of 27 years with an expectancy of 36 years would have to pay Rs 264 000 to purchase an annuity of Rs 1,000 a month. He would therefore have to pay Rs 33 000 for an annuity of Rupees 125 a month, and I accordingly find on the 5th issue that that sum is the amount that the plaintiff is entitled to recover as damages from the defendant on account of himself and his mother. I will pass a decree for Rupees 33 000 against the defendant with tax and costs, and under the provisions of Section I, Act 13 of 1925, I direct that the said sum shall be divided into two equal parts, of which one shall be handed over to the next friend of the plaintiff, the widow of the deceased for her sole use and benefit and the other moiety shall be handed over to her on such terms as the Court shall direct on behalf of the plaintiff for his sole use and benefit.

I certify for two Counsel for the plaintiff, and two Counsel for the defendant

Case No. 35.

In the Court of the Second Subordinate Judge
at Alipur.

SUIT No 1 of 1905

JADAB CHUNDRA GHOSH, PLAINTIFF,

v

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,

DEFENDANT

*Claim by contractor—Supply of ballast—Supply of coal by Railway Company—Compensation for damage—Limitation*1906
January, 27

This was a suit against the defendant for compensation (1) for damage sustained by the plaintiff on account of bad quality of coal supplied by the defendant (2) for the price of bricks spoiled on account of supply of bad coal by the defendant and (3) for the price of brick ballast taken delivery of by the defendant. The suit was dismissed on the following grounds—

(1) that the coal supplied to the plaintiff was not of bad quality, but that bricks were spoiled owing to the insufficiency of coal used by the plaintiff in burning them and that the suit was barred by limitation

(2) that the plaintiff was paid for the ballast supplied by him,

(3) that as regards job works done by him, the claim was admitted by the defendant and the amount was duly credited

JUDGMENT—The plaintiff is a contractor. He offered in November 1899, to supply ballast to the E B S Railway Administration at Rs 9 8 per 100 cubic feet. This offer was verbally accepted by the Executive Engineer in charge of the line and the plaintiff commenced work in 1899. There was a specification of the contract and the written tender of the same was signed by the plaintiff on the 23rd of January 1900, and subsequently accepted in writing by the Engineer in Chief.

It is alleged that in accordance with the specification, the ballast was to be broken into 1½ inches gauge, that the size of the bricks was to be 11" x 5½" x 3", that the supply of coal was to be made by the Railway Administration, that 90 maunds of coal was to be burnt for every lac of bricks, that in August 1900 a circular was issued by the Engineer in Chief and forwarded to the plaintiff directing him to break ballast so as to pass through a ring 2 inches in diameter, that in pursuance of the aforesaid contract the plaintiff claimed bricks with the coal supplied by the Railway from February

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to May 1900 that the plaintiff signed a coal statement prepared by the Railway Administration showing a supply of 194,000 maunds of coal to him, valued at Rs 77,946 0 7, that the Railway Administration took delivery of 8,53,769 cubic feet of ballast without objection in 1900 and of 6,35,153 cubic feet in 1901 and that the plaintiff also did some job works for the Railway valued at Rs 4,706 7 9 which by mutual consent were incorporated with the ballast account, that with the exception of 54,000 maunds of Assam coal obtained in May 1900 the remaining coal supplied by the Railway Administration was bad and unfit for burning bricks that in consequence of the bad quantity of the coal 4 lacs of cubic feet of bricks were spoiled and unburnt whereby the plaintiff sustained Rs 12,000 as damages that as the plaintiff's kacha bricks on clamps measured 18 lacs of cubic feet and the space occupied by coal was 3 lacs of cubic feet a quantity of 1,35,661 maunds of good coal was only necessary to burn his bricks and the plaintiff is therefore entitled to claim a sum of Rs 26,018 1 9 for the excess 52,000 maunds of coal. Upon those allegations the plaintiff claims—

Compensation—

| | Rs | A | P |
|--|--------|----|---|
| (1) For excess of coal consumed owing to its bad quality 4,339 maunds @ Rs 6 per maund | 16,07 | 8 | 0 |
| (2) For 54,000 maunds of Assam coal supplied to him | 24,500 | 13 | 7 |
| (3) For price of 4 lacs cubic feet of bricks spoiled on account of bad coal including cost of clamping @ Rs 3 per 100 cubic feet | 12,000 | 0 | 0 |

Price of ballast—

| | | | |
|--|----------|---|---|
| For 8,53,769 cubic feet of brick ballast taken delivery of in the plaintiff's presence and 6,35,153 cubic feet taken over in his absence @ Rs 9 8 per 100 cubic feet | 1,41,369 | 0 | 0 |
|--|----------|---|---|

Job works—

For breaking ballast &c

Deduct payment in cash
Price of coal

| | | | |
|---------|----------|----|---|
| | Rs | A | P |
| Total | 1,84,293 | 14 | 7 |
| | 47,210 | 0 | 0 |
| | 78,035 | 0 | 0 |
| | 1,25,245 | 0 | 0 |
| Balance | 59,048 | 14 | 7 |

The plaintiff also claims Rs 21,257 7-3 for interest at 12 per cent per annum, and his total claim is thus laid at Rs 80,306-6 0

The principal objections raised on behalf of the Railway Administration are that in accordance with the specification signed by the plaintiff, the Railway authorities were not bound to supply coal to him, that it was quite optional with the plaintiff to take the coal from them or from anywhere, that the size of the bricks agreed to be prepared by the plaintiff was 10' x 5' x 3' and not 11' x 5 1/2' x 3", as stated by the plaintiff that the circular referred to by the plaintiff had nothing to do with the size of the ballast agreed to be supplied by the plaintiff, that in 1900 the plaintiff supplied 8,79,640 cubic feet of ballast, of which 17,958 cubic feet were mixed with peela, that in 1901 and 1902 the ballast taken over contained peela and rubbish and on being rectified by Messrs B L Sen and Company, was found to contain only 4 21,230 cubic feet, that the coal supplied to the plaintiff was not bad or unfit for burning bricks and he sustained no loss and is entitled to no damages and that the kaoha bricks in clamps measured only 20,11 575 and hence 1,94,000 maunds of coal were insufficient to burn his bricks. The Railway Administration denied that anything was due to the plaintiff for the ballast supplied by him and contends that the money paid when in cash and the price of the coal supplied to him exceeded the value of his ballast taken over. These and other objections raised in the defence were resolved into the following issues settled in this case, that is to say,—

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- 1 Is the suit barred by limitation ?
- 2 What were the terms of the contract and specification, and what was the effect of Circular No 92 dated the 7th of August 1900 thereon ?
- 3 What is the total quantity of ballast for which the defendant is liable to pay to the plaintiff, and what was its price ?
- 4 To what compensation, if any is the plaintiff entitled to (firstly) for coal (secondly) for bricks spoiled ?
- 5 Is the plaintiff entitled to any interest ? If so how much ?
- 6 To what other relief if any is the plaintiff entitled ?
- 7 Was the plaintiff entitled to raise any question as to the quantity of the coal ?
- 8 Did the plaintiff manufacture the ballast according to the specification ?

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- 9 What was the quantity of the remaining ballast after the acceptance of 8,53,769 cubic feet? Was it specification and was not the Railway Administration justified in respect to take delivery of the same

ISSUE No 1 —The plaintiff's claim consists of 2 distinct parts
viz —

- (a) compensation an account of the coal supplied to him by the Railway authorities, and
- (b) price of the ballast delivered with that of some job works done by him

As regards the first part of his claim, it is admitted on all hands that the coal was supplied to him from February to May 1900 that is, when he went on with the work of burning his brick clamps. Thus he must have been aware of the so called bad quality of the coal when it was delivered to him as, at the latest, when his bricks were burnt. The specific injury which he is said to have sustained resulted in the year 1900, and it was in that year therefore that the alleged breach of contract on the part of the Railway Administration took place. It also appears that the plaintiff signed an account admitting the coal supplied to him and its value in April and June 1901. The suit was instituted on the 3rd of January 1905, that is more than 3 years after the time when he received delivery of the coal and burnt his bricks as well as after the time when he signed the coal account. The claim for compensation is based upon a distinct agreement alleged to have been made by the Railway authorities which is separable from the main contract for ballast. Admittedly the agreement was never made in writing. Hence, I am of opinion that the plaintiff's claim for compensation is barred under Art. 114 Schedule II, of the Indian Limitation Act.

As regards the other portion of the plaintiff's claim his last delivery of the ballast is proved to have begun on the 25th of December 1902, and as there was a running account as regards the advances made by the Railway Administration and delivery of the ballast by the plaintiff from time to time, I do not think the plaintiff's claim for price of the ballast is barred by limitation.

ISSUE No 2 —It is admitted on all hands that the terms of the contract made by the parties are entered in the *Hundi* and specifically signed by the plaintiff. The plaintiff has not filed any copy of either of these documents but he has taken exception to the specifically filed by the defendant in this way, namely, that the first two pages thereof which contain the terms in dispute have been altered and substituted. The plaintiff no doubt on oath says that these two pages have been replaced but there is no reliable evidence to corroborate

him on this point. He examined one Bipin Behary, the retired Head Clerk of the Executive Engineer's office, but the witness swears that all the three sheets of the specification filed are in the hand writing of his then assistant Gobind Seal. He does not say that the first two sheets have been altered, and to my mind he has disproved the plaintiff's case. No doubt there is some discrepancy in the evidence of the Executive Engineer and his Assistant Engineer as to the copy of specification which remained in their office but this does not in the least help the plaintiff. The plaintiff has examined also a clerk of his attorney, who inspected the specification in the office of the Engineer in Chief. He too could not swear that he did not see the first two pages of the specification in dispute at the time of his inspection, and I am constrained to observe that the plaintiff has made a reckless statement that a portion of the specification filed has been tampered with. All the pages of the documents bear seals and they came from the custody of responsible officers, and I can never persuade myself to believe that the specification filed by the defendant has been altered in any of its part. I believe in the genuineness of the tender and specification filed by the defendant and find that the supply of coal by the Railway authorities was never compulsory, that it was quite optional with the plaintiff to take the coal from them or from anybody else, that as to the size of the bricks to be manufactured the agreement was that they should be 10" x 5" x 3" each and not 11" x 5 1/2" x 3" and that the ballast agreed to be broken in such a way as to pass through a ring 1 1/2 inches in diameter. As to the size of the ballast, the plaintiff relied upon a circular being No. 92 of 1900, and contends that in accordance with that circular he had to increase the dimension of the ballast. This circular bears date, the 7th of August 1900, and the agreement with the plaintiff was that he was to have supplied ballast before the 30th of June, personally. Mr. King, the Assistant Engineer, sent this circular to the plaintiff with a forwarding memorandum bearing date the 10th of August 1900, and this memorandum does not appear to have enjoined the plaintiff to break his ballast in 2 inches gauge. His forwarding memo and the evidence of Mr. King distinctly prove that the plaintiff was never directed to increase the ballast nor to deviate from the terms of the specification which he signed on the 5th of June of 1900. Some ballast of 2 inches dimension was indeed taken over, but it seems to me that it was a matter quite optional with the Railway authorities, and thereby we can never infer that they directed the plaintiff to deviate from the terms of the specification. I find that the circular referred to could not have any retrospective effect, and that it had no application to the size of the ballast agreed upon in the specification filed by the defendant. The correspondence on this subject between the parties supports the

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defendant's case and I find that the plaintiff agreed to break ballast so as to pass through a ring 12 inches in diameter, and that he was never directed to deviate from this agreement. I find all the terms of the dispute in favour of the defendant, and adversely to the plaintiff.

It is to be observed in conclusion, that from the tender and specification of the contract, it does not appear that there was any agreement on the part of the Railway administration to take any specific quantity of ballast from the plaintiff.

ISSUE No 3.—It has transpired from the plaintiff's own evidence that he has had measurement books and other books showing the supply of ballast to the Railway authorities from time to time but for reasons best known to himself he did not choose to produce them in Court. The measurement book of the Engineering staff of the Railway are proved to have been burnt but the bills which were prepared on a reference to these books are extracts and have been filed. These documents support the defendant's case and I see no tangible ground to disbelieve it. I should observe also that the oral evidence adduced by the plaintiff on this point does not commend itself to me, and I must reject it as unworthy of credence.

Now, there is no dispute that 553,769 cubic feet of ballast was taken over by the Railway Administration before August, 1901. As regards the ballast taken over subsequently, the Railway Administration admits to have taken over 625,000 cubic feet, but it is proved that this ballast was mixed with peels and rubbish and that it was of inferior quality that the authorities asked the plaintiff to sort and rectify the quality that on his failure to do so they made it over to Messrs B. L. Sen and Company for rectification and that after rectification they obtained only 421,220 cubic feet of ballast agreed to be delivered. I must therefore allow this quantity as the quantity taken over subsequently.

The plaintiff would have us believe that the 625,000 cubic feet were taken over without any notice, but I am unable to believe him on this point too. Mr Pestonji, the plaintiff's agent, swears that he gave notice to Barada Babu the plaintiff's agent, and that he told the Barada Babu of this measurement too. Barada Babu was examined by the plaintiff but he could not deny that any such notice was given to him. Besides it is proved that the plaintiff's servants were in the field and one of them was present during the measurement. In these circumstances, I am unable to believe that the second quality of ballast was taken over without notice.

The next question for determination is whether the Railway authorities are bound to pry for the entire 625,000 cubic feet of ballast. It is proved satisfactorily by the witnesses examined and

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behalf of the defendant that the ballast was not according to specification and that they contained peela and rubbish. These witnesses have no personal interest in the matter. It is true, there was a criminal case against Mr. King, but it was compromised, and the evidence on the record shows that he dealt with the plaintiff as leniently as he did before that case. All these witnesses are responsible officers, and I see no reason to disturb their testimony. Their evidence disproves the plaintiff's case, and I can place no reliance on his witnesses. It is also proved that the Railway authorities gave notice to the plaintiff to separate good ballast out of the lot that he was allowed time to do so, but that he put forward lame excuses and did not comply with the requisition. That being so, I think Railway authorities were justified in making over the ballast for rectification to Messrs. B. L. Sen and Company. This Company found the rectified ballast to be 4,21,220 cubic feet, and I think the defendant is liable to pay for this quantity only. The balance is on the field, and the plaintiff's ownership over it is not extinguished. He can deal with it in any way he likes, but I do not think the Railway Administration is bound to pay for it.

It is to be observed that the ballast supplied before August 1901 was also of not good quality, and that a portion of it, namely, 17,958 cubic feet, were paid at a reduced rate of Rs. 5 per 100 cubic feet, which the plaintiff has accepted without any protest. The plaintiff did not, though called upon, rectify the ballast taken over from the 29th of December, 1901, hence he is bound to pay the charge incurred for its rectification, which is proved to be Rs. 5,793 10. The price of job works is not in dispute and it has been duly credited. So that I feel no hesitation in finding that the plaintiff is not entitled to have from the Railway Administration anything more than what was admittedly paid to him in cash, and for value of the coal supplied to him at his requisition. The defendant did not claim refund of the excess payment from the plaintiff and I think it is not necessary for me to determine the exact sum due to the Railway Administration. I find that the plaintiff is not entitled to claim anything from the defendant Administration.

IS-UF No. 4.—It is admitted on all hands that coal was supplied to the plaintiff from February to May 1900, and that by the end of July following, all his brick clamps were burnt. In his evidence the plaintiff admits also that he began to burn his bricks from February 1900, and that since then his outturn was bad. It has also transpired from the evidence on the record that the plaintiff accepted the price of the coal supplied to him, and seized the coal account on the 13th of April 1900, and on a reference to the correspondence passed between the plaintiff and the Railway authorities I find that from July 1900 to November 1901, i.e. for a period of 15 months

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The plaintiff never complained that the coal supplied to him was bad. No doubt, in his evidence the plaintiff says, he verbally complained to the Executive Engineer, but this officer was neither examined nor attempted to be cited in this case. The plaintiff has examined a few witnesses on this point, too, but I can place no reliance on them when the circumstances and probability of the case are against their evidence. The ex Head Clerk of the Executive Engineer appears to be an old friend of the plaintiff, and I have reason to believe that it is he who also induced the plaintiff to launch into this hopeless litigation. I am not prepared to believe that the coal supplied to the plaintiff was bad or unsuitable for the purpose of burning the brick clamps.

I have already found that it was quite optional with the plaintiff to take coal from the Railway authorities, and if the coal supplied on his requisition turned out to be bad, he must have complained then and there and never accepted its price without any protest. Instead of preparing his bricks of the specified size, namely, 10" x 5" x 3" he manufactured them of a larger size, and in order to make a better bargain he seems to have consumed a less quality of coal than what was necessary for him to use, the result was that his bricks did not burn well and he must bear the loss caused by his own short-sightedness and imprudence. I find that the plaintiff is entitled to no compensation either for the coal supplied to him, or for the bricks not burnt and spoiled.

ISSUE No 8 — From all what I have already found, it is evident that the plaintiff did not manufacture all his ballast according to specification and that he was not entitled to claim anything from the Railway Administration.

I do not think it necessary to determine the other issues framed in this case.

ORDER — The suit is dismissed with costs and interest at 6 per cent per annum till realisation.

Case No. 36.

In the Court of the First Class Sub Judge
at Ahmedabad.

CIVIL SUIT No. 585/96

PARIKH RANCHODLAL GIRDHARLAL, PLAINTIFF

2

1 THE B B & C I RAILWAY COMPANY

2 F G LYNDE, Esq, RESIDENT ENGINEER, B B & C I Ry,
DEFENDANTS

Declaration of right to convey water across Railway line—Permanent injunction—Claim for damages—Stoppage of work—Loss of Customers

1897
August 17

The plaintiff sued the defendant Company for declaration of his right to convey water from his Mills to the Ginning Factory through a pipe embedded under the Railway line of the defendant Company and to recover Rs 1,000, as damages from the defendant Company on account of the Ginning Factory having completely stopped work for some time owing to the water connection having been broken by the defendant Company and owing to the loss of customers

Held, that the plaintiff had a right to convey water through the pipes across the Railway line, and Rs 500 was awarded as damages to the plaintiff owing to the stoppage of work caused by the water connection having been broken by the servants of the defendant Company

THE plaintiff sues to obtain the following reliefs, viz —

- (1) To obtain a declaration that he is entitled to convey water from his Mills to the Ginning Factory through a pipe embedded under the Railway line of the defendant
- (2) To recover Rs 1,000 as damages from the defendants on account of their Ginning Factory having completely ceased to work for some time owing to the water connection having been broken by the defendants, and owing to the subsequent loss of customers occasioned by the act of the defendants
- (3) To obtain an injunction ordering defendants to repair the water pipe at their expense and on their failure to do so enjoining defendants to refrain from obstructing him (plaintiff) from repairing the same

In addition to the above defence, Mr Lynde in his written statement, Ex 11, contends that he has no private interest in the subject matter of the suit, and that his costs should therefore be awarded and the plaintiff's suit should be thrown out

Parikh
Ranchodlal
Giriharlal
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B B & C, J
By

ISSUES

- 1 Will this suit lie without making Swami Narayan Maharaj a party to this case ?
- 2 Was the drain referred to in the plaint made by the plaintiff or by the defendants for the use of the plaintiff ?
- 3 Has plaintiff right to carry water by the drain ?
- 4 Have defendants or their servants broken the drain or pipe in dispute ?
- 5 If so has plaintiff suffered any injury ?
- 6 To what relief is plaintiff entitled and against whom ?

No further issue is sought by either party

My finding on the 1st issue is that this suit will lie and that it is not necessary to make Swami Narayan Maharaj a party to this case

My finding on the second issue is that the drain was made by the defendant for the use of the owner and tenant of the land leased to plaintiff

My finding on the 3rd issue is in the affirmative that is in favour of the plaintiff

My finding of the 4th issue is also in the affirmative, that is, in favour of the plaintiff

My finding on the 5th issue is in the affirmative

My finding on the 6th issue is that the plaintiff is entitled to obtain the declaration prayed for in his first claim and that he is entitled to recover Rs 500 as damages. It is unnecessary to award any other relief to him

The above relief should be granted against the Railway Company but not against the 2nd defendant personally

REASONS

The plaintiff has his Spinning Mill on the west of the Railway line and his Ginning Factory to the east of it. There is a well in the land occupied by the Mill. This well supplies water to the Ginning Factory through cisterns connected by a pipe across the Railway line. Plaintiff says that the pipe was broken by some one of the Railway men on the 1st March 1896 and though he requested the Railway authorities to repair the pipe, no reply was given to him

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He was thereby put to loss. Plaintiff now prays for several reliefs in connection with the drain and asks Rs 1,000 as damages for the loss sustained by him.

The fields in which the Mill and Ginning Factory have been erected belong to Swami Narayan Maharaj, and defendants contend that the said Maharaj should be made a party to this case. The first issue is whether this suit will lie without making the Maharaj a party to it. From Ex 49 and 50, which are registered rent notes it clearly appears that plaintiff is the lessee of the lands on which the Mill and the Gin stand. As lessee he is fully entitled to bring such an action (vide section 108, A E), he is only bound to give a reasonable notice of the encroachment complained of to the lessor and clause (4) of para B of Section 108 of the Transfer of Property Act No IV of 1882. I therefore find the first issue in favour of the plaintiff.

The second issue is whether the drain referred to in plaint was made by the plaintiff or defendants for the use of the plaintiff. There is no direct evidence filed on this case as to the party who made the drain. There is no doubt as to its being made for the benefit of the person holding the lands on two sides of the Railway line for the water carried through the drain has been used by the occupant of the lands (vide Ex 29, 31, 33 and 37). As the two cisterns and the pipe connecting them lie within the boundaries of the Railway line, and as defendants say that they have made many drains like the one in question, I presume that the disputed drain was made by the defendants for the benefit of the owner or tenant of the two pieces of land lying on the east and west of the Railway line. The fact that it is highly necessary for the safety of the passage that the cisterns and drain should be within the direct supervision of the Railway authorities, I conclude that the drain was made by the Railway Company for the benefit of the land owners or occupiers.

The third issue is, whether the plaintiff has a right to convey water by the drain. I find that he has. From the evidence of witnesses 29, 31, 33 and 37 and others it appears that the plaintiff and before him the other tenants of the land used to convey water by the drain. The Railway authorities do not use it. I therefore find the third issue in favour of the plaintiff. The drain is a kind of easement created by a grant or under a contract, and as such is attached to the two pieces of land on which plaintiff's Mill and Gin stand. As plaintiff is now lessee of the land, he is entitled to convey water by it.

The fourth issue is whether the defendants or their servants have broken the drain. On this point I find that Natha Patha, a Railway servant, has broken the drain. The evidence of Kapilaram (No 29) and other eye-witnesses who have seen him breaking the drain is

quite satisfactory Defendants have not proved that the plaintiff or his men have broken it Plaintiff was highly interested in keeping the drain intact Had he or his men broken the drain, he would not have at once complained about it to the Railway authorities (*vide* Ex 75, 74 and 42) Ex 43 was written by Mr Lynde to plaintiff in reply to his letters of the 1st and 3rd of March 1896 (*vide* Ex 40). It does not say that the drain was not broken by a Railway servant Till 14th March 1896 (*vide* Ex 44), it was not alleged that plaintiff or his men had broken the drain It is a fact that in Ex 64 Mr Earl had informed Mr Lynde that it was a servant of the plaintiff that had broken the drain, but I am not inclined to believe that to be true Natha's evidence is not supported or corroborated by any other evidence Mr Lynde and other officers of the Railway appear to have no personal knowledge about the matter and their evidence is of no great importance in this case They appear to have inspected the spot days after the drain was broken and their evidence simply amounts to this, *viz*, that the work of breaking the drain was done by a skilled workman No professional opinion like this was needed in a case like this The whole correspondence filed in this case and the oral evidence adduced by the parties fully show that the drain was broken by Natha Patha, a servant of the Railway Company. I therefore find the 4th issue against the defendants

The 5th issue is whether the plaintiff has suffered any injury From the evidence of the witnesses examined by the plaintiff (*vide* Ex 24, 29, 35, 36, etc.), it appears that in order to carry on a Ginning Factory water is of greatest importance As the owner sometimes emits sparks of fire, etc., as cotton has to be ginned in the Factory, it is necessary that there should be an ample supply of water on hand From the evidence of witnesses Nos 24 & 29 it appears that Gin had to be stopped owing to the drain being broken by the defendant's men, stoppage of work is in itself an injury I therefore find that owing to the drain being broken by Natha Patha, plaintiff was obliged to stop the Ginning Factory for 5 or 6 days This was an injury for which plaintiff is entitled to relief After the 6th March, plaintiff tried to get water by means of buckets but a precarious supply of water could not satisfy the customers regarding the safety of the cotton and plaintiff had to lose most of the customers

The last issue is regarding the relief to be given to the plaintiff As to this I find that plaintiff is entitled to the declaration of his right to use the drain As to damages I am fully satisfied that the plaintiff has suffered much loss, but he (plaintiff) has failed to prove by his own account books and by the account books of his customers that he has suffered a loss of Rs 1,000 The accounts produced by him do not furnish any basis on which damages can be calculated

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(*vide* Ex 69, 70, 71 and 72) I therefore deem it proper to award him Rs 500 as damages for all the injury and wrongs suffered by him (plaintiff) As defendant, Mr Lynde has worked on behalf of the Railway Company, he cannot be made separately liable But for his failure to give prompt relief in reply to the plaintiff to make him defendant on his account, I do not deem it proper to award his costs As it appears from the evidence of Messrs Lynde and Ranchodlal (*vide* Ex 40 and 56) and from letter Ex 46, dated 11th December 1896 that the drain has been repaired by the Railway authorities it is needless to award the relief prayed for by plaintiff in his 3rd claim It is also unnecessary to award the remaining reliefs The declaration of the plaintiff's right of the award of Rs 500 as damages will be a sufficient security for the preservation of the plaintiff's rights

It is a matter of regret that the Railway Company had with a view to force plaintiff to come to terms (*vide* Ex 43, 44 and 45) as regards another dispute prolonged this matter unnecessarily and had exposed plaintiff to unnecessary loss and great inconvenience The conduct of the defendant as evidenced by Ex 43 44 & 45 and by the watchman kept on the disputed spot with a view to prevent plaintiff from repairing the drain leaves no room for doubt as to the fact that the drain was broken by one of the Railway servants

Mr Wadia argued that the drain was made for the purposes of agriculture and the plaintiff has no right to convey water for his Gin This argument is too flimsy Section 23 of the Easements Act allows the dominant owner to alter the mode and plan of enjoying the easement As long as the plaintiff has not imposed any additional burden on the Railway line, defendants have no right to restrain the plaintiff in using the drain Mr Tickell is not on record and his costs cannot be awarded

I therefore order that the plaintiff, as lessee of the land on which his Mill called the Rajnagar Ginning and Manufacturing Company Limited, stands and of Survey No 617 of the village of Asarwa in which his Ginning Factory stands, is entitled to use the disputed drain for the purpose of conveying water from the Mill premises to the Ginning Factory, that the defendant Company has no right to interfere with the plaintiff's right, and that the plaintiff recover Rs 500 and all the costs of this suit from the 1st defendant The claim against the 2nd defendant is thrown out Defendants to bear their own costs

Case No 37

In the Court of the Political Agent, Sorath Prant, at
Jetalpur Civil Station

CIVIL SUIT No 5 of 190, 1904

MR T O C RHEINUS PLAINTIFF

v

THE MANAGER OF THE B G J P RAILWAY, DEFENDANT

Railway servant—Leave allowance claim for in advance—Provident Fund money, Claim for before resignation—House rent

1904
March, 19

A Railway servant on leave is not entitled under the rules of the Company to claim in advance leave allowance and Provident Fund money in anticipation of his leaving the service of the Company until after the termination of the leave without the special sanction of the Board.

This is a claim by Mr T O C Rheinns, lately Traffic Inspector, against the B G J P Railway for sums alleged to be due to him on account of leave allowances in advance, Provident Fund interest, house rent and damages, making a total of Rs 7,490 10 5. There is an item claimed by the Company as a set off Rs 88 9 11 on account of Railway quarters rent for house occupied by plaintiff at Jetalpur.

Plaintiff's case is that in an interview with the Traffic Superintendent at Bhavnagar Para on 16th February 1903, he was asked to leave Railway service and that the conditions on which he agreed to do so were eventually accepted. That plaintiff had severed his connection with the Company from 16th April 1903, the date on which he was relieved of his charge. That owing to the Company refusing to settle his dues, plaintiff was unable to leave Jetalpur to seek other employment, and was unable to occupy a house he had rented in Bombay and is therefore entitled to damages and house-rent.

Defendant denies any agreement with plaintiff and represents the suit to be premature, the right to claim in advance leave allowance and Provident Fund having not accrued to plaintiff at the time suit was filed.

The first issue I find in the negative.

REASONS—Two things are admitted by both parties.

1 That the Board of Control alone has power to sanction the payment of leave allowances in advance.

Rhenius
v
B G J P
Ry
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2 That Provident Fund money can only be claimed when quitting Railway service, or on death (by heirs)

In this case the payment of leave allowances in advance was only sanctioned by the Board of Control in their Resolution, dated 31st December 1903 Ex D/28

Mr Munshi for plaintiff has argued that Ex D/2 and Ex P1 constitute a proposal and an acceptance, and that the Board is bound by the same, so that when Mr Shoobridge, the Traffic Superintendent told plaintiff in Ex D/1 that he could get leave allowances in advance, plaintiff had a right to consider that the Board had sanctioned it. But as a matter of fact, the question of granting leave allowances in advance never came before the Board for decision until 31st December 1903. Mr Shoobridge undoubtedly understood that plaintiff would get leave allowances in advance and would retire at the end of the leave granted him, but he was well aware that the Board alone could grant such payment in advance or dispense with plaintiff's services, plaintiff being a Railway servant drawing pay of over Rs 200. The Manager's statement in Ex D/11 that no official intimation had been given to plaintiff that his services were to be dispensed with is certainly incorrect, for in Ex D/10, dated 18th August 1903, the Traffic Superintendent informs plaintiff, "You are aware that you are now on 15 months' leave at the end of which you are to retire." The Manager's statement dated 18th October 1903. Plaintiff's letter, Ex D/2, can under no circumstances be considered a resignation. It merely says "I therefore shall expect that I be given my full privilege leave and furlough or the same in payment on my leaving the Railway" and in addition to this I shall expect a gratuity as compensation "for my services." It refers to his leaving the Railway only as a possible contingency, and makes no reference whatever to Provident Fund money.

On this application, Ex D/2, an application for leave in the prescribed form was filled in the Traffic Superintendent's office. The number of his application with date being quoted in the place for signature, according to the usual practice, evidence of which has been produced, and sanctioned by the Manager under date 25th May 1903, Ex D/6

Granted that there was an understanding between plaintiff and the Traffic Superintendent that plaintiff was to retire at the end of the leave granted to him. But both plaintiff and the Traffic Superintendent were aware that Mr Rhenius being under no special agreement, he could only leave the Company's service under the orders of the Board contained in their acceptance of his resignation or in a notice to quit their service.

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The grant of a leaving certificate does not help plaintiff's case. Such certificate the Traffic Superintendent had power to grant, and he did so to help plaintiff to look for other employment as he was not to rejoin when his leave was over.

Even when called upon to resign by the Board plaintiff would not put in his resignation and it was therefore not until 8th March 1904 that his connection with the Railway Company was severed by a notice from the Board.

I therefore find that on the 20th November 1903 the date this suit was filed plaintiff was still in the Company's service and the payment of leave allowances in advance not having been sanctioned by the Board, who alone could sanction such payment the right to claim such payment had not accrued to plaintiff, and since Provident Fund money can only be claimed when quitting the service which can only be done in plaintiff's case with the sanction of the Board, and that sanction had not been obtained the right to claim Provident Fund money had also not accrued. Since the claim must be rejected on this issue it is unnecessary to record findings on the other issues except issue No 8.

On the 8th issue I find in the affirmative.

REASONS—It has been shown that the Company's rules provide that when a Railway servant ordinarily entitled to free quarters is on leave, and his quarters are required for other Railway servants, the Manager may call upon him to vacate, and if he refuses to do so he must pay rent at the rate of 5 per cent on the Capital Cost of the building, which in this case works out Rs 15 3 1 per month.

No sufficient reasons have been shown for making an exception in the plaintiff's case. He was called upon to vacate and refused to do so. The defendant is therefore entitled to deduct from the sum found due to plaintiff house rent at the rate of Rs 15 3 1 per mensem from 1st August 1903 to such date as plaintiff may vacate the quarters.

JUDGMENT—For the reasons given above I dismiss plaintiff's suit with costs and give judgment for defendant to deduct from the amount found due to plaintiff house rent at the rate of Rs 15 3 1 from 1st August 1903 to such date as he may vacate such quarters.

Rhenius
v
B G J P
Ry
—

2 That Provident Fund money can only be claimed when quitting Railway service, or on death (by heirs)

In this case the payment of leave allowances in advance was only sanctioned by the Board of Control in their Resolution dated 31st December 1903 Ex D/28

Mr Muushi for plaintiff has argued that Ex D/2 and Ex P1 constitute a proposal and an acceptance, and that the Board is bound by the same, so that when Mr Shoobridge, the Traffic Superintendent told plaintiff in Ex D/1 that he could get leave allowances in advance, plaintiff had a right to consider that the Board had sanctioned it. But as a matter of fact, the question of granting leave allowances in advance never came before the Board for decision until 31st December 1903. Mr Shoobridge undoubtedly understood that plaintiff would get leave allowances in advance and would retire at the end of the leave granted him, but he was well aware that the Board alone could grant such payment in advance or dispense with plaintiff's services, plaintiff being a Railway servant drawing pay of over Rs 200. The Manager's statement in Ex D/11 that no official intimation had been given to plaintiff that his services were to be dispensed with, is certainly incorrect, for in Ex D/10 dated 18th August 1903, the Traffic Superintendent informed plaintiff, 'You are aware that you are now on 15 months' leave at the end of which you are to retire'. The Manager's statement dated 18th October 1903. Plaintiff's letter, Ex D/2, can under no circumstances be considered a resignation. It merely says "I therefore shall expect that I be given my full privilege leave and furlough or the same in payment on my leaving the Railway" and in addition to this I shall expect a gratuity as compensation for my services. It refers to his leaving the Railway only as a possible contingency and makes no reference whatever to Provident Fund money.

On this application, Ex D/2, an application for leave in the prescribed form was filled in the Traffic Superintendent's office the number of his application with date being quoted in the place for signature, according to the usual practice, evidence of which has been produced, and sanctioned by the Manager under date 25th Mar 1903, Ex D/6

Granted that there was an understanding between plaintiff and the Traffic Superintendent that plaintiff was to retire at the end of the leave granted to him. But both plaintiff and the Traffic Superintendent were aware that Mr Rhenius being under no special agreement, he could only leave the Company's service under the orders of the Board contained in their acceptance of his resignation or in a notice to quit their service.

The grant of a leaving certificate does not help plaintiff's case. Such certificate the Traffic Superintendent had power to grant and he did so to help plaintiff to look for other employment as he was not to rejoin when his leave was over.

Rt Hon
B G J P
Ry

Even when called upon to resign by the Board plaintiff would not put in his resignation and it was therefore not until 8th March 1904 that his connection with the Railway Company was severed by a notice from the Board.

I therefore find that on the 20th November 1903 the date this suit was filed plaintiff was still in the Company's service and the payment of leave allowances in advance not having been sanctioned by the Board, who alone could sanction such payment the right to claim such payment had not accrued to plaintiff, and since Provident Fund money can only be claimed when quitting the service which can only be done in plaintiff's case with the sanction of the Board and that sanction had not been obtained the right to claim Provident Fund money had also not accrued. Since the claim must be rejected on this issue it is unnecessary to record findings on the other issues except issue No 8.

On the 8th issue I find in the affirmative.

REASONS.—It has been shown that the Company's rules provide that when a Railway servant ordinarily entitled to free quarters is on leave, and his quarters are required for other Railway servants the Manager may call upon him to vacate and if he refuses to do so he must pay rent at the rate of 5 per cent on the Capital Cost of the building which in this case works out Rs 15 3 1 per month.

No sufficient reasons have been shown for making an exception in the plaintiff's case. He was called upon to vacate and refused to do so. The defendant is therefore entitled to deduct from the sum found due to plaintiff house rent at the rate of Rs 15 3 1 per mensem from 1st August 1903 to such date as plaintiff may vacate the quarters.

JUDGMENT.—For the reasons given above I dismiss plaintiff's suit with costs and give judgment for defendant to deduct from the amount found due to plaintiff house rent at the rate of Rs 15 3 1 from 1st August 1903 to such date as he may vacate such quarters.

Case No 38

In the Court of the Agent to the Governor
in Kathiawar.

CRIMINAL APPEAL No 24 of 1902 1903

GUARD BI HERAMJI (APPELLANT)

CRIMINAL APPEAL No 25 of 1902 1903

DRIVER VIRA LAXMAN (APPELLANT)

1903
March 13

*Indian Railways Act IX of 1890 S 101—Endangering the safety of persons
—Disobedience of rules by Driver and Guard—Failure of Guard to
protect his train—Failure of Driver to inform Guard before uncoupling
his engine*

The engine of a Special Goods Train was disabled on the road between two stations. The driver uncoupled his engine and ran to the next station in advance to take water, pinning down brakes of only three wagons and without informing the Guard. The train ran down the gradient and rushed through the station in rear and jumped the points. The Guard and Driver were convicted under Section 101 of the Indian Railways Act IX of 1890 for endangering the safety of passengers by doing a rash and negligent act and sentenced to pay a fine of Rs 200 each. On appeal the conviction and sentence of both the accused were confirmed.

JUDGMENT.—These two appeals have been presented by the two accused Vira Laxman and Beheramji Bejori, convicted under Section 101, Railways Act, by the 1st Class Magistrate of Songad in Criminal Case No 56 of 1902 1903, and each sentenced to pay a fine of Rs 200 or in default to undergo two months' rigorous imprisonment.

At the hearing the accused Vira Laxman was represented by Mr Kevalram Dave.

Mr. Abhechand appeared for the Crown.

The issue in each appeal is whether the conduct of the accused amounted to a negligent act or omission endangering the safety of any one within the meaning of Section 101, Railways Act.

I find in the affirmative in the case of both the accused.

For convenience sake, the two appeals were argued together and they will be decided in one Judgment.

The facts of the case appear to be these. On the night of the 19th April 1902, a Special Goods Train left Bhavnagar Para with 39 loaded waggons. On the way the injectors of the engine got worse and worse, and when the train reached Dhola the engine appears to have been in a very bad way. However the Driver made an effort to take it on to Jetalpur.

In re
Guard
Bheramp &
Driver Vira
Laxman

After going three miles beyond Jalia, the station beyond Dhola, both injectors failed entirely and the train came to a standstill at mile post 42½ on a culvert.

There the Driver communicated with the Guard, and a telegram was sent by an oilman Daya to Jalia. The train halted at 12.2 for about half an hour. Then the Driver either on his own initiative as stated by the Guard, or because as stated by the Driver, the Guard wished the train to be moved away from the culvert, started the train once more and succeeded in getting it with great difficulty to mile 46.5. There the engine broke down altogether and the driver began to fear that the boiler would be burnt as all the water had failed. He appears to have lost his head and in his flurry forgotten to tell the Guard, but after hurriedly putting down three brakes and whistling twice detached his engine and made his way on it to Dhasa Station that was close by. There was a very high wind at the time and the waggons left by themselves began to move back down the gradient. The guard made no attempt to control the train, which rushed through Jalia Station, providentially jumped the points at Dhola and so escaped collision with the passenger train halting there, and finally came to a halt some two miles beyond Dhola, where it was found by a search engine and brought back to the latter station.

Mr Dave who has conducted the Guard's defence with considerable ability has pleaded that the guard was under the impression that the Driver had failed to reach Dhasa and was working back to Jalia and that therefore he took no precautions to stop the train until it passed Jalia. That the train was given a push by the fireman when uncoupling the engine, that in no case was the safety of the persons on board the train endangered, and that therefore no offence under Section 101 was committed. He relied on Sterling's Commentary to Section 280, Indian Penal Code, 5 N. W. Reports, p. 240, Wayne's Criminal Law, p. 565.

Mr Krishnalal, who conducted the Driver's defence, has contended that his client gave the Guard full warning by blowing his whistle twice and himself took all the necessary steps to secure the train's safety by putting down the brakes. That under Rule 260 his client who had already been degraded from the post of Driver on Rs. 50 to that of fireman on Rs. 16, could not be punished twice.

In re
Guard
Beheramji &
Driver Vira
Laxman

I will now examine these pleas. The lower Court has held that Mr Dave's client went to sleep after the first halt, and I am of opinion that the evidence justifies no other conclusion. It must be borne in mind that the Guard has resolutely denied having ordered the Driver to take the train on. So the plea that Mr Dave has advanced that the Guard did not take the necessary precautions required by Rule 182 of the Railway Rules, viz, protect the train by showing danger signals and putting detooators on each side of it, because the train was to move away from the culvert is negatory. On the other hand, the train remained at 42/2 for half an hour in a quite exposed condition, as admitted by the Guard who has stated that he was just about to take some steps when the train moved on again. Having gone to sleep, as it would appear, at the 1st halt while waiting for an engine to be sent in answer to his telegram, he remained asleep apparently until after the train passed through Jalia station. My reasons for this are as follows. The Guard has stated that after the train went for, as he thought, two miles it began to back and that he believed that the Driver failing to get it into Dhasa was trying to back it to Jalia. Now, this story is incredulous. The train had actually gone four miles, but even if it had gone only two it would have still been two miles nearer Dhasa station than Jalia. The Guard therefore could not have believed that the driver who had hopelessly failed to get to the former station would attempt to get to one still further off. Again the oilman Daya has deposed that after delivering the telegram at Jalia, he walked back to 42/2 and not finding the train there he turned back towards Jalia when it passed him without its engine. He exhibited his danger signal but no notice was taken of it and as the Guard's van passed him he saw neither the Guard nor the Guard's lamp. It was then going at a great rate of speed. Thus three miles before reaching Jalia a speed incompatible with the theory that the train was being pushed back by a disabled engine had been reached and yet the Guard as he himself has stated, exhibited no danger signal until after passing Jalia station. Nor did he awaken the Police Inspector who was sleeping in the same compartment. Finally, the defence witness Mr Rheinns has stated that a driver cannot push back a train between stations without the Guard's written permission and this is borne out by Rule 7 of the Railway Rules. Thus from the very first the Guard should have taken steps to stop such an open violation of the rules. That he did not do so, and that he exhibited no danger signal until after the train had gone for at least three miles at a high rate of speed appears to me to bear out the lower Court's view that he was asleep. Now to be asleep on duty is certainly a rash act or error. But Mr Dave has argued that there was no danger. But with this view, I cannot concur. Had the train not jumped the rails at

Dhola, it would have collided with the passenger train there and loss of life would certainly have ensued. Moreover Mr Church has distinctly stated that any train running without an engine is dangerous to the men in the train and anything coming in contact with it. And in fact, this view is the only possible one. Mr Dave's client was therefore guilty of a rash and negligent act endangering the safety of the public and was rightly convicted by the lower Court. When the possible consequences of a collision are considered, I do not think his punishment too severe.

In re
Guard
Belaramji &
Driver Vira
Laxman

The Driver, I am of opinion, should never have been placed in that position by the Railway Administration. He is a Koli and is so I have been informed by his pleader quite illiterate. He was promoted from the post of fireman on some Rs 15 a month to that of Driver on Rs 50 possibly from motives of economy. As was pointed out by his counsel, his illiteracy prevents him from acquainting himself with the rules. He must therefore trust entirely to an uneducated memory. I am glad to learn that he has since been degraded to his former post as fireman. I cannot, however accept Mr Krishnalal's plea that his ignorance in this case justifies his conduct. Even he must have known that to detach in a high wind an engine without informing the Guard or taking other steps than to put down three brakes when the train was on a steep gradient was an extremely rash act. It is contended that he blew his whistle twice but that was not enough. He should have satisfied himself that the whistle had been heard by the Guard.

As for the plea that under Rule 269, he cannot be punished by a criminal Court after receiving punishment departmentally, I do not think that it can have been serious. The said rule distinctly lays down that the penalties under clause (1) of the said rule may be inflicted in addition to the penalties incurred by a prosecution under the Railway Act. A criminal prosecution must have precedence of any departmental punishment.

I cannot find that the driver has been wrongly or over severely punished.

Therefore in both cases, I dismiss the appeals and confirm the lower Court's findings and sentences.

Case No. 39.

In the Court of 1st Class Magistrate of the
District of Lahore.

TRIAL No 3/3 OF 1906

THE CROWN

1.

(1) B HIRA LALL, ASSISTANT STATION MASTER MIAN
MIR EAST

(2) MOHAMMAD DIN, GUARD, N.W RAILWAY, LAHORE

(3) IMAM BAKSH, DRIVER, N.W RAILWAY

*Railways Act, IX of 1890, Section 101—Endangering the safety of passengers—
Driver running on a wrong line—Collision—Want of communication
between Guard and Driver—Driver failing to observe signals—
lock certain points by Station Master personally*

1906
June, 18.

A troop train, which was to run on the Chord line from Mian Mir East to Mian Mir West, ran on the Main line to Lahore owing to the points having been set to the Chord line. When the train approached the latter station the distant signal was against it and it was then stopped. In the meanwhile, intimation was sent by the Guard of the troop train to the Station Master to allow his train to get into the station yard. As the memo reached him the mail train left Lahore for Mian Mir East and collided with the troop train standing outside the distant signal. There was no loss of life except that a few soldiers were slightly injured. The Station Master on duty at Mian Mir East and the Guard and Driver of the troop train were charged and tried by the First Class Magistrate of Lahore, who acquitted all of them, on the following grounds—

(1) That there was no valid rule brought home to the knowledge of the Station Master on duty binding him to see personally that the points over which the troop train went on the main line to Lahore were set to the proper line, and that even if the Station Master was aware of the rule it was impossible to carry it out, seeing that the distance he had to traverse was a distance of half a mile besides other works he had to attend to.

(2) That the Driver was new to the road, and he did not observe the signals which the Guard alleges he had exhibited to stop the train.

(3) That, as regards the Guard there were a certain number of goods vehicles without vacuum jugs and without even footboards and he was not therefore able to get access to the passenger carriage and check the vacuum tube and that when the train stopped at the distant signal it

Lahore he protected it in the rear by placing detectors and sent a memo to the Station Master requesting him to let his train into the Station yard

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Mohammad
D B Imam
Baksh

JUDGMENT —The facts in this case are that on 1st December 1905 M M Up troop special arrived at Mian Mir East at 6 35 P M and was to have gone by the Chord line to Mian Mir West. It left Mian Mir East at 6 42 P M but instead of being put on to the Chord line it continued on the main line to Lahore. The Driver finding the Lahore distant signal against him stopped outside the distant signal. The Guard then wrote the memo Ex P VI addressed to the Station Master, Lahore which is as under — M M Up troop "special is outside signal please receive it inside station limits. She "arrived wrong direction instead of Mian Mir West. The time noted on this memo by the Guard is 6 55 A M. It was conveyed by one of the Driver's khallasies to the Engine Shed. It was received there by Mr French (P W 13) Shedman at 7 20 A M. He telephoned the purport of the memo to Lahore. Mr C A Lod I (P W 5), Train Despatcher, received the message at 7 29 A M, but No 1 Down Mail had left Lahore at 7 15 A M, Mr Ellison (P W 6) was the Driver of the Mail he was going from 25 to 30 miles an hour. His attention was drawn to the standing train by somebody who was raising and lowering a red light violently. He was then only a train's length away. He immediately shut off steam and put on the vacuum brake. He says he did all he could, but not stop his train entirely, it collided with the standing Troop Special when going at about 5 miles an hour. There was no loss of life. About 9 soldiers in the special received slight injuries. Slight damage was also caused to the rolling stock.

An enquiry was held by a committee consisting of the Executive Engineer as President and the District Traffic Superintendent and District Collector as members on 4th and 5th December 1905, to enquire into the cause of the accident, the result of which is that Hira Lal Assistant Station Master of Mian Mir East, and the Guard (Mohammad Din) and Driver (Imam Baksh) of the M M Up troop special have been sent up for trial under Section 101 of Act IX of 18 60 (the Railway Act). The section is as under

"If a Railway servant, when on duty endangers the safety of any person —

(a) "by disobeying any general rule made, sanctioned, published and notified under this Act—or

(b) "by disobeying any rule or order which is not inconsistent with any such general rule, and which such servant was bound by the terms of his employment to obey and of which he had notice or"—

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—

(c) "by any rash or negligent act or omission he shall be punished with imprisonment for a term which may extend to two years or with fine which may extend to five hundred rupees or with both. There is no doubt whatever that the safety of persons was endangered in this case.

Before considering the case of each accused separately it is necessary to make a few general remarks.

Owing to the visit of the Prince of Wales to Lahore at the time and to the large collection of troops which was taking place for Rawalpindi Camp of Exercise, there was a very great rush of traffic.

The M M Up troop special was booked to run at 30 miles an hour (see evidence of Mr Robson at page 57), therefore under Rule 21 of the Working Time Table of 1st October 1905 the train should have had vacuum connection throughout. The contravention of that rule—this train was not provided with vacuum connection throughout. There were a certain number of goods vehicles without vacuum pipes and without even any footboard (see evidence of Mr Robson at page 57), so that there was also a breach of General Rule 141 which provides that no passenger train shall be despatched from any station unless it be provided with an appliance by which the Guard can communicate with or get access to every passenger carriage in the train. If there had been footboards to the goods vehicles the Guard could have obtained access to the passenger carriages and could have kicked off the vacuum tube and the brake would have acted at once.

The accused Imam Baksh is an illiterate Driver, who had been transferred from the Quetta District to Lahore only a few days before, Mr Robson, Loco Foreman (at page 53 of the record) says that this Driver had come to Lahore about the middle of November 1905. Mr Wrench, Assistant Loco Superintendent (at page 41) says that the Driver had been only about 5 days at Lahore. The fact remains that the Driver only on 29th November 1905 furnished the certificate, D P V, in which he states that he has learnt the rules and signals of the Lahore District and of Rawalpindi and Rapperswil. This was the first time that accused Imam Baksh was working as an Engine in independent charge in the Lahore District. He was sent for this particular train, but, as he happened to be at Phillour he was ordered by the Foreman there to bring in this troop special (see statement of Mr Robson at page 57). Mr Wrench (at page 41) says that Native Drivers do not go with Mail or Troop Trains (see page 81) he says that accused Imam Baksh was not intended to run on the Chord line between Mian Mir East and Mian Mir West. This Chord line is only used on special occasions and it is quite evident that accused Imam Baksh had never seen it before and had certainly never gone over it before.

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Baksh
—

The disc signals which work with the points and show exactly how the points are set had been removed at Mian Mir East by the Engineering Department because of certain alterations which were then being made in the station yard

I now proceed to consider the case of each accused separately—

Accused 1, Hira Lal, admittedly was the Assistant Station Master on duty at the time that this Troop Special arrived at Mian Mir East, when it left. His hours of duty were 6 P.M. to 6 A.M., 12 hours in succession. The point involved was point No 3, if that had been properly set the train would have gone all right on the Chord line. Inasmuch as it was not set the train went on to Lahore. Sathe Ram (P.W. 2), slanting and platform Jemadar, says that when the Up troop special had left the Jallo station Hira Lal handed him the key of point No 3 and told him to make it over to Madho Shah, Pointsman Jemadar, and to tell him to open point No 3 for the Chord line for Mian Mir West. He went to the end of the platform and called to Madho Shah, the latter did not come, but Thakar Singh, Senior Pointsman came saying that Madho Shah had sent him. He handed the key to him and told him either to make the key over to Madho Shah and tell him to open point No 3 and give the signal, or to open it himself and give the signal.

Thakar Singh (P.W. 3) says that he and Madho Shah were together, when they heard Sathe Ram's call from the Station. Madho Shah told him to go and find out what he had to say. He went and Sathe Ram handed him the key and said "when I call out then open point No 3." He took the key and went back where Madho Shah was and delivered the message to him as above. He says that at the time that Sathe Ram handed the key to him the Troop Special was standing at the Mian Mir platform, that Sathe Ram never called out and so they did not open point No 3. He admits exchanging signals with the Jemadar on the platform, but he says the Jemadar showed the green light so they did likewise. He did not make over the key into Madho Shah's hand, but he threw it on the ground near him. When the train had passed, he picked it up from the ground and kept it and about an hour later when Mr. Smith, the Station Master, made the first enquiry regarding the cause of the accident, he handed the key over to Mr. Smith.

Madho Shah (P.W. 4), the Points Jemadar, says that Thakar Singh never handed him the key nor did he deliver any message to him. He says that a train was standing at the platform. The engine whistled. Thakar Singh showed the green light. He asked him where the train was going, he said to Lahore. He told him to be careful. Thakar Singh replied that he had just found out from the Station that the train was to go to Lahore. He says after a

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time a passenger came running from the Lahore direction and said that there had been a collision. He then asked Tialar Singh and the latter said, he had the key but had forgotten about it and wished to hand it to him then. He declined to receive it, accused Hira Lal himself says that he handed the key of point No. 3 to Sathe Ram Shunting and Platform Jemadar, and told him to go and have No. 3 set for the Chord line to Mian Mir West, and to come back and report to him. There can be no doubt that Sathe Ram Thakar Singh and Madho Shah, in order to save themselves were lying in many material respects. But so far as accused Hira Lal the Assistant Station Master, is concerned, the prosecution evidence actually shows that the key of point No. 3 was sent out by him with the direction to open the point for the Chord line. The contention on behalf of the prosecution is that accused Hira Lal should not have sent the key of point No. 3 by anybody, but should have gone there himself and opened it himself, the authority for this is an order entered in the Mian Mir East Station Order Book Ex P 1 by Mr Bernard, the Traffic Inspector. The order is of 14th July 1904. The portion of the order concerning this case is as under:—

"The following points will be permanently locked and only opened by the Station Master on duty."

"Nos. 1, 3 and 6 will be kept locked for the Main line"

It is contended that this is an order issued under the provisions of Subsidiary Rule 113, G IV, which is as under:—

"District Traffic Superintendents will issue instructions to Station Masters as to (1) which of the points at stations are to be considered as permanently locked points (2) the normal position of such points and (3) which of these points are to be locked or unlocked in their presence."

Sub clause V under the same rule directs that in regard to (1) and (2) the Station Master will depute a responsible official, who will be held responsible that such points are correctly changed set and locked. It is only in regard to

(3) that it is the Station Master's duty to see that this is done

I take the above rule to mean that it is the District Traffic Superintendent, who is to issue the orders and not the Traffic Inspector

Mr Bernard Traffic Inspector (see page 33) has tried to make believe that he received the order in writing from the District Traffic Superintendent, and that he simply went to Mian Mir East and entered it in the Order Book there

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Baksh

When asked however, why he did not quote the Number of the District Traffic Superintendent's letter or why he did not record that it was the order of the District Traffic Superintendent, his reply was that he did not think it necessary to do so. When asked whether he could produce the District Traffic Superintendent's letter, he says he cannot, because he burns up his correspondence no sooner the case is finished.

Mr. Boalch, who was District Traffic Superintendent at Lahore at the time, has been obliged to admit in cross examination (see page 48) that he cannot say for certain that any specific orders were issued by him as regards permanently locked points at Mian Mir East and that he does not hold Hira Lal's signature for any such order. At the next hearing when directed to produce the correspondence regarding permanently locked points he produced his letter, Ex P X, addressed to all the Traffic Inspectors of the Lahore District. It is as under —

"Please send in at once a list of points at non-interlocked stations that should be permanently locked, the normal position of such points and those that have to be locked or unlocked in the presence of Station Masters under para 115 C, Correction slip 28 of 24th February 1905

The original draft of the letter is dated 24th May 1904. The date on which the letter issued from the office is not noted.

The reply from Mr. Bernard, Ex P XI, is of 12th July 1904. It is as under —

"I beg to send you a list of stations at which points with their numbers should be permanently locked."

It will be seen from above that Mr. Boalch asked for suggestions, and suggestions were made but as far as Mian Mir East is concerned it remained at that stage. Mr. Boalch says (see pages 67 and 68) that on receipt of Mr. Bernard's letter he, after making such alterations as he considered necessary, issued orders to all stations in Mr. Bernard's section except Mian Mir East. It appears therefore that by an oversight on the part of Mr. Boalch no orders were issued by him to Mian Mir East, declaring which points were to be considered as permanently locked point, nor as to which of them was to be locked or unlocked in the presence of the Station Master on duty.

The note under Clause 17 of General Rule I distinctly lays down that an 'authorised officer' is not empowered to depute the power conferred on him to any other person, so that under no circumstances could Mr. Bernard have been empowered to declare which points were to be considered as permanently locked points and which were

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to be locked and unlocked in the presence of the Station Master Mr Bernard has even gone further than the rule permits he does not say in his order in the order book that point No 3 is to be locked and unlocked in the presence of the Station Master and it but he directs that the Station Master on duty is to lock and unlock it himself

The result of the foregoing is that there were no legally constituted permanently locked points at Mian Mir East, nor were there any legal instructions in regard to them as to who was to see to their being locked and unlocked. For the purpose of a criminal prosecution point No 3 must therefore be considered as an ordinary point and for an ordinary point, the procedure followed by Hira Lal was all right (see evidence of Mr Smith at page 7)

The exact distance of point No 3 from the centre of the station building is 1,303 feet (see evidence of Mr Ghose, Assistant Engineer at page 52) which is roughly about a quarter of a mile. If the Station Master on duty had to go and unlock the point himself he would have to go there and come back, that is traverse a distance of half a mile, and when the train had passed, he would have to traverse another half a mile to lock it again. It is admitted that on the main line between Lahore and Amritsar the tablet system of line clearance is in force and that the Station Master on duty is alone authorised to work the tablet instrument. Mr Booth at pages 61 and 62 has specified from the various registers the various duties which the Station Master on duty, i.e., Hira Lal had to perform from 6 p.m. the time he came on duty, 6 p.m. light engine despatched to Lahore also enquiry was made from Jallo and reply received regarding M M Troop Special

6 15 p.m. departure of the said Special was signalled from Jallo and received by Mian Mir East

6 20 p.m. arrival report of light engine was received from Lahore also line clear enquiry message was written and despatched to Mian Mir West

6 23 p.m. line clear reply received from Mian Mir West

6 35 p.m. arrival report of the troop special was sent to Jallo

6 42 p.m. departure of the troop special was sent to Mian Mir West

No 4 Down Mail if it had been running to time should have started from Lahore at 6 30 p.m. But it was late and Hira Lal could not anticipate at what precise moment Lahore might make enquiry for it. As it happened the enquiry was made at 6 50 p.m.

There are always numerous other duties which Station Master has to attend to. Under the circumstances it was impracticable

for the Station Master on duty to have gone himself to point No 3. Had the disc indicator not been removed by the Engineering Department Hira Lal from his platform could have seen whether the point had been unlocked or not.

Hira Lal is an old servant of Government. Mr Smith, the Station Master of Mian Mir East, considers him to be about of the best assistants that he has had (see page 11). Mr Boalch also says that he found his work satisfactory, and finding him fit for service, recommended him for an extension after the age of 55 years.

Immediately after the accident, two additional assistants were sent to Mian Mir East. One additional man as a permanent arrangement, and the second additional man, temporarily, to cope with the extra train working at night during the rush of troop traffic. I find on the evidence produced in this case that Hira Lal was in no way to blame for the accident. He certainly does not come under any of the three Clauses (a), (b) or (c) of Section 101 of the Railway Act. He did not disobey any of the General Rules framed under Section 47, Sub Sections (1) and (2) of the Railway Act.

In regard to Clause (b) the subsidiary rules framed by the Manager of the N W Railway are not framed under any Section or Clause of the Railway Act. They are administrative rules framed by the Head of the Railway Administration and unless any employee undertakes to be bound by them by the terms of his employment they cannot be taken into account under Clause (b).

In regard to Hira Lal, the terms of his employment are not forthcoming. He was an employé of the B B and C I Railway, and was only within the last 4 or 5 years transferred to the N W Railway. He was taken on by the B B & C I Railway some time in 1878-1897, Ex PXIV, is a copy of the form of declaration that used to be taken in those days by that Railway from their employés. It does not throw any light on the subject, for it is not known what circular orders are referred to therein. Clause (c) does not apply, for there was no rash or negligent act or omission by Hira Lal. I omitted to mention that, at the time Mr Bernard's order was recorded in the order book, accused Hira Lal was admittedly on leave, and the order seems never to have been communicated to him. Mr Hall who was the Station Master at the time has signed the order in token of having seen it, but nobody else has signed it in token of having seen it. Therefore in the first place the order was not a valid one, and next it was never communicated to accused Hira Lal. For all the foregoing reasons, I discharge Hira Lal of any offence under Section 101 of the Railway Act. In regard to the other two accused it is admitted that accused Mohammed Din was the Guard and accused Imam Baksh was the Driver of M M Up Troop Special. Beyond

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the fact, that the train was sent on the wrong line (for which they were in no way responsible), that it halted outside the Lahore distant signal, and that there was a collision, there is absolutely no evidence on the file to show in what way the Guard or the Driver is to blame. The Driver as already stated was a new hand in the Lahore District, he had never been on the Chord line and did not know where it was. He was not even aware that his train was on the wrong line. It is true that he knew from the description of line clear that he received that it was for a branch line, but he did not know where the branch line was. He stopped his train simply because the Lahore distant signal was at danger. The Guard knew that the train had been sent on to the wrong line, but he had no means of communicating with the Driver, and was powerless. He says that he did all he could to attract the attention of the Driver, by showing the danger hand signal lamp and by applying his hand brake, &c, but did not succeed in attracting his attention. There is no evidence on the file to contradict what he says. The Driver says he did not see the Guard showing any danger signal. In the absence of any evidence which of these two accused is to be believed? When the train came to a stand outside the distant signal, it was the Guard's duty to protect the train by detonators. The train left Nian Mir East at 6.42 P.M. allowing 8 minutes for the distance up to the Lahore distant signal it may be presumed the train came to a stand at about 6.50 P.M. The Guard went up to the Driver and they consulted each other there. Before the Guard sent the Memo, Ex P VI, already referred to. He noted the time on the memo as 6.55 P.M., one of the Drivers men took it to the Shed, where Mr. French says he received it at 7.20 P.M. What the man was doing for 25 minutes does not appear, for he has not been produced as a witness. The Shed is only half a mile away and it would not take a man 25 minutes to go half a mile. The Guard after he despatched the Memo at 6.55 P.M. says he told the Driver to place detonators at the front of the train while he went to place detonators at the rear. The rule requires the rear of the train to be protected first (see General Rule 182). The detonators are to be placed $\frac{3}{4}$ of a mile from the train. He says he actually did place 3 detonators at the rear of the train. To traverse $1\frac{1}{4}$ mile on a dark night would take about 15 or 20 minutes. The collision occurred presumably at about 7.17 or 7.18 P.M. The Guard was single handed without any assistant, it is obvious therefore that he had not sufficient time to have protected the front of the train which would have taken him another 15 or 20 minutes. He had at most only about 23 minutes after he had despatched the memo and that time probably was taken up in protecting the rear of the train. The Driver says that the Guard did not tell him to place detonators in front of the train. The placing of detonators was not the Driver's duty. There

was no danger whistle to the Engine The Driver says he kept sounding the ordinary whistle

As far as the Driver and Guard are concerned there is only the word of one accused against the other, which is not evidence The confession of a co accused may be taken into account by the Court against the other accused, but any ordinary statement of one accused in his own defence cannot be taken into account against the other

Either the Guard or the Driver has disobeyed General Rule 150 and Subsidiary Rule 150 Q., which direct that the Guard and Driver must exchange signals as soon as the rear brake van has cleared the outer trailing points Without this exchange of signals, the Driver must stop the train, but there is no evidence to show which of them has done so Each of them denies having disobeyed the rule One or the other is no doubt telling a lie, but there is no evidence to show which it is

Under the circumstances, they must get the benefit of the doubt, and I accordingly discharge them both of any offence under Section 101 of the Railway Act

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Case No. 40

In the Sessions Court of Cuddapah.

CRIMINAL APPEAL No 29 of 1906 *

H G BRINDLEY (ACCUSED), APPELLANT

v

CROWN

Endangering the safety of passengers—Collision—Guard failing to protect his train—Railways Act IX of 1890, Section 101

1906
October, 1
—

A Mixed train was running from U to K Station. The Driver having run short of water left the vehicles on the road and proceeded to K to take water The Station Master at K thought that the whole train had arrived and gave line clear to Station Master at U for a Mail train, who allowed the train to start for K, the consequence being that it collided with the Mixed train, which was standing between these two stations, and 5 persons were killed and several injured. The Chief Guard of the Mixed train and the Station Master of K were charged and tried for endangering the safety of the persons in the train by disobedience of the rules of the Company under Section 101 of the Indian Railways Act, IX of 1890, and the Guard was convicted and sentenced to three months' rigorous imprisonment by the Magistrate

* For Judgment of the High Court, see ante page 911

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On appeal the conviction of the lower Court was confirmed but the sentence of imprisonment was set aside and in substitution thereof the appellant was directed to pay a fine of Rs 100, in default of payment to suffer one month's rigorous imprisonment.

This appeal and appeal No 30 coming on for first hearing on the 17th day of September 1906, upon perusing the petition of appeal and the record in the case and upon hearing on the question of jurisdiction the arguments of Mr C Ramachandra Rao Vakil for the appellant, and of Mr K Narayana Rao Public Prosecutor specially appointed by Government in support of the order of Joint Magistrate and having stood over for consideration till 19th September 1906, the Court made the following

ORDER —

Before going into the merits of these two cases, two objections on legal points have been raised, which are common to both. The first is that the Joint Magistrate of Madanapalli had no jurisdiction to try these cases, and secondly, that the transfer of the cases by the District Magistrate to the Joint Magistrate was illegal, inasmuch as he had no power to take, and did not in fact take, cognizance of the cases.

2 With regard to the first point it is a noteworthy fact that the Joint Magistrate of Madanapalli Division cannot under any circumstance be held to be empowered to exercise jurisdiction over the whole district. The Gazette notification states that Mr Coleridge is posted to the Madanapalli Division. The Public Prosecutor engaged by Government relies on another notification empowering Mr Coleridge to take down evidence in his own hand, in which he is described as "a First Class Magistrate in the District of Cuddapah". This does not mean that he is empowered to try cases arising anywhere in the Cuddapah district, but it is so worded that he might legally take down evidence in cases occurring elsewhere and which have been legally transferred to him for trial. There can be no doubt whatever that the Joint Magistrate of Madanapalli can under no circumstances try a case arising in the Sidhant division without a legal transfer.

3 The careless wording of the proceedings of the District Magistrate has led to this second objection. After the usual recital of reading the proceedings of the joint Railway enquiry and his own enquiry, he proceeds to write the order, which runs as follows — "Under Section 190 (c), C P C, the Superintendent Railway Police is directed to charge the accused, etc." The section quoted gives him no such power. It enables him to take cognizance of the case on information other than that derived through the Police. Under the Code of 1882, Magistrates had no power to direct the Police to

investigate a case unless the truth of the complaint was disbelieved (Section 202), and such an order as was passed by the District Magistrate in this case would have been absolutely illegal. But under the present Code in Section 156 clause (3) a special provision is made by which Magistrates, after taking cognizance of the case under Section 190 (c) may direct the Police to investigate. The fault of the proceedings in question, therefore lies in the fact that he omitted to state that he took cognizance of the case. But in his second proceedings dated the same day, he states "that the above case of which cognizance has been taken is transferred, etc." Reading the two together, and having regard to the new provision in Section 156, I think it must be conceded that the District Magistrate did in fact, legally take cognizance of the case, and therefore, under Section 192, his transfer of the case to the Joint Magistrate was also legal.

4 Another objection is raised on this point. It appears that the Sub-Divisional Magistrate of Sidhout issued summonses to witnesses under Section 252, C P C, and subsequently took a bail bond from the accused, and it is argued that inasmuch as he had thus taken cognizance of the case, it was not open to the District Magistrate to do so, but legally he might have transferred the case under Section 528 C P C, to the Joint Magistrate, which he did not do. Now, the summonses in question have no reference to the accused and purport to be concerned with a general enquiry into the Railway collision case. The bail bond is taken with a view to the accused appearing for their trial before the Joint Magistrate and not the Deputy Magistrate himself. On this it is argued that, since the Act empowers only the District Magistrate to enquire into such cases, and under the rules framed the Sub Magistrate alone is mentioned, it must be presumed that the Deputy Magistrate was acting under the Criminal Procedure Code when he issued the summonses and was not holding a general enquiry into the collision. I cannot accept this view. Though the summonses purport to have been issued under Section 252 there is no mention made of the accused or of any specific charge, and so it cannot be held that the Deputy Magistrate had taken cognizance.

5 Even assuming that he had, there is no provision of law preventing the District Magistrate from also taking cognizance since he exercises concurrent jurisdiction over the Sidhout division. His taking cognizance and his subsequent transfer of the case under Section 192 were both legal.

6 A further point is raised as to the trial having taken place in Cuddapah, which is outside the jurisdiction of the Joint Magistrate. I have never heard of such an object in before. No doubt the Code lays down that the trial shall ordinarily take place within the juris-

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diction of the Magistrate in which the offence occurred. But in this case it was for the convenience of the accused (in fact appellant's pleader admits that he requested that the case might be heard at Cuddapah) and the witnesses that the District Magistrate decided that the trial might take place at Cuddapah. I believe it is a common practice for Divisional Magistrates when they come into head-quarters for District Board meetings to hear cases which arise within their own divisions, and I have never known of any objections being raised on that ground. Above all there is nothing to show that the accused were in any way prejudiced by such procedure, on the other hand, it is admitted that they were greatly benefited. Under these circumstances, I overrule the legal objections taken and direct that the appeals be heard on merits on the 28th instant.

This appeal again coming on for hearing on 28th and 29th September 1906, and upon hearing on the merits of the case the arguments of Mr C Ramachandra Rao, Vakil for the Appellant and of Mr K Narayana Rao, Public Prosecutor, in support of the conviction, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT —

The appellant is Henry Gilbert Brindley, a Chief Guard on the Madras Railway, and he has been convicted by the Joint Magistrate of Madanapalle under Section 101 of the Indian Railways Act, of negligently disobeying rules and sentenced to undergo rigorous imprisonment for three months.

2 The case was charged by the Railway Police and the case for the prosecution is somewhat as follows. I say somewhat since the evidence is full of falsehood. About midnight of the 10th of May last, mixed train No 4 in charge of Chief Guard Brindley left Urampad station at 0 20 according to the station register, or at 0 23 according to the Guard, in the direction of Kodur. The distance is eight and a half miles. After going five miles, the driver found that his tank was running short of water, he stopped the train and sent one of his firemen to inform the Chief Guard. Before this fireman returned, the driver uncoupled his engine and proceeded to Kodur for water. At Kodur, the Assistant Station Master was on duty, and he ordered the pointsman to so arrange the points that the mixed train might go on the main line and allow the mail train No 14 also coming in the same direction to pass it on the loop which is next to the platform. The engine came the Assistant Station Master, who was in his signal room, naturally thought it was the mixed train coming in, he shouted to his porter and asked him if the train had come. The reply was in the affirmative. Just then

Urampad was asking for line clear for No 14 mail. On the strength of what the porter told him he gave line clear. In the meantime, the driver managed to persuade the pointsman to let him go on the loop, and coming along up to the middle of the platform he whistled. The Assistant Station Master seeing that his order was not carried out came out and went up to the driver. The driver then informed him that he had left his train on the line. The Assistant Station Master realising the danger he had brought on by giving line clear for the mail ran back to his signal room and in vain tried to set back the line clear block.

3 In the meantime, Chief Guard Brindley, finding that his engine had gone proceeded to direct his Under Guard Narayanaswamy to protect the train. The latter, who was asleep on a pillow, said that there was no hurry, there was half an hour before the mail would come and that under the perfect block system it would not be permitted to leave Urampad. Brindley told him not to care about that, but to do his duty, and, according to him, gave him two detonators and asked him to place them on the line at a distance of ten telegraph posts and to return to a distance of two telegraph posts from the train and exhibit a danger signal. He then goes on to say that he proceeded to protect the front part of his train, and hearing the whistle of his own engine returning (this could not have been the case) he ran to the front and held his light. Just then the mail from Urampad collided with the mixed train on the line.

4 The engine was completely wrecked, it had left the rails and turned at right angles to it on the east side, whilst the tender had been wrenched off, had also left the rails and turned at right angles on the west side. Next to the tender was the front brake van of the mail, it had been lifted up at the back and thus enabled the next carriage, a first and second class composite bogey, to get under it. In the other train the brake van was smashed to matchwood and three covered goods waggons broken to pieces. The impact had the effect of uncoupling a number of vehicles in the front part of the mixed train, and these had rolled on to some distance. The funnel of the engine was torn off, the fire box was broken and had come out scattering the fire over the wreckage and the inflammable materials in the goods waggons. These took fire and there was a huge blaze. A wind was blowing from the direction of Kodur and the fire soon reached the composite bogey which was half consumed. The damage to the rolling stock, as estimated by the railway authorities, is Rs 46 22½ apart from the loss caused by the destruction of the goods and damages done to the permanent way.

5 As far as can be made out, five persons were killed. Capt Fitzpatrick, who was in a first class compartment in the bogey was

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pinned down under the wreckage. Some soldiers, who were travelling in the mail, found him dead and tried to extricate him but did not succeed, and his body was completely burnt in the fire. One of the firemen in the mail was also killed and burnt. The same was the fate of Narayanaswamy, the Under Guard of the mixed train and whose charred remains could not be identified. Two other third class passengers appear to have been killed and some injured. This was the result of the collision.

6 The engine of the mixed train had returned and it was attached to some of the vehicles of that train, and in it were carried some of the passengers as far as Kodur, Guard Brindley accompanying. He took with him a message which he and the Chief Guard of the mail had drafted. On arrival at Kodur he sent this message and it had the effect of bringing to the scene the District Traffic Superintendent, who started making enquiries. The result of the enquiry is, as I have so far stated.

7 The first person he examined on arrival was Guard Brindley who told him his story. I shall now proceed to show that the story of water in the tank of the engine running short is a myth and made up by the driver in consultation with Brindley, most probably when they met just after the collision. There are several points which when put together conclusively prove that a coupling parted somewhere and the driver not noticing it went on and only discovered his mistake on arrival at Kodur. It is odd that they should not have struck any of the Railway authorities, the District Magistrate, or the Joint Magistrate. In the first place I propose to examine the gradients between Urampad and the place where the accident took place. At Urampad level, then a rise of 1 in 139 then level then a rise of 1 in 660 then another of 1 in 242 then level then a fall of 1 in 135, then level, then a fall of 1 in 302 then a rise of 1 in 480, and then a fall of 1 in 132, on which incline the vehicles of the mixed train came to a stop. It will be seen that with the exception of two down gradients, the rest are either level or ascents. The train consisted of no less than 15 vehicles. The strain on the couplings in the front portion must have been enormous. My theory is that just as the train cleared the brow of the last rise (1 in 480) a coupling at the end of the tenth or twelfth vehicle snapped. This accelerated the speed of the engine and the vehicles attached to it but as the driver was then going down a steep incline of 1 in 132, he drew no inference from the sudden acceleration, and failed to look behind him all the way to Kodur.

8 The next point is that if the driver brought his train to a stop in order to go and get water, he would never have pulled up his train and much less left it on an incline. He at first stated that he

took Brindley's permission in writing before he left. He could not produce this, and finally when he was caught in the act of attempting to commit suicide, he made another statement in which he said he went without any permission. It is very strange that the driver, who could not be responsible for water running short, and who apparently was guilty of no crime, nor even the least negligence, should go to the length of committing suicide. It is evident that he felt that he was negligent in not looking back to see the side lights of the last brake van, an act they are enjoined to do as frequently as possible, and he felt that this negligence on his part had brought about the collision and caused so many deaths. He stated that he had his tank examined at Urampad and found it was quarter full, and this he considered was sufficient to take him to Kodur. There is no reason then for its running short. He further admits that only once in his service has he ever run short of water.

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9 Now I come to the evidence which clearly proves that the engine did not go into Kodur as a light engine, but had ten or twelve waggons attached to it. The most important evidence on the point is that of the police constable who was travelling in the mixed train on duty. His earliest recorded statement runs as follows: "The train came to a stop in the middle of the jungle. Three or four minutes after, I got out. I went to the Chief Guard's van in front. He was not there. I don't know where he was. The engine went off with some vehicles. I saw that the train looked shorter than it was at Nandalur." Even when he makes his statement before the Joint Magistrate, he says that the engine went with some vehicles, and this was after he had been instructed by his Inspector not to say so. Then the Joint Magistrate warns him and tells him the punishment for perjury (a very strange proceeding indeed) and then witness tries to make out that this was hearsay. It was he who made the earliest record of the accident. He noted down in his note book at 5 A.M., the facts connected with the accident, and the entry shows that the engine took some vehicles with it. Further he says he went to the Under Guard, who was comfortably sleeping on a pillow, awoke him by pulling by the leg and asked him why the train had stopped in the middle of the jungle. The latter replied that he did not know. This could not have been the case if what Brindley says is true, namely, that as soon as he heard from the fireman the cause of the stoppage, he sent the fireman to inform the Under Guard. This constable did not see the fireman, and why, for the simple reason that he was not there. It may then be asked why porter Palliah says that he did not notice whether the engine brought any vehicles with it to Kodur, and the pointman (even after a warning by the Joint Magistrate) says that it did bring ten or

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twelve waggons. It is very simple. The former's statement was at the Railway enquiry and it was not then known who were going to be prosecuted. If he stated that there were waggons, the driver who had probably squared him, would get into trouble. The other man's statement was made at a time when the driver had been exculpated and it had been decided to prosecute the Assistant Station Master, and the pointsman is only too ready to assist him by telling the truth. Thus, there can be not the slightest doubt what over that the train parted and the engine did not run short of water. The fact of the attempt at suicide, and the fact that the train was left standing on an incline, conclusively prove it.

10 Having established how the accident occurred, I now proceed to determine whether accused is guilty of such negligence as is punishable under the section under which he has been convicted. According to his own statement, he went to the Under Guard and gave him instructions to protect the train. According to the rules this would be sufficient performance of his duty. But he himself has stated that Narayanaswamy was reluctant to do this work. He also adds that Narayanaswamy was a fool and a lazy man, a fact borne out by the statement of the constable who found him asleep on a pillow. Under such circumstances, was it not incumbent on him either to do it himself or satisfy himself that Narayanaswamy had actually done the work. With regard to the first, it may be said that he should protect his end of the train and the Under Guard his, more so as the engine was soon expected back. With regard to the latter point, he says he actually saw Narayanaswamy go a distance of forty yards. This is false, since the constable found him asleep a few minutes later. Then it has to be ascertained what time there was at his disposal. It was only three and a half miles to Kodur, and the engine going with only a dozen vehicles would cover the distance in about seven minutes. I allow one minute for giving line clear. The mail, as I shall presently show, was travelling between 50 and 60 miles an hour, and it had to cover a distance of five miles, and this it did in about seven minutes. Thus Brindley had at his disposal about quarter of an hour. The rules require him to pin down the brakes of *all* the waggons, that is 25 waggons, deducting the waggons which the engine had taken and the passenger coaches. The fact that he did pin down some brakes is evident from the fact that the train stood still on such a steep incline. The distance from the first waggon to the last brake-ran must have been nearly 800 feet deducting 175 feet for the portion of the train which had gone ahead. I accept accused's statement that he did instruct Narayanaswamy to protect the train and gave him two detonators, for, if this was false, he might just as well have said that he gave him three, as required by the rules, and also told

him to place them at the proper places. According to him, his instructions were not in accordance with rules and this leads me to suppose that he did give the instructions. Then I have to consider whether he neglected his duty by not checking Narayanaswamy's work. I consider that he did, in spite of the short time at his disposal, the long distance from end to end, and the fact that he had to pin down so many brakes.

11 One more question then remains. Were the three back lights burning? And if they were not, did the accused neglect his duty in not examining them. My own idea is that they were burning properly. The side lights are visible all the way along the train and surely Brindley whilst pinning down the brakes or in coming to the Under Guard, must have noticed it at least on one side. The driver of the mail says that he saw the glimmer of the tail light only. It must be remembered that his evidence on this point must be taken with some caution, as he would be to blame if the lights were burning. He had his line clear, he had lost time which he was trying to make up by going full speed at the rate of sixty miles an hour, he was constantly making the fireman put in coal and it is possible he was engaged in conversation with them, and only looked out when it was too late. It was a journey of only seven minutes. The Chief Guard of the mail was writing his journal, and did not look out. It is but reasonable to suppose that the lights were burning when the train left Urampad, or else that Station Master or some porter would have noticed it and brought the train back. The lights were lighted at Naadaln and they are intended to last the whole night. There is no reason to suppose that they would go out by one o'clock.

12 Even supposing that only the middle light was burning, and that dimly, as the driver of the mail would make out, the Under Guard would be primarily responsible as they are attached to his van. Brindley's duty would be only secondary. In considering the evidence of the driver of the mail, notice has been taken of the false statements he has made. He says he was going full speed. His engine's full speed is 60 miles an hour. It is then pointed out to him that on this side of Renigunta he is limited to a maximum speed of 45 miles. He at once turns round and says that he was going at that rate. Even granting that, he says he shut off steam and put the brakes on as soon as he saw the light, that is, about four telegraph posts away from the mixed train, or 1320 feet away. But experiments show even at 51 miles an hour, it is possible to pull up within that distance. It is clear, therefore, that he must have been going about 60 miles an hour and all his attention was directed to making up time and he looked out too late. The interval was only six or seven minutes.

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13 In the result, I find Chief Guard Brindley guilty of negligence inasmuch as he failed to satisfy himself that Narayanaswamy actually carried out his instructions, under circumstances under which he had a reasonable suspicion that he would not carry them out. Then comes the question of punishment. I consider that three months' imprisonment is too severe considering the short time at his disposal, the distance he had to walk or run (he is an old man) and the number of brakes he had to pin down. Considering his old age and long service, I think justice will be sufficiently vindicated by a sentence of fine. I set aside the sentence of imprisonment and substitute in its place, a fine of Rs 100, or in default one month's rigorous imprisonment. The person to blame in the matter was Narayanaswamy, and he has paid the penalty by meeting with a most horrible death.

Case No. 41

In the Sessions Court of Cuddapah

CRIMINAL APPEAL No 30 of 1906 *

KESERGOD ACHUTA SHENAI (ACCUSED),

APPELLANT

v

CROWN

1906
October, 1

Railways Act, IX of 1890, S 101—Endangering the safety of passengers—Collision—Disobedience of Rules

The Assistant Station Master at K gave line clear to the Sam Master at U, for No 14 Mail without observing personally that the whole of No 4 Mixed train, which was running in advance had arrived at his Station, and that the rear portion of the train was missing. He was convicted under S 101 of the Railways Act IX of 1890 by the Magistrate. On appeal, the conviction of the lower Court was confirmed but the sentence of imprisonment was set aside and in substitution thereof the appellant was directed to pay a fine of Rs 50, in default of payment of fine to suffer 15 days' rigorous imprisonment.

This appeal coming on for hearing on the 29th and 29th days of September 1906, upon perusing the petition of appeal and the record in the case and upon hearing the arguments of Mr. C Rama chendra Rao, Vakil for the Appellant and of Mr K Narayana Rao,

* For Judgment of the High Court, see ante page 916.

Public Prosecutor, specially appointed by Government in support of the conviction, and having stood over for consideration till this day the Court delivered the following

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JUDGMENT.—The appellant is Keserg d Achuta Shenai Assistant Station Master of Kodur, on the Madras Railway and he has been convicted by the Joint Magistrate of Madanapalle under Section 101 of the Indian Railways Act and sentenced to undergo ten weeks' rigorous imprisonment

2 The case was charged by the Railway Police and the case for the prosecution is somewhat as follows. I say somewhat since the evidence is full of falsehood.—About midnight of the 10th of May last mixed train No 4 in charge of Chief Guard Brindley left Urampad Station at 0.20 according to the Station Register or 0.23 according to the Guard, in the direction of Kodur. The distance is eight and a half miles. After going five miles the driver found that his tank was running short of water, he stopped the train and sent one of his firemen to inform the Chief Guard. Before this fireman returned, the driver uncoupled his engine and proceeded to Kodur for water. At Kodur, the Assistant Station Master was on duty and he ordered the pointsman to so arrange the points that the mixed train might go on the main line and allow the mail train No 14 also coming in the same direction to pass it on the loop which is next to the platform. The engine came, the Assistant Station Master, who was in his signal room, naturally thought it was the mixed train coming in he shouted to his porter and asked him if the train had come. The reply was in the affirmative. Just then Urampad was asking for line clear for No 14 mail. On the strength of what the porter told him, he gave line clear. In the meantime the driver managed to persuade the pointsman to let him go on the loop, and coming along up to the middle of the platform, he whistled. The Assistant Station Master seeing that his order was not carried out came out and went up to the driver. The driver then informed him that he had left his train on the line. The Assistant Station Master realising the danger he had brought on by giving line clear for the mail ran back to his signal room and in vain tried to set back the line clear block.

3 In the meantime Chief Guard Brindley, finding that his engine had gone, proceeded to direct his Under Guard Narayana swamy to protect the train. The latter who was asleep on a pillow, said that there was no hurry, there was half an hour before the mail would come and that under the perfect block system it would not be permitted to leave Urampad. Brindley told him not to care about that, but to do his duty, and, according to him, gave him two detonators and asked him to place them on the line at a distance of

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ten telegraph posts and to return to a distance of two telegraph posts from the train and exhibit a danger signal. He then goes on to say that he proceeded to protect the front part of his train and hearing the whistle of his own engine returning (this could not have been the case) he ran to the front and held his light. Just then the mail from Urmipud collided with the mixed train on the line.

4 The engine was completely wrecked, it had left the rails and turned at right angles to it on the east side, whilst the tender had been wrenched off, had also left the rails and turned at right angles on the west side. Next to the tender was the front brake van of the mail, it had been lifted up at the back and thus enabled the next carriage, a first and second class composite bogey to get under it. In the other train the brake van was smashed to match wood and three covered goods waggons broken to pieces. The impact had the effect of uncoupling a number of vehicles in the front part of the mixed train, and these had rolled on to some distance. The funnel of the engine was torn off, the fire box was broken and had come out scattering the fire over the wreckage and the inflammable materials in the goods waggons. There took fire and there was a huge blaze. A wind was blowing from the direction of Kodur and the fire soon reached the composite bogey which was half consumed. The damage to the rolling stock, as estimated by the Railway authorities is Rs 46,225, apart from the loss caused by the destruction of the goods and damage done to the permanent way.

5 As far as can be made out five persons were killed: Capt Fitzpatrick, who was in a first class compartment in the bogey was pinned down under the wreckage. Some soldiers, who were travelling in the mail, found him dead and tried to extricate him but did not succeed, and his body was completely burnt in the fire. One of the firemen in the mail was also killed and burnt. The same was the fate of Narayanaswamy, the Under Guard of the mixed train and whose charred remains could not be identified. Two other third class passengers appear to have been killed and some injured. This was the result of the collision.

6 The engine of the mixed train had returned, and it was attached to some of the vehicles of that train, and in it were carried some of the passengers as far as Kodur. Guard Brailley accompanying. He took with him a message which he and the Chief Guard of the mail had drafted. On arrival at Kodur, he sent this message and it had the effect of bringing to the scene the District Traffic Superintendent, who started making enquiries. The result of the enquiry is as I have so far stated.

7 The first person he examined on arrival was Guard Brindley, who told him his story. I shall now proceed to show that the story of water in the tank of the engine running short is a myth and made up by the driver in consultation with Brindley, most probably when they met just after the collision. There are several points which, when put together, conclusively prove that a coupling parted somewhere and the driver not noticing it went on and only discovered his mistake on arrival at Kodur. It is odd that this should not have struck any of the Railway authorities, the District Magistrate or the Joint Magistrate. In the first place I propose to examine the gradients between Urampad and the place where the accident took place. At Urampad level then a rise of 1 in 139, then level, then a rise of 1 in 660, then another of 1 in 242, then level, then a fall of 1 in 135, then level, then a fall of 1 in 352, then a rise of 1 in 480, and then a fall of 1 in 132 on which incline the vehicles of the mixed train came to a stop. It will be seen that with the exception of two down gradients the rest are either level or ascent. The train consisted of no less than 45 vehicles. The strain on the couplings in the front portion must have been enormous. My theory is that just as the train cleared the brow of the last rise (1 in 480) a coupling at the end of the tenth or twelfth vehicle snapped. This accelerated the speed of the engine and the vehicles attached to it, but as the driver was then going down a steep incline of 1 in 132, he drew no inference from the sudden acceleration, and failed to look behind him all the way to Kodur.

8 The next point is that, if the driver brought his train to a stop in order to go and get water, he would never have pulled up his train and much less left it on an incline. He at first stated that he took Brindley's permission in writing before he left. He could not produce this and finally, when he was caught in the act of attempting to commit suicide, he made another statement in which he said he went without any permission. It is very strange that the driver, who could not be responsible for water running short, and who apparently was guilty of no crime nor even the least negligence, should go the length of committing suicide. It is evident that he felt that he was negligent in not looking back to see the side lights of the last brake van, an act they are enjoined to do as frequently as possible, and he felt that this negligence on his part had brought about the collision and caused so many deaths. He stated that he had his tank examined at Urampad and found it was quarter full, and this he considered was sufficient to take him to Kodur. There is no reason then for its running short. He further admits that only once in his service has he ever run short of water.

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9 Now I come to the evidence which clearly proves that the engine did not go into Kodur as a light engine, but had ten or twelve waggons attached to it. The most important evidence on the point is that of the police constable who was travelling in the mixed train on duty. His earliest recorded statement runs as follows: "The train came to a stop in the middle of the jungle. Three or four minutes after, I got out. I went to the Chief Guard's van in it. He was not there. I don't know where he was. The engine went off with some vehicles. I saw that the train looked shorter than it was at Nandapur." Even when he makes his statement before the Joint Magistrate, he says that the engine went with some vehicles and this was after he had been instructed by his Inspector not to say so. Then the Joint Magistrate warns him and tells him the punishment for perjury (a very strange proceeding indeed) and then the witness tries to make out that this was hearsay. It was he who made the earliest record of the accident. He noted down in his notebook at 5 A.M. the facts connected with the accident, and the entry shows that the engine took some vehicles with it. Further he says he went to the Under Guard, who was comfortably sleeping on a pillow, awoke him by pulling by the leg and asked him why the train had stopped in the middle of the jungle. The latter replied that he did not know. This could not have been the case if what Brindley says is true, namely, that as soon as he heard from the fireman the cause of the stoppage, he sent the fireman to inform the Under Guard. This constable did not see the fireman, and why for the simple reason that he was not there. It may then be asked why porter Pallish says that he did not notice whether the engine brought any vehicles with it to Kodur and the pointsman (even after a warning by the Joint Magistrate) says that it did bring ten or twelve waggons. It is very simple. The former's statement was at the Railway enquiry and it was not then known who were going to be prosecuted. If he stated that there were waggons the driver who had probably squared him, would get into trouble. The other man's statement was made at a time when the driver had been exculpated and it had been decided to prosecute the Assistant Station Master and the pointsman is only too ready to assist him by telling the truth. Thus, there can be not the slightest doubt whatsoever that the train parted and the engine did not run short of water. The fact of the attempt at suicide and the fact that the train was left standing on an incline conclusively prove it.

10 Having established how the collision actually occurred I now proceed to discuss the accused's case. It cannot for a moment be denied that he failed to satisfy himself that the train had come in on the last van on. It is a notorious fact that Station Masters never dream of looking at a train when it enters a station much less

examine and see if the last van is attached. The usual practice is to shout out to the porter, as the accused in this case did, and be satisfied with his reply. But, the fact that it is the practice to break a rule cannot under any circumstances justify the breaking of it. It can only go in mitigation of sentence.

11 Let us examine and see his subsequent conduct. On receipt of the porter's reply he gives line clear for the mail. He is startled to find the engine at the platform whistling. He rushes out to ascertain the cause. He is then told that part of the train is left on the line. He tries hard to communicate with Urampad by means of the block signal. It is so constructed that it is impossible to interfere with it from his end. The result of his working the plunger would only have the effect of producing a rumbling noise at the other end. That he did this is proved by the Urampad Assistant Station Master's statement. The latter, however, to save his own interests, says that he heard the noise only eight or ten minutes after the mail left. Further, the block signal failing, the accused had at once recourse to the telegraph needle and he sent a message asking Urampad not to allow mail to pass, and in support of this a telegram is filed. It runs thus: 'D D D Refused line clear. Don't allow mail to pass.' The prosecution impugn this document as a subsequent concoction. Whether that is so or not matters very little. All I have to consider is whether in fact he did send such a telegram. Would it not be consistent with the conduct of a sane, rational man, to suppose that he did, in fact, send such a telegram, and possibly several such. I cannot for a moment believe that the accused, who had such an excellent character from his superiors, would exult at the idea of a probable collision, and would quietly sit down and wait for the news of it. The fact that the driver of the mixed train beat his mouth (meaning thereby that he had done a terrible thing another little incident going to prove that the train parted) and urged him to try and stop the mail, the fact that he fainted when he heard the news of the collision, and the fact that he was found the next morning with his head in his wife's arms, all go to show that from the time he had sent that fatal line clear till the time he heard of the collision he was like a tortured lamb, doing everything imaginable to the telegraph needle, in order to communicate with Urampad. The Assistant Station Master of that Station lies most grossly when he says that he received no such D D D message.

12 In connection with the mitigation of sentence, it has been urged that accused's conduct in fabricating this telegram should be taken into account. I do not think it is a fabrication. It was produced by the Station Master and not by him. The latter came before the news of the accident had arrived. He found from the train register that line clear had been given at 0.58, and he asked accused

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how that was Accused explained that he had forgotten to write against that entry "line clear refused" His first impulse was to make out that he had refused line clear That being the case it is not natural to suppose that he would send a telegram worded "Line clear refused Don't start mail" If that document had been a subsequent concoction, it would have run thus "Line clear withdrawn Don't start mail" It has further been suggested that the Station Master being friendly with the accused assisted him in handing over this concocted document If that had been the case he would have permitted the accused to enter up against the entry of line clear at 0 58 "line clear refused," and then the whole blame would have shifted from the accused to the Unemployed Assistant Station Master But on the other hand, he at once took charge of the train register I do not, therefore, see that the accused has been guilty of creating false evidence The only thing he may be considered guilty of is in his intention, at first impulse to try and make out that he refused line clear What person I ask would not do so, when he faces "line clear" between himself and the passenger gates

13 In the result, it amounts to this accused is guilty of having recourse to the universal, and yet most dangerous practice of acting on the word of an irresponsible porter Thousands of Station Masters have practised this with impunity throughout their service but as fortunately it was the accused's lot to be brought to task in order to set an example to all his other fellow delinquents The Railway authorities have testified to the exceptionally excellent character he bears Taking all these circumstances into consideration I think imprisonment is not called for in such a case I set aside the sentence of the Joint Magistrate, and whilst confirming his conviction I substitute in its place, a fine of Rs 50, or, in default, 15 days rigorous imprisonment

Case No 42

In the Court of 1st Class Magistrate, of the
District of Lahore.

TRIAL No 13/3 OF 1907 *

THE CROWN

v

SHAHAB DIN

Endangering the safety of passengers travelling by train—Railways Act IX of 1890 Section 101—Disobedience of General Rules by Driver—Collision—Loss of life 1908 February, 15

The Driver of a down goods train, standing in the loop line waiting to pass an Up passenger train received a line clear ticket prepared for the latter train and started his train without satisfying himself that the ticket was for his train disregarding the signal which was against him the consequence being that his train collided at the crossing with the passenger train which was running from the opposite direction. He was charged before the First Class Magistrate under Section 101 of the Railways Act IX of 1890 for endangering the safety of passengers in the train by disobeying the General Rules, and was convicted and sentenced to undergo six months' rigorous imprisonment

JUDGMENT—The accused Shahab Din, a Railway servant, is charged under Section 101 of Act IX of 1890 (the Railway Act) with endangering the safety of persons by disobeying General Rules 223, 297 and 299 when on duty

The facts are that accused Shahab Din is a Shunter, passed Driver competent to work as a Driver on the Main line. He passed as a Driver on 3rd May 1907, and worked as Driver for 11 days in September and 10 days in October 1907. On the early morning of 24th October 1907, he was Driver of No 153 Down goods, which arrived at Kot Lakhpat Station at 6-5 on the loop line and came to a dead stop after clearing the crossing. This train was to have remained there till first No 9 Up passenger had been crossed and next No 13 Up passenger after which it would have been allowed to proceed. No 9 Up passenger was to have run through on the Main line. When a passenger train runs through a station, one copy of the line-clear is fixed in a clip, and it is sent to the pointsman to

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hand to the Driver of the incoming train. The Station Master on duty fixes the duplicate copy of the line clear in another clip, which he keeps in front of the station, ready to hand to the Driver of the incoming train in case he fails to pick up the line clear at the point. The Station Master on duty at Kot Lakhpat was Jaggan Nath (P W 3). After No 154 Down-goods had come to a stop on the loop line, Jaggan Nath, Station Master, handed one copy of the line clear in a clip for No 9 Up passenger to Asa Waterman (P W 10) to be handed to the pointsman Manohi Ram (P W 9). At the point Asa Waterman (P W 10) says that when he was passing the engine of No 154 Down goods, with the line clear clip in hand somebody on the engine snatched away the clip from him, took the line clear out and threw down the clip. He told them on the engine that the line clear was for No 9 Up passenger and not for 154 Down goods. They, however, did not heed him and started the train. What Asa says is too absurd to be believed. He stated to Mr Holloway, the District Traffic Superintendent very soon after the collision that the Station Master had handed him the line clear in the clip with instructions to give it to the Driver. Muhammad Din (D W 4), who was the 1st fireman on accused's engine, says that a porter brought the line clear in a clip and handed it to him. Asa Waterman is a stupid sort of a man, and he either did not receive clear instructions, or he did not understand them, and there is no doubt that he wrongly handed the line clear in clip intended for No 9 Up passenger to the fireman of No 154 Down goods. The fireman made the line clear over to accused Shahab Din, the Driver, who blew a short whistle and then started his train. When he got to the crossing, he saw No 9 Up passenger coming at full speed on the line. He reversed and did what he could to back his train, but it was too late and No 9 Up crashed into his engine which was not quite clear of the main line. No 9 Up-passenger suffered most severely, 8 passengers were killed on the spot and 2 were injured, out of the injured 3 died before they could be removed and 2 subsequently succumbed to their injuries when in hospital. That is, 13 passengers were killed and 22 were injured. The damage to the rolling stock is estimated to be about Rs 55,000. As already stated, accused Shahab Din is charged with disobeying General Rules 223, 297 and 299. General Rule 223 (1) is to the effect that the Engine Driver must see that the authority to proceed (in other words the line clear) is accurate and applies to the Section which he is about to enter, that it is complete and is signed in full, and in ink. Accused Shahab Din is admittedly illiterate and could not be expected to know whether the line-clear which he received was complete and signed in full, but he should have known that it did not apply to the Section which he was about to enter.

He was going *Down* whereas the line clear was for an *Up* train. The line clear which he actually received wrongly is marked Ex PV. It has two broad parallel red lines each about an inch wide, across the face running up and down which distinguish it from a *down* line clear which has no such lines and is on plain white paper, so that illiterate Drivers can easily distinguish between "up" and "down" line clears. Clause (2) of the same rule directs that if the conditions mentioned in sub rule (1) are not complied with the Engine Driver *shall* not take his train from the station until the mistake is rectified. Accused clearly disobeyed General Rule 223 as above stated.

The next General Rule which accused disobeyed is 297 which directs that the engine driver shall not start from a station an engine with vehicles attached until the Guard in charge of the train has given the signal to start. The Guard in charge of No 154 Down goods was Abdul Aziz (P W 6). He says that when his train arrived at Kot Lakhpat he got out of his brake van and went into the Station Master's office and found that his train would have to wait a considerable time. He remained seated in the office, after a little while he observed his train was in motion, he ran out and showed the danger signal and ran shouting towards the accused to stop. He certainly never gave accused any signal to start.

The third and last general rule which accused disobeyed is 299 which directs that the engine driver must, before starting his train, satisfy himself that the correct signals are shown and that the line before him is clear.

There is not the least doubt that at the time the collision took place the starting signal for accused's train was against him. Mr Halder (P W 1), District Traffic Superintendent, N W Railway, Bhatinda had his reserve carriage attached to No 154 Down goods and immediately the collision took place he took note of the state of the signals, they were for No 9 Up passenger to run through and against accused's train. There is also the evidence of Mr O'Brien (P W 7), Driver of No 9 Up, and his fireman Attar Din (P W 8), who say that the signals were all lowered for No 9 Up to run through.

There is the evidence of Jaggan Nath (P W 3), Station Master on duty who says that the starting signal for No 154 Down-goods, that is, accused's train was at danger, when he started his train. Munshi Ram Pointman (P W 9) says that the signals were all arranged for No 9 Up to run through.

Accused in his written statement says that when he received the line clear in the clip, he whistled and the starting signal for his train was lowered. But this is absurd. The Pointman Munshi

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Ram knew that No 9 Up was expected, Jaggan Nath, the Station Master, had just sent out the line clear for No 9 Up to run through. Neither of them would have been so absurd as to have lowered the starting signal for accused's train to start, I find that accused started his train against signals, and he certainly did not satisfy himself that the line before him was clear. If he had taken the trouble to look before him, he would have seen No 9 Up coming. I find that accused disobeyed General Rule 299.

I find accused Shahab Din was grossly negligent. His plea that he was greatly overworked is no answer to the charge under Section 101 of the Railway Act, for there is no question of "intention" or "knowledge." The section is as under—

If a railway servant, when on duty endangers the safety of any person—

(a) by disobeying any General Rule made, sanctioned, published and notified under this Act, or

(b) * * * * or

(c) by any rash or negligent act or omission—he shall be punished with imprisonment for a term which may extend to two years or with fine, which may extend to five hundred rupees or with both.

The plea of overwork, however, may properly be considered as an extenuating circumstance for the purpose of awarding sentence. The statement Ex. D III prepared by the District Local Superintendent, shows the hours accused was on duty from 16th October up to the time of the collision on the morning of the 24th October. The hours of duty from 20th October need only be considered. He left Phillour at 8.15 A.M. on 20th October, and arrived at Lahore half an hour after midnight—that is somewhat over 16 hours' duty. He left Lahore again for Phillour on 21st at 4.55 A.M., and arrived Phillour next day, 22nd, at 12.47 noon. That is, he was on duty all that night. The duty extended for about 20 hours. He left Phillour again that night, 22nd, at 9.55 P.M. and arrived Lahore at 6.6 P.M. on 23rd October. He was on duty all that night also and the duty was for about 20 hours. After arriving at 6.6 P.M. on the evening of the 23rd October, he was ordered out again at 7 A.M. on 24th. Accused was certainly very much overworked. Taking this fact into consideration, as well as the gravity of the offence and the fact that serious collisions have recently been only too common on the N-W Railway, I am of opinion that a fairly deterrent sentence is necessary. I sentence accused Shahab Din under Section 101 of the Railway Act to six months' rigorous imprisonment.

I consider it my duty to record, that it should be brought to the notice of the Railway Administration that the Railway employees

whose hands the safety of the travelling public is placed should under no circumstances be overworked in the manner that accused Shahab Din was overworked for the few days immediately preceding the collision. If accused had had reasonable rest, the collision in this instance would most probably never have occurred.

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Shahab Din

Case No 43

In the Court of the Head Quarter Magistrate, 1st
Class, Pegu.

TRIAL No 19

IN Re W. J C FOWLER, Accused

Indian Railways Act, IX of 1890 S 101—Driver endangering the safety of persons—Collision—Omission to place fog signals—Driver acquitted

1908
August 31

A driver of a goods train which was approaching a station was charged before a Magistrate for running his train against signals and colliding with the engine of another train standing at the Station, under S 101 of the Indian Railways Act, IX of 1890. The defence of the accused was that his train was under control, that owing to foggy weather he was not able to see the signals and ascertain his locality, that no fog signals were placed on the line as required by the rules and that, if this had been done by the Station Master on duty, the accident would not have taken place. The Magistrate being satisfied with this explanation acquitted the accused.

JUDGMENT—The accused W. J C Fowler is an Engine driver and was formerly employed by the Burma Railway Company. The charges against him are that (1) he passed the Payagyi Railway Station outer stop signal when it was "on" without receiving orders to proceed, and (2) "not taking every possible precaution when approaching Payagyi Station to have his train well under control" thereby disobeying General Rules 314 and 318 of the Indian Railway Act IX of 1890, and thus endangered the safety of others, and punishable under Section 101 (A) of the said Act. The facts of the case are briefly as follows—

The accused was driver of a goods train No 19 Up, and on the 5th March about 4.30 A.M. his engine came in collision with the 1 Down Special Goods train which was at Payagyi and about to commence shunting operations. Both trains being goods trains there were only the usual Railway officials on them, but no one was hurt and slight

*In Re
Fowler.*

damage was caused to the engine of the 1 Down Special Goods train. The collision has been proved, and admitted by the accused but he has urged that it was due to a dense fog prevailing at the time so that he could not see the outer signals and ascertain his locality and although he had his train under control he was unable to bring it to a standstill in time owing to the 'slippery state of the rails occasioned by the fog, and moreover no 'fog signals' were put down for him, as there should have been as directed by Rule 20. After considering the evidence, there can be no question that on the morning of the 5th March and at the time of the accident, there was a dense fog. This is proved by the 21st witness for the prosecution, Driver Rodgers, and other witnesses called by the accused. The Asst Station Master and his Jemadar 3rd and 4th witnesses for the prosecution wanted to make out that there was no fog at the time of the accident, but this is clearly untrue and the motive is obvious, to save the Asst Station Master from a prosecution. The Asst Station Master has not, I believe, been punished. In the case of *King Emperor v A C Das, L B R, Volume IV*, the learned Chief Justice held "that the essence of the offence was the danger or risk entailed by neglect of the rules, irrespective of the consequences that actually ensued." Applying this ruling to the present case the Asst Station Master seems to have been the principal offender and directly responsible for the accident and by way of analogy the same view is taken in the present case. If the Asst Station Master had put down fog signals there would have been no accident, but as he failed to do so, there was an accident, hence his responsibility is the greater. Rule 36 runs: "In thick and foggy weather to indicate locality of a signal, two detonators must be placed on the line at 10 yards apart, and at least 100 yards outside the outermost signal at the station. Section 36 runs:—(a) In thick or foggy weather Station Masters are 'personally responsible' that two fog signals are placed on the line 100 yards outside outermost signal and about 10 yards apart for every incoming train. Small white posts, about 14 inches above ground level are fixed 100 yards outside the outermost signal at every station to indicate where fog signals are to be placed. (b) Guards and Engine drivers shall report all cases of dense fog. (c) When a train passes over a fixed signal. (d) Engine driver and Guard shall look out for hand or fixed signals and act in accordance therewith. (e) In the event of there being no signals available, the Station Master shall send on a railway servant 200 yards outside the outermost signal to exhibit a danger signal to incoming trains. The Asst Station Master had fog signals put down. Again, the Asst Station Master appears to have disregarded Rule 103, which runs:—That in thick or foggy weather a train must

for an order to proceed shall not be allowed to draw out to a starting signal in an *advanced position*, or up to an advanced starting signal. I am bound to say that I think it was most unfortunate to take the train No. 1 Special Goods down to the advanced position it was in at the time of the accident. Driver Rodgers said, he thought the arrangement a faulty one and he asked the Jemadar why he did not shunt the train which was standing on the second line before his arrival. The Jemadar replied that he was a new man and the Asst Station Master was also a new man, and the only thing about him is he drinks a bit, and gives no definite orders. Although the Jemadar denies this now, I still prefer to believe driver Rodgers. The Station Master was upset at the time owing to some cause. He admitted that he was unable to eat any food all day, or rather night before the accident. The Guard of 191 Up, Margin Ram, who saw him at the time of the accident, said he appeared "to be confused." I take notice of this, because Rule 110 runs as follows — Obstructing the line outside the facing points in the direction of an approaching train, whether a shunting board or an advanced starter is provided or not, shall be permitted only under special instructions which take into consideration the speed, weight and brake power of trains, the gradients, the position of the outer signal and the distance from which that signal can be seen by the driver of an approaching train. Subsidiary rule (a) runs — Shunting beyond facing points as far as the shunting boards, where such are provided, in the face of an approaching train, *shall on no account be permitted in thick or foggy weather*. There is a shunting board at Payagi, and I take it that in this instance the shunting should not have taken place under the circumstances. This is of importance to the accused who has stated that his train was a heavy one with inferior brakes and the line was slippery owing to the fog. That the accused did apply his brakes as soon as possible is clear from the evidence of the driver Rodgers who said the impact was slight and the brake must have been applied near the bridge which is close to the outer signals. The fireman of the accused's engine has also given evidence corroborating this point. Some of the witnesses have given evidence as to what they would have done under similar circumstances when cross examined. It is easy to be wise after the event, and I do not think that I should attend to it to the prejudice of the accused, who has been a driver for 19 years without mishap of any kind. Whatever he did appears to have met with severe punishment. He was first put under suspension without pay and then dismissed. He was then drawing Rs. 120 a month. Immediately after this he was ordered to be prosecuted. Unfortunately owing to his own ignorance or stupidity, the case has been hanging fire for a long time and he has been out of work and unable to get employment.

In Re
Cawler

He and his family are practically starving and live on the charity of others. In these circumstances, I think he has been sufficiently punished without a prosecution. However, I do not find any of that Rule 314 and 318 override Rule 35. Neither am I satisfied that "wilfully" passed the outer signal, which was against him. I am convinced that the train was not under proper control and finally I am of opinion what happened was due to an accident which would not have taken place, if there had been proper use of signals as laid down by the rules. It seems to me that the use of fog signals is somewhat erratic, viz. that some stations use them and others do not. It should be universal and imperative when the occasion demands it and not left to individual choice. Every driver is clearly entitled to them and should have them regardless of expense. In this case, I am afraid that the immediate circumstances of the case have been exaggerated to the prejudice of the accused. I find that the accused did not wilfully disobey Rules 314 and 318 of the Railways Act and that he has not committed or is guilty of an offence punishable under Section 101 (A) of the said Act and accordingly direct that he be acquitted and set at liberty so far as his case is concerned.

Case No. 44.

In the Court of the Extra Assistant Commissioner Bombay.

RUSTUMJEE DARASHAW, Accused

Cheating—I. P. O., Section 420-109—Permanent Way Inspector giving false measurement—Ballast and earthwork.

A Permanent Way Inspector was prosecuted for two offences of abetment of cheating the G. I. P. Railway Company, one in respect of ballast and the other in respect of earthwork, under Section 420-109 I. P. Code.

The case for prosecution was that he gave to his engineer false measurement of ballast supplied by a contractor and earthwork done by the contractor. Bills were prepared and paid for payment. The accused pleaded that the shortage was due to the fact that the difference in the quantity of ballast was used in spreading over the line.

The magistrate acquitted the accused on the ground that he accepted the measurements and passed the bills for the same after they had been repeatedly over the section, of which this portion formed a part and that the measurement imputed to the accused was a misapprehension of the immediate detection. As regards earthwork the magistrate was of opinion that the filling of the bank could not give any rise to the

original shape or form of the heap removed and witnesses could not give any idea of the true surface of the earth before the cuttings were made as the climatic conditions rapidly upset then original levels.

JUDGMENT—In this case, one Rustumjee Darashaw, Permanent Way Inspector on the G I P Railway at Khandwa, has been prosecuted for two offences of abetment of cheating punishable under Section 420/109, I P Code—one in respect of ballast, and the other in respect of earthwork. As both offences are under the same section and as they were committed about the same time these have been tried together in a single trial.

The case for the prosecution now stands thus:

A contract for supplying 1,50,000 c ft of ballast was given by Mr Blake the late Resident Engineer Khandwa, to one Murjee Meghjee (Agent, Shantjee Lohani) in October 1904.

The accused in his memorandum No 103, dated 31st March 1905 and No 104, dated 21st February 1905 shows 1,40,525 c ft of ballast as having been measured by him at the following mileages—

| | | | | | | | | |
|----|-----|-----|-----|-----|------|------|-----|-----|
| 33 | 330 | 341 | 337 | 334 | 338 | 338 | 338 | 339 |
| 4 | 12 | 5 | 6 | 7 | 5 10 | 8 10 | 13 | 16 |

But actually only 107,610 c ft of ballast existed at the said mileages. The difference of 1,29,774 c ft of ballast valued at Rs 5512 4 9 is said by the accused to have been spread out on the Railway line between mileages 337½ to 341½ by baskets carried by coolies during the months of February and March 1905 while as a matter of fact, this was never done. In fact Rustumjee accused is said to have confessed eventually before Messrs Preston, Middleton and Everett (P W Nos 13 and 12 respectively) to the effect that the whole of the ballast was never there and that he put down these measurements at the instance of Mr Blake who wished to make good the loss sustained by Murjee Meghjee on his king work. Rustumjee is thus accused of having abetted Mr Blake and the contractor in cheating the G I P Railway Company in obtaining delivery of a cheque from them for ballast not supplied.

3. As regards the earthwork, it is stated that a contract for removing the spoil heap 10 ft beyond the Railway fencing from Talwaria to Chanani was given to Murjee Meghjee by Mr Blake in January 1905.

11. Work done was measured by the accused whose memorandum No 102 dated 31st March 1905 shows 1,26,080 c ft of earthwork excavated at the following mileages—

| | | |
|--------|------|----------------------|
| 337— | 1 to | 37—12 |
| 338—72 | to | 38 (should be 37—12) |
| 341—10 | to | 34—11 |
| 355—22 | to | 35—23 |
| 354—20 | to | 359—25 |

In the
Fowler

He and his family are practically starving and live on the charity of others. In these circumstances, I think he has been sufficiently punished without a prosecution. However, I do not find anywhere that Rule 314 and 315 overrule Rule 30. Neither am I satisfied that he "wilfully" passed the outer signal, which was against him. I am convinced that the train was not under proper control and finally I am of opinion what happened was due to an accident which would not have taken place, if there had been proper use of fog signals as laid down by the rules. It seems to me that the use of fog signals is somewhat erratic, viz., that some stations use them and others do not. It should be universal and imperative when the occasion demands it and not left to individual choice. Every driver is clearly entitled to them and should have them regardless of expense. In this case, I am afraid that the immediate circumstances of the case have been exaggerated to the prejudice of the accused. I find that the accused did not wilfully disobey Rules 314 and 315 of the Railways Act and that he has not committed or is guilty of an offence punishable under Section 101 (A) of the said Act and accordingly direct that he be acquitted and set at liberty so far as his case is concerned.

Case No. 44.

In the Court of the Extra Assistant Commissioner,
Bombay.

RUSTUMJEE DARASHAW, Accused

Chaitany—G. I. P. Section 120 (10)—Permanent Way Inspector gets false measurement—Ballast and earthwork

1905
October, 25

A Permanent Way Inspector was prosecuted for two offences of abetment of cheating the G. I. P. Railway Company one in respect of ballast and the other in respect of earthwork, under Section 420 (10) of the Code.

The case for prosecution was that he gave to his engineer false measurement of ballast supplied by a contractor and earthwork done by him and bills were prepared and passed for payment. The accused pleaded that the shortage was due to the fact that the difference in the quantity of the ballast was used in spreading over the line.

The magistrate acquitted the accused on the ground that the engineer accepted the measurements and passed the bills for the same after having been repeatedly over the section of which this portion formed a part and that the measurement imputed to the accused was so palpable that it could not escape immediate detection. As regards earthwork the Magistrate was of opinion that the figures of the book could not give any idea of the

original shape or form of the heap removed and witness examined to give any idea of the true surface of the earth before the cuttings were made in the climatic conditions rapidly up at their original heights.

JUDGMENT.—In this case, one Rustumjee Darashaw, Permanent Way Inspector on the G I P Railway at Khandwa, has been prosecuted for two offences of abetment of cheating punishable under Section 420/109, I P Code—one in respect of ballast, and the other in respect of earthwork. As both offences are under the same section and as they were committed about the same time, these have been tried together in a single trial.

The case for the prosecution now stands thus:

A contract for supplying 1,50,000 c ft of ballast was given by Mr Blake the late Resident Engineer, Khandwa, to one Murjee Meghjee (Agent, Shamjee Lohana), in October 1904.

The accused in his memoranda No 103, dated 31st March 1905, and No 88, dated 21st February 1905, shows 1,40,225 c ft of ballast as having been measured by him at the following mileages—

| | | | | | | | |
|-----|-----|-----|-----|-----|------|------|-------|
| 337 | 339 | 341 | 337 | 338 | 338 | 338 | 339 |
| 4 | 12 | 5 | 6 | 7 | 5 10 | 8 10 | 13 16 |

But actually only 107,1 c ft of ballast existed at the said mileages. The difference of 1,29,774 c ft of ballast valued at Rs 5,512-4 9 is said by the accused to have been spread out on the Railway line between mileages 337½ to 341½ by baskets carried by coolies during the months of February and March 1905, while, as a matter of fact, this was never done. In fact, Rustumjee, accused, is said to have confessed eventually before Messrs Preston, Milderton and Everett (P W Nos 1, 3 and 12 respectively) to the effect that the whole of the ballast was never there and that he put down these measurements at the instance of Mr Blake, who wished to make good the loss sustained by Murjee Meghjee on linking work. Rustumjee is thus accused of having abetted Mr Blake and the contractor in cheating the G I P Railway Company in obtaining delivery of a cheque from them for ballast not supplied.

3. As regards the earthwork, it is stated that a contract for removing the spoil heaps 10 ft beyond the Railway fencing from Talwaria to Chandni was given to Murjee Meghjee by Mr Blake in January 1905.

The work done was measured by the accused whose memorandum No 102 dated 31st March 1905, shows 5,26,080 c ft of earthwork excavated at the following mileages—

| |
|-----------------------------------|
| 337—4 to 337—12 |
| 338—72 to 338 (should be 337)—12) |
| 351—10 to 351—14 |
| 355—22 to 355—38 |
| 359—20 to 359—28 |

In Pe
Rustumjee
Dangargau

While, as a matter of fact the measurements subsequently made show that only 71,100 c ft of earthwork was done. The difference of 154,950 c ft valued at Rs. 2274 14 5 was never done. By means of these measurements the accused is said to have abetted Mr Blake and the contractor in cheating the G I P Railway Company in obtaining delivery of a cheque for earthwork done.

1 The defence briefly is to the effect that no confession was made as alleged, that the measurements of the ballast and the earthwork have been duly accepted as correct and that the ballast was spread by coolies.

5 It seems necessary to show how this case originated.

On the 2nd of April 1903, Mr Hormusjee (P W 27) gave information to Mr Middleton (P W 3) about the shortage of ballast on the Dongargau siding and about the deficiency in earthwork. On the 25th of May 1903, Mr Middleton sent out Mr Everett (P W 19) to Dongargau to find out exactly how much ballast there was. After two or three days Mr Everett returned and reported the shortage. Then Messrs Middleton and Everett went together to Dongargau on the 31st May 1903 and took measurements of ballast etc., on the 1st of June 1903. On their return to Khandwa enquiry was made from Rustumjee, and on 5th June 1903 Mr Everett left for Jubbulpore to report the case to Mr Preston (P W 2). On Mr Preston's arrival at Khandwa on the 6th June 1903 the enquiry was resumed, which resulted in the prosecution of Rustumjee.

6 It is to be noted that the Khandwa section of the Railway Public Works is a subdivision of the Jubbulpore District. The various officers who held the appointments are given below—

| | |
|---|--|
| District Engineer Jubbulpore | Mr Preston from November 1901 to June 1903 |
| Resident Engineer, or Assistant Engineer, Khandwa | Mr Blake from September 1901 to March 1903 |
| | Mr Walker from 10th March 1903 to 1st April 1903 |
| | Mr Everett from 1st April 1903 |
| | Mr Middleton from 17th April 1903 |

7 Under the orders of Mr Blake the measurements referred to in paragraphs 2 and 3 were taken by the accused. On receipt of the Exhibits P 20 P 19 and P 27, the measurements were copied in Mr Blake's measurement book (Exhibit P 3) with a note that the measurements had been made by Rustumjee the accused. From this measurement book the contractor's bills were prepared which are not disputed.

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8 The prosecution is that whereas the accused showed as measured 1,40,525 c ft of ballast, only 10,751 c ft of ballast existed. In support of this, the case for the prosecution is based on the evidence of Messrs Preston, Middleton, Walker, Everett, and Mangil Singh. The evidence of these witnesses is to the effect that the quantity of ballast found to be existing at the time of their measurements taken during the month of June 1905, was, as shown above, considerably less than the measurements obtained by Rustumjee in the months of February and March 1905. The accused explains that the shortage is due to the fact that the difference in the quantity of the ballast was used in spreading over the line. Messrs Preston, Middleton, Walker and Everett, Professional Engineers, on the other hand, contend that the accused's explanations cannot be correct, because, had that quantity been used on the line, the line would have been raised by 3 inches and that such sinkage is never permitted. I may note that this is purely the theory of the question. But what I am called upon to decide in this case is whether the measurements taken by the witnesses are correct. To determine this question, it is necessary to note that Mr Preston accepted the measurements of the accused as correct and passed bills for the same, after admittedly having been over that section of the line four or five times between January and February 1905 for the express purpose of inspecting the line of which this portion formed a part. It seems to me that, if Mr Preston had any reason to doubt the accuracy of the accused's measurements he would have detected them at once, specially as he had so many times been over the section, and, moreover, the exaggerated measurements imputed to the accused are so palpable that they could not possibly have escaped immediate detection. It is explained for the prosecution that the bills are passed after checking arithmetical calculations of the measurements. But even so, it is difficult to understand how such glaring inaccuracies, if they really existed, could have been overlooked. Had the excess measurements not been so large as they are alleged to be, it would be possible to accept the explanation. But in the present case that is not possible in view of the evidence given by Messrs Preston, Walker and others, which tends to inspire the conviction that such a wholesale swindle could not have been perpetrated without immediate detection.

9 As regards cuttings, it is alleged by the prosecution that the accused submitted measurements of 5,26,050 c ft in excess of the actual quantity of excavation work done. In support of this contention, it is urged that, if the quantity of earth which the accused showed as having existed in the place from which it was excavated, the telegraph posts on the side of the line would have been buried, and because they are not buried, it is inferred that the measurements

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has been

are false and exaggerated. This conclusion is arrived at by the witnesses now left do not warrant such high means. But this again is an inference based on theoretical deduction from the bank and the witnesses as they now stand it cannot give the measurement shown by the accused. On the hand, it is explained that the present facing of the bank is not any indication of the original shape or form of the bank. It can be existing witnesses convey a correct idea of the true of the earth before the cuttings were made because they are not at all likely to alter their original heights.

10 So this question has been merely discussed on the lines, but here as in the question regarding ballas I have seen what are really the facts. Mr. Preston had been several times and down the line and Mr. Middleton but neither of them capable of giving a correct idea of the soil or ground, as before excavation. The stability of witness against race depends entirely on the nature of soil. In the present case it varies from place to place and it is impossible to decide which present witnesses have and which have not retained their height. Lastly, it has to be noted that the accused's statements were accepted and a bill passed for them by Mr. Preston, who been on this section of the line and who therefore had probably a fairly accurate idea of the shape and form of spoil heaps and the quantity of spoil that must have been taken out in excavation. In view of this fact it is strange that the accused's measurements apart from having been accepted were not even questioned as they are now declared to be so excessive as to be almost of escaping immediate notice.

11 The case for the prosecution is also based on the confessions declared to have been made by the accused to wit Nos. 1, 3 and 12. None of these witnesses in a position to give precise language used by the accused in making this confession. They explain that what they have deposed to on the point is to the purport or gist of what the accused said. It is obvious in the circumstances opposed to equity to hold that the accused made confession when what he actually said cannot be brought on the record. It would be very prejudicial to the interest of the accused if the Court of law to hold as proved only those portions of the confession the purport only of which can be given by the witnesses. The effect would be lost of any qualifying or modifying expressions might have been used, if the exact words of the confession were given.

12 Apart from this there is ample evidence to show that the accused might have said what was said under inducement or pressure. In support of this it is necessary to note that Mr. Scanlon has affirmed in this Court that he was directed by Mr. Middleton, the super-

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Rustomjee
Darashaw

officer of the accused, to tell the accused to make a clean breast. By this expression Mr Scanlon declares that he understood that Mr Middleton meant to imply that Rustomjee should confess that it was a false measurement or that the ballast had not been there. Mr Scanlon adds that "he did not tell me in so many words what would be the result if he confessed. But from the way he said I concluded that he would make it lighter and would not press." If this impression could have been created in Mr Scanlon's mind, it is not difficult to see that a similar impression would have been created in the mind of the accused. And if this condition of things was attained, there can be no doubt that the accused, if he really made the confession, whether it was true or false, made it for the purpose of profiting by the promise. Necessarily therefore, on this ground alone it would be impossible to hold that anything like a voluntary confession was made. Unless a confession is voluntary, it certainly cannot be admitted as evidence against an accused person. Mr Scanlon contends that he did not convey to the accused the message which he had been directed to communicate, but I am unable to accept this statement of Mr Scanlon's for the very clear reason that it would have been impossible for the accused to have become acquainted with the very same words of the message, which had been imparted to Mr Scanlon unless the latter had informed him. The case law is very clear on the point as also the Evidence Act, and it is therefore unnecessary to comment any further.

13 It is necessary, however to observe further that the prosecution have sought to establish certain *mala fides* on the part of the accused by imputing to him an attempt made to induce Hormasjee to collude with him in the commission of fraud. Hormasjee has been put up as a witness (P W 27) to show that, in the month of September or October 1904, the accused made a proposal to him. "He (accused) asked me if I were prepared to pay percentage on the ballast that I would supply on the Dongergaon length." In respect of this Hormasjee affirms that he was alone when the said proposals were made to him and that he declined to accede to them on the ground that "it was a dangerous practice." While remembering so much of the language of the accused, Hormasjee's memory does not help him in the least and he is completely at sea as to the time when, and the place where, the proposal was made, although it is clear that, to the ordinary mind in respect of a thing of this description it would be far easier for a person to remember the time when, and the place where, rather than the language in which, the proposal was made. Furthermore, it has to be noted that there is considerable documentary evidence on record to show that there was much ill feeling continuing up to the present time between the accused and Hormasjee long before this proposal was made and the

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Darashan.

presumption arising in consequence is that it is unlikely that the accused would select a most hostile person to whom to make such proposal. Therefore, I am of opinion that the prosecution has not established the previous *mala fides* it sought to impute to the accused.

14. On the other hand the records show that the accused has been held by the various officers to be one of the best and honest Inspectors.

15. The case for the prosecution as set out in the *chalan* unquestionably implies that the two principal witnesses on whom the prosecution relied to establish their allegations were Mr Blake and Shamjee. The latter, I might add, was first made an accused person, but because the Police investigation disclosed that nothing could be established against him, he was therefore withdrawn from the prosecution. Nevertheless in the trial before me attempts have been made to impugn the credit of these two persons. Whether they are in any way implicated in the case, is not for me to decide, but if full weight is given to the *chalan*, it would appear that they are not.

I have carefully considered the whole of the evidence adduced in this case, and I am forced to the conclusions that there are perhaps grounds justifying suspicion against the accused, but it is impossible to decide a case on suspicion alone. I am obliged to hold the accused not guilty of either of the offences charged against him, and to acquit him on both counts.

Case No. 45.

In the Court of the Deputy Magistrate, Bankura.

EMPEROR

v.

1 ROBERT BAILLIE FORSYTH

2 NAJIR-SHEKH

Prosecution of a Driver and Fireman of a train—Wrongful confinement—Criminal force—Outraging the modesty of a woman

1905
October, 21.

A young woman, after supplying midday meals to her people working in the fields, was returning home and stopped very close to the Railway line looking at a Goods train which was then running between two stations. The Driver and Fireman stopped the train, charged her, brought her by force and confined her in the brakevan of the train, and proceeded to the next station. They were charged for using criminal force and wrongful confinement with a view to outrage her modesty and were convicted by the magistrate.

JUDGMENT—The two accused have been charged with having used criminal force to the complainant Raimoni Dassi on the 2nd August 1905, knowing it likely that they would thereby outrage her modesty, and further with having wrongfully confined the complainant, the said Raimoni Dassi, in the brakevan of the Railway train, of which the first accused was the driver and the second accused the fireman.

The prosecution alleges that, on the 2nd August 1905 at about 2 30 P M, while the complainant, a young girl of about 15 years of age, was washing utensils in a ditch about 10 cubits of the railroad (at a place called Lipoor between the Railway stations of Bishenpur and Ondagram on the Bengal-Nagpur Railway) after supplying the midday meal to her father-in-law, her husband and her other relatives, who were transplanting seedlings on their fields at a distance an Up Goods Train came in her sight. Seeing the train coming, the complainant stood up and was watching the train pass out of girlish curiosity about 10 cubits off the line. According to her, the first accused, who was the driver of the train, beckoned her to come. She was frightened and moved towards the field away from the line when the train was suddenly stopped. The complainant, seeing the first accused come after her, began to run away, but was overtaken by him on a field about 10 cubits from the line. She then cried aloud when the alarm was raised by P W I. The first accused forcibly dragged her some way when the 2nd accused (who was the fireman of the engine), the Guard and the brakeman got down from the train and they with the first accused all forcibly put the complainant into the brakevan and carried her off to the next station Ondagram, where they made her over to the Station Master.

Meanwhile, the alarm having been taken up two of the complainant's relations pursued the train and reached the Ondagram station a little after the train had left.

The accused in their examination say that the woman was lying on the line to commit suicide, when the first accused stopped the train and ordered the second accused to seize her, which order the second accused obeyed. The complainant was put into the brakevan by the second accused.

The points for determination are —

- (i) Whether the accused used any criminal force to the complainant
- (ii) Whether they knew it likely that the use of such force would outrage her modesty, and

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- (iii) Whether the accused wrongfully confined the complainant in the brakevan of the train, between the time of her arrest and the making over of her to the Station Master of Dadagram

The decision of the Court on each of the above points is in the affirmative

It is evident from the evidence of the eye witnesses (Nos I, II III and IV) for the prosecution that the first accused got down from the engine, chased the complainant, who was running away, caught hold of her and forcibly dragged her, when the 2nd accused the Guard and the brakeman joined him

The second accused admits having seized the complainant but under orders from the first

Although the first accused in his examination disclaims having actually seized the complainant, his own witnesses (D W II and D W IV) depose having seen him actually seize her when brake van was covered. The complainant's story that she sobbed, cried and struggled with the first accused, is corroborated not only by the prosecution but by the defence (D W II, III and IV), some of whom (D W III and IV) go so far as to say that she begged them to let her go, as she did nothing. The deliberate arrest and forcibly dragging the complainant to the brakevan against her will and in spite of her entreaties show that both the accused intentionally used force to her. From her plight at the time, it appears that she was not only frightened and annoyed and injured by the action of the accused but that the action of the accused amounted to something graver than using criminal force as detailed below

It has been established by the prosecution that the complainant belongs to respectable middle class society and that like one belonging to that class always appeared in veil in public. It is also on record that the females of this class in the village of occurrence take meals to the fields for their relatives, who work or supervise the work thereon. The above points have not been challenged by the defence at all. It has been proved by the prosecution that while the accused were catching hold of the complainant they used such force that not only her veil, but the clothes on the upper part of her person fell off. The latter surely is looked upon as an outrage to the modesty to women of any civilized country. In a country where pulling up of a woman's veil is looked upon as an outrage to female modesty the accused were surely aware that not only this, but the using such force as exposed the upper part of her person was surely an outrage to her modesty. It also appears from the evidence for the prosecution, as well as of the defence that the complainant was forcibly lifted up to the brakevan. From the uncontradicted evidence

for the prosecution, it appears that the two accused, the Guard and the brakeman, lifted the complainant there perforce. D W II says that the trolley man (D W III) and the brakeman (D W IV) lifted her therein. But D W III denies having taken any part in the affair, and this agrees with the story for the prosecution. D W IV contradicts the trolleyman and the guard and says that he himself alone caught the waist of the girl and lifted her to the van in spite of her entreaties. As the evidence on this point is confused by the defence, the Court accepts the story for the prosecution that all four lifted the girl to the brakevan perforce. The brakevan was about a man's height, and from the way she was handled by the waist, as well as by other parts of her person, it will be obvious that her modesty was outraged.

The fact, that the complainant was carried to the brakevan and confined therein, is admitted by the defence. Again it has been pointed out that the complainant struggled, sobbed and begged to be let off when forced therein. This shows that she was prevented from going beyond the confines of the brakevan having been put therein perforce. When once there the train let off, she could not possibly have jumped off the train at the risk of her life.

From the above, it will be seen that the main facts of the case, viz., of the arrest of the complainant by the accused, their forcibly dragging her against her will, their forcibly lifting her to the brakevan and confining her therein in spite of her protests, are points admitted by the defence. It now remains to be seen what justification the accused had in their conduct.

When a young girl is run after by, is caught, and becomes the subject of force and restraint at the hands of a young man of the age of the 1st accused, and subsequently molested and confined by him and others, the burden of proof that the motive of the accused was innocent or actuated by good faith lies on the defence. If the motive be innocent, then the outrage to the modesty amounts to a mere technicality.

The accused pleads that the girl was "sleeping" on the line as will appear from Exhibit A, signed both by the 1st accused and by the Guard (D W II). There is absolutely no evidence to corroborate their theory. Not an iota of evidence has been adduced by the defence to support this. True, it may be, that the 1st accused has been telling the story of the girl's attempt to commit suicide by sleeping on the rails from the time he was discovered catching hold of the complainant till his arrival at Ondagram. But this appears to be to find an excuse for his own conduct. For, first of all, there must be some motive for the girl to commit suicide. According to the prosecution, whose witnesses were very searching cross-

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examined by the ablest pleader of the local bar, who defended the *accused*, the complainant was a chaste and good girl perfectly happy with her husband and her relatives, and dearly loved by all of them. Previous to this incident, there was no threat or no attempt by her, no talk, nor even any rumour of her ever attempting to commit suicide. There is a total absence of any motive for her—a young girl of 15—to commit suicide and none has been suggested nor even ascribed, nor sought to be proved by the defence. Secondly, had the girl been bent on committing suicide, she would not have possibly selected a fine afternoon for the act, when her relatives and other cultivators were working around the place of occurrence. No quarrel, or no misunderstanding took place immediately before the occurrence for attempting a speedy suicide in broad daylight. Thirdly, to sleep on the rails when they are very hot after a whole day's fierce sun is not a comfortable idea, as also according to P W V there is no place for sleeping on the rails.

Fourthly, the suggestion, that the complainant was sleeping there is not a sustained story. D W I says that the first accused did not tell him in what way the complainant attempted to commit suicide. D W II says that the first accused told him while discovered with the complainant that she threw herself on the line as the train was approaching her. Surely throwing one's self on the rails at the approach of a train is not sleeping thereon.

The complainant had been telling the one story of her forcible capture for nothing even to the witnesses for the defence from the very beginning of the case, and her story is borne out by her witnesses.

Again, D W III did not hear of the theory of attempted suicide. He was the only eye witness who was not accused of any offence. The rest of the eye witnesses of the defence were more or less implicated with the case, and hence their story should be accepted with great hesitation unless corroborated by independent evidence. They were all railway servants probably wanting to save the accused as well as themselves, as much as possible. This will be evident from the admission of D W II that he attended the Court on the days of hearing of the case.

It has been pressed by the defence, that the complainant herself says in the first information she lodged with the police (Ex 1) that she was not ravished. The accused arrested her as she was attempting to commit suicide. It has been shown above that the theory of attempt at suicide does not bear scrutiny. Apart from the unwillingness of a Hindu girl to admit having been ravished by any one, far less by a Christian, lest she would be outcasted and shunned by society for ever and given up by her husband, there are

circumstances in this case, which made it impossible for the 1st accused to ravish her. It appears from the defence that they did not notice any one around, or at the place of occurrence. The unchallenged testimony of the complainant that the 1st accused beckoned her to come and the subsequent stopping of the train and other acts seem to be plausible facts, as the 1st accused was probably under the impression like his own witnesses—that there was none in the fields, his outrage on the girl could not be seen by outsiders. But as the girl being frightened ran away the 1st accused also ran after her even then probably not noticing any outsiders on the fields. But as soon as he caught hold of the girl she cried out and the alarm was raised by P. W. I. to the cultivators working around. Apprehending the danger of having been seen, the 1st accused could not proceed further in his act than the catching hold of the girl. At the same time, if this part of the story of the defence be believed, the Guard and other railway employees in the train got down to see what had happened on account of the sudden stopping of the train and discovered the girl in the clutches of the 1st accused, who had no alternative than to invent the story of her sleeping on the rails (for his own safety), with the admitted result that she was forcibly put into the train. The villagers could not come to the rescue as will appear from their evidence being terrified at the sight of the Guard and the Driver and the train having started immediately. The matter having been known, the relatives of the complainant ran after the train and reached the Ondagram Station after the train had left. The accused probably feared that had he let off the complainant at the place of occurrence the charge against him would have been all the more strong and hence he being confounded invented the absurd story of her sleeping on the rails.

As regards the second accused, who was working with the first as a fireman on the engine, the only inference that can be drawn is that he was cognizant with the motive of the first accused who left the engine before him. As soon as he sensed danger for the 1st accused, he also got down to render what help he could in securing the girl in putting her to the brakeman as soon as possible.

A word or two may be necessary on the petition marked Exhibit B. It was alleged to have been filed by the complainant wanting to compound the case, under Section 312, I.P.C. But the complainant who was searchingly examined on the point denies any knowledge whatever of the petition. The mukhtar who was said to have identified the complainant says that the complainant did not consent to have the case compounded and that it was never read out to her. Probably it was an attempt to have the case compounded on the part of others who had no legal *locus standi* to do so. The value of the petition, however, amounts to nothing, when it is remembered

Emperor
v
Forsyth

that it was filed after the District Magistrate on going through the complaint ordered the Court Sub Inspector to add the charge under Section 354, I P C, and the accused were being tried under that charge and under Section 342, I P C. Moreover, a mere glance at the complainant's first information will show that she complained of violence having been used to her though she was not actually *raushe*l. Her deposition in Court supports the complaint she lodged with the police and there is ample independent evidence to show that the case comes under Section 354 I P C.

For the above reasons, I find that there was no justification for the 1st accused to use criminal force to the complainant and to confine her in the brakevan. His actions have amounted to an outrage to the modesty of the complainant and her wrongful confinement. The second accused has deliberately assisted the first in his acts knowing that there was no justification in them, and is therefore as much guilty as the first. I therefore find both of them guilty under Section 354 and 342, I P C.

As regards the sentence to be passed, the Court takes into consideration the facts that the father of the first accused had been a Deputy Assistant Commissary on the Madras Establishment of H M S Indian Military Force, as will appear from the warrant of appointment filed by the first accused. He has also been put to some pecuniary loss in having had to defend his case by the ablest pleaders of the bar and a large number of muktears. Moreover any sentence of conviction will mean loss of present employment for him and social stigma.

After therefore, giving the case a most careful and anxious consideration, the Court directs that the first accused Robert Esch Forsyth be made to undergo simple imprisonment for one month and to pay a fine of Rupees Two Hundred only (in default to undergo one month's additional simple imprisonment) and the second accused Najir Sheikh to undergo one month's rigorous imprisonment, under Sections 354 and 342, I P C.

APPENDIX B.

ACTS.

ACT XVIII OF 1854

An Act relating to Railways in India

Passed on the 12th of August 1854

| | |
|---|--|
| WHEREAS it is expedient that all railways which have been, or shall be opened by any railway company under the superintendence and control of the East India Company, for the public conveyance of passengers or goods in any part of the territories in the possession and under the Government of the said company, should be subject to the same regulations, it is enacted as follows — | Preamble |
| I* For the purposes of this Act, 'railway' includes land within the fences or other boundary marks prescribed under Section 21, and all lines of rail, sidings or branches, worked over by locomotive engines for the purposes of, or in connexion with a railway also all stations, offices, warehouses, fixed machinery, and works constructed or being constructed for the purposes of, or in connexion with a railway | Railway |
| No person shall enter any carriage used on any such railway for the purpose of travelling therein without having first paid his fare and obtained a ticket Every person desirous of travelling on such railway shall, upon payment of his fare be furnished with a ticket specifying the class of carriage and the distance for which the fare has been paid and shall when required show his ticket to any servant of any such company duly authorized to examine the same and shall deliver up such ticket, upon demand to any of the company's servants duly authorized to collect tickets Any person not producing or delivering up his ticket as aforesaid shall be liable to pay the fine from the place whence the train originally started unless he can prove that he has travelled a less distance only in which case he shall be liable to pay the fare only from the place whence he has travelled | Fares to be paid Passenger tickets to be given up on demand Penalty |
| II At the intermediate stations the fares shall be deemed to be accepted and the tickets furnished only upon condition that there be room in the train for which the tickets shall be furnished In case there shall not be room for all the passengers to whom tickets shall have been furnished those who shall have obtained tickets for the longer distance shall have the preference and those who shall have obtained tickets for the same distance shall have preference according to the order in which they shall have received their tickets Provided that all officers and troops of Her Majesty or of the East India Company on duty, and all other persons on the business of the East India Company who by virtue of any contract with the East India Company shall be entitled to be conveyed on such railway in preference or in priority over the public shall be entitled to such preference and priority without reference to the distance for which or the order in which they shall have received their tickets | At intermediate stations the fares and tickets to be conditional Proviso. |

Penalty for
fraud

III. Any person who shall defraud or attempt to defraud any such railway company, by travelling, or attempting to travel upon such railway without having previously paid his fare, or by riding in or upon a carriage of a higher class than that for which he shall have paid his fare, or by continuing his journey in or upon any of the carriages of the company beyond the place for which he shall have paid his fare without previously paying the fare for the additional distance, and with intent to avoid payment thereof, or who shall knowingly and wilfully refuse or neglect on arriving at the point to which he shall have paid his fare, to quit such carriage, or who shall in any other manner whatever, attempt to evade the payment of his fare, shall be liable to a fine not exceeding fifty rupees for each offence.

Fine for enter-
ing carriage
in motion

IV. Any passenger who shall get into or upon, or attempt to get into or upon, or shall quit or attempt to quit any carriage upon any such railway, while such carriage is in motion, or who shall ride or attempt to ride upon any such railway, on the steps, or any other part of a carriage except on those parts which are intended for the accommodation of passengers, shall be liable to a fine not exceeding twenty rupees for each offence.

Or riding on
the steps

Fine for rid-
ing on en-
gine, tender
or luggage-
van

V. Any person other than the engine man and fire-man, and as such fire man, if any, who without the special licence of the superintendent of locomotives, shall ride or attempt to ride upon any locomotive engine or tender upon any such railway, and any person other than the guard or brake-man, who without such licence as aforesaid shall ride, or attempt to ride upon such railway, in or upon any luggage van or goods wagon or other vehicle not appropriated to the carriage of passengers, shall be liable to a fine not exceeding twenty rupees for each offence.

Smoking pro-
hibited

VI. If any person shall smoke, either on the premises or in or upon any of the carriages belonging to any such railway company, except in places or carriages which may be specially provided for the purpose he shall be liable to a fine not exceeding twenty rupees for each offence, and if any person persist in infringing this regulation after being warned to desist by any of the servants of the company, such person, in addition to incurring the liability above mentioned, may be removed by any of the servants of the company from any such carriage, and from the premises of the company, and shall forfeit his fare.

Penalty for
intoxication
or nuisance

VII. Any person who shall be in a state of intoxication or shall commit any nuisance or act of indecency in any railway carriage or upon any part of the premises of any such railway company or who shall wilfully and without lawful excuse interfere with the comfort of any passenger on such railway, shall be liable to a fine not exceeding twenty rupees, and in addition to such liability the offender may be removed by any of the servants of the company from any such carriage and also from the premises of the company, and shall forfeit his fare.

Penalty for
entering
private room
on carriage

VIII. If any special carriage, or portion of a carriage, or any private room or apartment, shall be provided by any such railway company for the exclusive use of females, any male person who without lawful excuse shall enter such carriage or portion of a carriage or any such room or apartment, knowing the same to be exclusively appropriated as aforesaid,

or shall remain therein after having been informed of its exclusive appropriation, shall be liable to a fine not exceeding one hundred rupees, and may be removed therefrom, and also from the premises of the company by any of the servants of the company, and shall forfeit his fare.

IX No such railway company shall in any case be answerable for loss or injury to any passengers' luggage unless it shall have been booked and separately paid for.

No liability
for passen-
gers' luggage

X No such railway company shall in any case be answerable for loss of, or injury to any gold or silver, coined or uncoined manufactured or unmanufactured, or any precious stones, jewellery, watches, clocks or time pieces of any description, trinkets, Government securities, bills of exchange, promissory notes, bank notes, orders or other securities for payment of money, Government stamped paper, postage stamps, maps, writings, title-deeds, paintings, engravings, pictures, plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials shawls lace, or any of them contained in any parcel or package which shall have been delivered to such railway company, either to be carried for hire or to accompany the person of any passenger, unless the value and nature of such articles shall have been declared by the person or persons sending or delivering the same, and an increased charge for the safe conveyance of the same shall have been accepted by some person specially authorized to enter into such engagements on behalf of the said railway company.

No liability
for loss of
gold silver
&c, unless in
case of special
engagingment

XI The liability of such railway company for loss or injury to any articles or goods to be carried by them other than those specially provided for by this Act, shall not be deemed or construed to be limited or in any wise affected in any public notice given or any private contract made by them, but such railway company shall be answerable for such loss or injury when it shall have been caused by gross negligence or misconduct on the part of their agents or servants.

Public notice
or private
contract not
to limit
liability

XII If any person shall fail to pay on demand any sum due to any such railway company for the conveyance of any goods, it shall be lawful for the company to detain all in any part of such goods or if the same shall have been removed from the premises of the company, any other goods of such person which shall then be on their premises, or shall thereafter come into their possession and also to sell by public auction sufficient of such goods, to realize the sum payable as aforesaid and all charges and expenses of such detention and sale, and until the proceeds of the sale to retain the sum so payable together with the charges and expenses aforesaid, rendering the overplus, if any of the money arising by such sale, and such of the goods as shall remain unsold to the person entitled thereto, or the company may recover any such sum by action at law.

Liability for
detention of
the
goods

XIII The owner or person having the care of any goods which shall have been carried upon any such railway or shall be brought on to the premises of any such railway company for the purpose of being carried on their railway shall order and by any servant of the company appointed to receive goods to be carried on that part of the railway in which such goods shall have been carried, or shall be about to be carried deliver to such servant an exact account in writing, signed by him of the number or quantity and description of such goods.

Written
account of
goods to be
received on
and

Penalty for
false account

XIV If any such owner or person as aforesaid shall wilfully fail to give a true account to such servant of the company, or if he shall wilfully give a false account thereof, he shall for every such offence, be liable to a fine not exceeding fifty rupees for every ton of goods, or for any parcel exceeding one hundredweight, and to a fine not exceeding twenty rupees for any quantity of goods less than a ton, or for any parcel less than one hundredweight.

Carriage of
goods of a
dangerous
nature

XV. No person shall carry upon any such railway any dangerous goods, or be entitled to require any such railway company to carry upon such railway any luggage or goods which in the judgment of the company or any of their servants, shall be of a dangerous nature, and if any person shall carry upon such railway any dangerous goods, or shall deliver to such railway company any such goods for the purpose of being carried upon such railway, without distinctly marking their nature on the outside of the package containing the same, or otherwise giving notice in writing of the nature thereof to the book-keeper or other servant of the company to whom the same shall be delivered for the purpose of being so carried, he shall be liable to a fine not exceeding two hundred rupees for every such offence, and it shall be lawful for any such Company or any of their servants to refuse to carry any luggage or parcel that they may suspect to contain goods of a dangerous nature, and to require the same to be opened to ascertain the fact previously to carrying the same, and in case any such luggage or parcel shall be received by the company for the purpose of being carried on the railway, it shall be lawful for the company or any of their servants to stop the transit thereof until they shall be satisfied as to the nature of the contents of the baggage or parcel.

Penalty for
obstructing
servant in
his duty

XVI Any person who shall wilfully obstruct or impede any officer or servant of the company in the discharge of his duty on such railway or any of the works, stations or premises connected therewith, shall be liable to a fine not exceeding fifty rupees.

Penalty for
trespass

XVII Any person who shall trespass upon any such railway or upon any of the lands, stations or other premises belonging to the company, shall be liable to a fine not exceeding twenty rupees, and if any such person shall refuse to leave such railway or premises on being requested to do so by any officer or servant of the company, or by any other person on behalf of the company, he shall be liable to a fine not exceeding fifty rupees, and may be immediately removed from such railway or premises by such officer, servant, or other person as aforesaid.

Construction
of the words
'cattle' and
'public road'

XVIII * The word "cattle" shall have meaning attached to it in the Cattle Trespass Act 1871, and the expression 'public road' in Sections 11 and 26 of the said Act, shall be deemed to include a railway.

Any person employed on a railway may exercise the powers of seizure provided by the said Section 11.

Penalty for
cattle
trespass with
in fences of a
railway

XIX * The owner or person in charge of any cattle trespassing or straying on any railway provided with fences suitable for the exclusion of cattle shall, on conviction before a Magistrate be liable to a fine not exceeding ten rupees for each animal, in addition to any amount that may be recovered under the Cattle Trespass Act.

XX. * Whenever cattle are wilfully driven or knowingly permitted to be on any railway provided with fences suitable for the exclusion of cattle, otherwise than for the purpose of crossing the railway at the gate or bar provided for public use, the person in charge of such cattle, or, if he cannot be identified, then the owner of the said cattle, shall, on conviction before a magistrate, be liable to a fine not exceeding fifty rupees for each animal, in addition to the amount that may be recovered under the said Act.

Penalty for wilfully driving cattle upon a railway.

Fines imposed under this or the preceding section may be recovered in the manner provided by Section 25 of the said Act.

XXI.* The Governor General in Council, or the Local Government with the sanction of the Governor General in Council, shall make rules, and may in like manner, from time to time, vary the same, for the provision of boundary-marks or fences for any railway or any part thereof, and for roads constructed in connexion therewith, and of gates or bars at places where any railway crosses a road on the level, and for the employment of persons to open and shut such gates or bars, and may by such rules determine what kind of fences shall, for the purposes of Sections 19 and 20, be deemed to be suitable for the exclusion of cattle.

Power to make rules as to fences, gates, and bars

XXII Any person who shall unlawfully and wilfully remove or deface the number, plates, or remove or extinguish any lamp on any carriage belonging to any such railway company, or shall wilfully or negligently damage or injure any carriage, engine, waggon, truck, warehouse, building, machine, fence, or any other matter or thing belonging to such railway company, shall be liable to a fine not exceeding fifty rupees.

Penalty for injury to carriage &c

XXIII If any person for whose use or accommodation any gate shall have been set up by any such railway company on either side of such railway, or any other person shall open such gate, or pass, or attempt to pass, or drive, or attempt to drive any carriage, cattle, or other animal or thing across the said railway at a time when any engine or train approaching along the same shall be in sight, or shall at any time omit to shut and fasten such gate, as soon as he and any carriage, cattle, or other animal or thing under his charge, shall have passed through the same he shall be liable to a fine not exceeding fifty rupees.

Penalty for opening or not properly shutting gate

XXIV. If any person shall commit any offence hereby made punishable by fine, and the name and address of such person shall be unknown, or there be reason to believe that the offender will abscond any officer or servant of the company, or any police officer or other person whom such officer or servant may call to his aid, may, without any warrant or written authority, lawfully apprehend and detain such offender until he can be taken before a magistrate or other officer having jurisdiction over the offence, or shall give sufficient security for his appearance before such magistrate or other officer, or shall be otherwise discharged by due course of law.

Offender may be apprehended

XXV. Whoever shall wilfully do any act or shall wilfully omit to do what he is legally bound to do, intending by such act or omission to cause, or knowing that he is thereby likely to cause the safety of any person travelling or being upon any such railway to be endangered shall be

Penalty for wilful act or omission endangering a passenger

liable to be transported beyond seas for the term of his life, or to be imprisoned, with or without hard labour, for any term not exceeding seven years.

Power of railway companies or controlling officer of a railway to make rules and regulations. XXVI.* Every railway company, or in the case of a railway not managed by a company, the officer for the time being entrusted with the control of such railway, shall make general rules and regulations for the use, working, and general administration of the railway, and may in like manner, from time to time, vary the same.

Publication of such rules. All such general rules and regulations or variations thereof, shall be submitted to the Governor General in Council for sanction and when sanctioned, shall be published in the *Gazette of India*, and shall be otherwise notified to the public, and to the officers and persons employed upon such railway in such manner as the Governor General in Council from time to time directs.

Any such rule or regulation may contain a provision that any person committing a breach of it shall be liable to a fine not exceeding fifty rupees, or in default of payment of such fine, to imprisonment of either description for a term which may extend to two months.

The Governor-General in Council may at any time cancel any rule or regulation so sanctioned.

Any justice of the peace may try a European British subject for an offence under this section, and on conviction award a sentence within the limits thereby prescribed for such offence.

Penalty for drunkenness or breach of duty by railway officer. XXVII. Any officer or servant of such railway company who shall be in a state of intoxication whilst actually employed upon the railway or any of the works connected therewith, in the discharge of any duty and any officer or servant of such company who shall negligently omit to perform his duty, or shall perform the same in an improper manner shall be liable to a fine not exceeding fifty rupees and if the duty in any of the cases mentioned in this section be such as to endanger the safety of any person, the officer or servant shall, on conviction before a magistrate, be liable to imprisonment with or without hard labour, for a term not exceeding one year, or to fine, or to both.

Penalty for an act not lawful. XXVIII. If any person shall rashly or negligently and without lawful excuse do any act which shall be likely to endanger the safety of any person travelling or being upon such railway he shall upon conviction before a magistrate, be liable to imprisonment, with or without hard labour for a term not exceeding one year, or to fine, or to both.

Penalty for endangering the safety of persons. XXIX.* If any officer or person employed upon a railway endangers the safety of any person by

- (1) disobeying any general rule or regulation sanctioned and notified in the manner prescribed by Section 26, or
- (2) disobeying any rule or order not inconsistent with the general rules or regulations aforesaid, and which he was bound by the terms of his service to obey, and of which he had notice, or
- (3) by any rash or negligent act or omission

he shall be liable to imprisonment of either description for any term not exceeding three years, or to fine not exceeding five hundred rupees, or to both

XXX. Any person, whether a European British subject or not, who shall be guilty of any offence for which, according to the provisions of this Act, he shall be liable to a fine only, shall be punishable for such offence by any justice of the peace for any of the presidency towns of Calcutta, Madras and Bombay magistrate, joint magistrate, or person lawfully exercising the powers of a magistrate, whether the offence shall have been committed within the local limits of the jurisdiction of such officer or not, and any person hereby made punishable by a justice of the peace, shall be punishable upon summary conviction

Jurisdiction of magistrate, &c. to him

XXXI. No conviction, order, or judgment of any justice of the peace, shall be quashed for error of form or procedure but only on the merits and it shall not be necessary to state on the face of the conviction, order, or judgment, the evidence on which it proceeds, but the depositions taken, or a copy of them shall be returned with the conviction, order, or judgment, in obedience to any writ of *certiorari*, and if no jurisdiction appears on the face of the conviction, order, or judgment, but the depositions taken supply that defect, the conviction, order, or judgment shall be aided by what so appears in such depositions

Conviction to be quashed on merits only — form of conviction, &c

XXXII. A magistrate may refer his trial and decision any charge of an offence hereby made punishable by him only to any of his assistants or to any deputy magistrate lawfully appointed to exercise the powers of a warranted assistant, and in such case every such assistant or deputy magistrate may exercise all the powers vested in a magistrate, subject to all the rules applicable to criminal cases devolved to such assistant or deputy magistrate, acting judicially

Magistrate may refer cases to his assistant or deputy

XXXIII. The local Government may give general authority to any such assistant or deputy magistrate to exercise without reference by a magistrate, any of the powers which they are hereby rendered competent to exercise upon reference by a magistrate subject to appeal to the magistrate from any conviction by such assistant or deputy magistrate, within one month from the date of conviction. Provided that a magistrate may at any time call from any of his assistants, or from any deputy magistrate subordinate to him, any case pending before such assistant or deputy magistrate

Local Government may authorise an assistant to

Proviso

XXXIV. All fines imposed under the authority of this Act for offences punishable by fine only by any justice of the peace, magistrate, joint magistrate, or person lawfully exercising the powers of a magistrate or by any assistant to a magistrate or deputy magistrate, may, in case of non-payment thereof, be levied by distress and sale of the goods and chattels of the offender by warrant under the hand of above named officers and in case any such fine shall not be forthwith paid, any such officer may order the offender to be apprehended and detained in safe custody until the return can be conveniently made to such warrant of distress unless the offender shall give security to the satisfaction of such officer for his appearance at such place and time as shall be appointed for the return of the warrant of distress, and such officer may take such security by way of recognizance or otherwise and if upon the return of such warrant

Fines how to be recovered

it shall appear that no sufficient distress can be had whereon to such fine, and the same shall not be forthwith paid or in case it appear to the satisfaction of such officer, by the confession for the or or otherwise, that he has not sufficient goods and chattles where such fine or sum of money could be levied if a warrant of distress issued, any such officer may, by warrant under his hand commit offender to prison, there to be imprisoned only, or to be imprisoned kept to hard labour, according to the discretion of such officer, for term not exceeding two calendar months when the amount of the shall not exceed fifty rupees, and for any term not exceeding four calendar months when the amount shall not exceed one hundred rupees for any term not exceeding six calendar months in any other case commitment to be determinable in each of the cases aforesaid on payment of the amount

Jurisdiction
in Madras
and
Bombay Pre-
sidences

XXXV. The heads of district police and ameens of police in presidency of Madras, and district or joint police officers in the presidency of Bombay, may punish, to the extent of the powers conferred upon them respectively in petty offences any offence hereby made punishable fine not exceeding twenty rupees

Enforcing
payment of
fare by pas-
senger not
producing
ticket

XXXVI. Payment of any fare to which any passenger not produced or delivering up his ticket shall be liable under Section 1 of this Act may be enforced in the same manner as any fine imposed by this Act

Apprehension
of offenders

XXXVII. Every person who shall be guilty of any offence mentioned in Sections 25, 26, 27, and 28 of this Act may be lawfully apprehended without any warrant or written authority, by any servant or officer of the company, or by any other person whom such officer or servant shall call to his aid, or by any police officer of such grade as shall, by any law in force for the time being, be entrusted in any case with the power to arrest without a warrant, and every person so apprehended shall with all convenient despatch be carried and conveyed before a magistrate or justice of the peace, or other officer lawfully authorised to punish the offender or to commit him for trial

Construction

XXXVIII. In the construction of this Act unless where a contrary intention appears from the context the word 'magistrate' shall include a joint magistrate and any person lawfully exercising the powers of a magistrate, words in the singular number shall include the plural words in the plural shall include the singular, and words in the masculine gender shall include the feminine, and the word 'fine' shall include a sum of money due upon a forfeited recognizance

XXXIX. Repealed by Act XIV of 1870

All Indian
railways to
be within the
Act

XL. Every railway within the said territories used for the public conveyance of passengers or goods shall, until the contrary be proved be presumed to be a railway within the meaning of this Act and every company to whom any such railway shall belong shall, until, the contrary be proved, be presumed to be a railway company within the meaning of this Act

Penalty for
omitting to
report acci-
dent

XLI. Every such railway company shall within forty eight hours after the occurrence upon the railway belonging to such company of an accident attended with serious personal injury, give notice thereof to the

local Government, and if any such company omit to give such notice, they shall forfeit the sum of fifty rupees for every day during which the omission to give the same shall continue.

XLII. The local Government may order and direct any such railway company to make up and deliver to them a return of serious accidents occurring in the course of the public traffic upon the railway belonging to such company, whether attended with personal injury or not, in such form and manner as the Government shall deem necessary and require for their information, with a view to the public safety; and if any such returns shall not be so delivered within fourteen days after the same shall have been required, every such company shall forfeit the sum of fifty rupees for every day during which the said company shall neglect to deliver the same.

Local Government may require return of accidents.

Penalty

XLIII. A copy of this Act, and of the general regulations, time tables, and tariff of charges which shall from time to time be published by any railway company, with the sanction of the local Government, shall be exhibited in some conspicuous place at each station of every railway so that they may be easily seen and read, and all such documents shall be so exhibited in English, and in the vernacular language of the district in which the station is situate, and in such other language, if any as shall be required by order of the local Government.

Copy and translation of Acts to be shown at railway stations

XLIV. The Governor General in Council may, from time to time, by notification in the *Gazette of India*, declare what government shall be deemed to be the local Government in respect of the whole or any part of a railway for the purposes of this Act.

Power to declare authority by which powers of local Government are to be exercised in case of railways

ACT XXV OF 1871

An Act to amend the Railway Act

Passed on the 5th September 1871

WHEREAS it is expedient further to amend Act No XVIII of 1854 (relating to Railways in India), it is hereby enacted as follows:—

I. This Act may be called "The Railway Act Amendment Act 1871."

Short title

It shall be read with, and taken as part of the said Act No XVIII of 1854 (relating to Railways in India) and Act No XIII of 1870 (to apply the provisions of Act No XVIII of 1854 to Railways belonging to, or worked by Government), and it shall come into force on the passing thereof.

Construction. Commencement

II. Act XVIII of 1854 shall be read as if for Sections 1, 11, 14, 24, 25, 26 and 29 of the said Act the following sections were substituted:—

Amendment of certain sections of Act XVIII of 1854

"I. For the purposes of this Act, railway includes land within the fences or other boundary marks prescribed under Section 21 and all lines

Railway

* See Act XXV of 1871

of rail, sidings or branches, worked over by locomotive engines for the purposes of, or in connexion with a railway also all stations offices warehouses, fixed machinery and other works constructed or being constructed for the purposes of, or in connexion with a railway

Fares to be prepaid

No person shall enter any carriage used on any such railway for the purpose of travelling therein, without having first paid his fare and obtained a ticket Every person desirous of travelling on such railway shall, upon payment of his fare, be furnished with a ticket specifying the class of carriage and the distance for which the fare has been paid and shall when required show his ticket to any servant of any said company duly authorized to examine the same, and shall deliver up such ticket upon demand, to any of the company's servants duly authorized to collect tickets Any person not producing or delivering up his ticket as aforesaid, shall be liable to pay the fare from the place whence the train originally started, unless he can prove that he has travelled a less distance only, in which case he shall be liable to pay the fare only from the place whence he has travelled "

Passenger tickets to be given up on demand

Penalty

Construction of the words 'cattle' and 'public road'

"XVIII The word 'cattle' shall have the meaning attached to it in the Cattle Trespass Act, 1871, and the expression 'public road' in Sections 11 and 26 of the said Act, shall be deemed to include a railway

Any person employed on a railway may exercise the powers of a sure provided by the said Section 11 "

Penalty for cattle trespass within fences of a railway

"XIX The owner or person in charge of any cattle trespassing or straying on any railway provided with fences suitable for the exclusion of cattle shall, on conviction before a magistrate be liable to a fine not exceeding ten rupees for each animal, in addition to any amount that may be recovered under the Cattle Trespass Act

Penalty for wilfully driving cattle upon a railway

"XX Whoever cattle are wilfully driven or knowingly permitted to be on any railway provided with fences suitable for the exclusion of cattle, otherwise than for the purpose of crossing the railway at a gate or bar provided for public use, the person in charge of such cattle or if he cannot be identified, then the owner of the said cattle shall on conviction before a magistrate, be liable to a fine not exceeding fifty rupees for each animal, in addition to any amount that may be recovered under the said Act

Fines imposed under this or the preceding section may be recovered in the manner provided by Section 25 of the said Act

Power to make rules as to fences gates and bars

"XXI The Governor General in Council, or the local Government with the sanction of the Governor General in Council shall make rules and may in like manner, from time to time vary the same for the provision of boundary marks or fences for any railway or any part thereof and for roads constructed in connexion therewith and of gates or bars at places where any railway crosses a road on the level and for the employment of persons to open and shut such gates or bars

and may by such rules determine what kind of fences shall for the purposes of Sections 19 and 20, be deemed to be suitable for the exclusion of cattle "

"XXVI Every railway company, or in the case of a railway not managed by a company, the officer for the time being entrusted with the control of such railway, shall make general rules and regulations for the use, working, and general administration of the railway, and may, in like manner, from time to time vary the same

Power of railway company or controlling officer of a railway to make rules and regulations

All such general rules and regulations or variations thereof shall be submitted to the Governor General in Council for sanction and, when sanctioned, shall be published in the *Gazette of India*, and shall be otherwise notified to the public and to the officers and persons employed upon such railway in such a manner as the Governor General in Council from time to time directs

Publication of such rules

Any such rule or regulation may contain a provision that any person committing a breach of it shall be liable to a fine not exceeding fifty rupees, or, in default of payment of such fine, to imprisonment of either description for a term which may extend to two months

The Governor General in Council may at any time cancel any rule or regulation so sanctioned

Any justice of the peace may try a European British subject for an offence under this section, and on conviction award a sentence within the limits thereby prescribed for such offence

"XXIX If any officer or person employed upon a railway endangers the safety of any person by

Penalty for endangering the safety of persons

(1) disobeying any general rule or regulation sanctioned and notified in the manner prescribed by Section 26, or

(2) disobeying any rule or order not inconsistent with the general rules or regulations aforesaid, and which he was bound by the terms of his service to obey, and of which he had notice, or

(3) by any rash or negligent act, or omission, he shall be liable to imprisonment of either description for any term not exceeding three years, or to fine not exceeding five hundred rupees, or to both

III After Section 43 of the said Act, the following section shall be added —

Addition of Section 44

XLIV The Governor General in Council may from time to time by notification in the *Gazette of India* declare what Government shall be deemed to be the local Government in respect of the whole or any part of a railway for the purposes of this Act

Power to declare authority by which powers of local Governments are to be exercised in case of railways.

IV. Instead of so much of Section 3 of Act XIII of 1870 as begins with the words 'but in Section 17' and ends with the section, the following shall be read —

An amendment of part of Section 3, Act XIII of 1870

"But in Sections 17, 20, 41 and 42 the expressions 'railway company' 'such railway company, the company and they' (when referring to a company) shall mean the officer for the time being entrusted with the control of such railway

ACT IV OF 1879

*An Act to consolidate and amend the law relating to
Railways in India*

Preamble WHEREAS it is expedient to consolidate and amend the law relating to Railways in India, it is hereby enacted as follows —

CHAPTER I

PRELIMINARY

- Short title 1 This Act may be called 'The Indian Railway Act, 1879'
- Local extent It extends to the whole of British India and, so far as regards subjects of Her Majesty the Empress of India to the dominions of Princes and States in India, in alliance with Her said Majesty,
- Commencement And it shall come into force on the first day of July, 1879
- Repeal of Acts 2 On and from that day, the Acts specified in the first schedule hereto shall be repealed
- Interpretation clause. 3 All rules made, notifications published and powers conferred under any of such Acts, or any enactment thereby repealed shall (so far as they are consistent herewith) be deemed to have been respectively made, published and conferred under this Act
- "Railway" 4 Nothing in the Carriers' Act, 1860, shall apply to carriers by railway
- 5 In this Act, unless there be something repugnant in the subject or context,—
- "Railway" means a railway for the public conveyance of passengers and goods
- It includes—
- (a) all land within the fences or other boundary marks prescribed under Section fifty two,
 - (b) all lines of rail, sidings or branches worked over for the purposes of, or in connection with a railway,
 - (c) all stations, offices, warehouses, fixed machinery and other works constructed for the purposes of, or in connection with a railway;
 - (d) all vessels and rafts used for the purpose of carrying on the traffic of a railway
- In Section four, 'railway' includes a railway under construction and in the remaining part of this section and in the following section (namely) six, eight sixteen twenty five thirty three thirty four forty to forty six (both inclusive) fifty two and fifty three railway includes a railway under construction and a railway not used for the public conveyance of passengers or goods
- "Railway Administration" 6 'Railway Administration' means in the case of a railway worked by Government or a Native State the Manager of such railway, and in the case of a railway worked by a company or private individual such company or individual

"Railway servant" means any person employed by a Railway Administration, to perform any function in connection with a railway, "Railway servant"

and in Section twenty five, last clause, Sections twenty six twenty seven, thirty-eight and forty two includes any person employed to perform any such function by any other person in execution of a contract into which he has entered with a Railway Administration

4. It shall be lawful, with the previous sanction of the Governor General in Council, to use on every railway locomotive engines or other motive power, and carriages and wagons to be drawn or propelled thereby Right to use locomotives.

CHAPTER II

DUTIES OF THE RAILWAY ADMINISTRATION

5. No railway or portion or extension of, or addition to, a railway shall be opened for the public conveyance of passengers until the Railway Administration has given to the Governor General in Council notice in writing of the intention of opening the same and until an officer appointed by the Governor General in Council to inspect such railway, portion, extension or addition has, after inspection thereof, reported in writing to the Governor General in Council that in his opinion the opening of the same would not be attended with danger to the public using the same Railway when to be opened

6. Every Railway Administration shall within forty eight hours after the occurrence upon the railway of— Accidents to be reported

- (a) any accident attended with loss of human life or serious injury to person or property,
- (b) any accident of a description usually attended with such loss or injury and
- (c) any accident of any other description which the Governor-General in Council may, from time to time, direct to be notified,

give notice thereof to the Local Government and the station master nearest to the place at which the accident occurs, or, where there is no station master, the officer in charge of the section of the railway on which the accident occurs, shall without unnecessary delay give notice in writing or by telegraph of such accident to the nearest Magistrate and to the officer in charge of the Police station, in the jurisdiction of which the accident occurs or to such other Magistrate and Police officer as the Local Government, from time to time, appoints in this behalf

7. Every Railway Administration shall make up and deliver to the Governor-General in Council a return of accidents occurring in the course of the public traffic upon the railway, whether attended with personal injury or not, in such form and manner and at such intervals of time, as the Governor-General in Council from time to time directs. Returns of accidents

8. Every Railway Administration shall make general rules for the following purposes (that is to say) General rules for working Railway

- (a) for regulating the mode in which, and the speed at which carriages and wagons used on the railway are to be moved or propelled,
- (b) for regulating the maximum number of passengers which each carriage and compartment may carry and the mode in which such number shall be denoted thereon,

(c) for regulating the provision to be made for the accommodation and convenience of passengers,

(d) for declaring what shall be deemed to be, for the purposes of this Act, dangerous goods, and

(e) generally for regulating the travelling upon, and the use, work, and management of the railway,

and may, from time to time, alter any such rules

Penalty for breach of rules

Any such rule may contain a provision that any person committing a breach of it shall be liable to a fine which may extend to fifty rupees or, in default of payment of such fine, to simple imprisonment for a term which may extend to two months.

No such rule shall be in force until it has received the sanction of the Government of India.

Notification of rules

All rules made under this Act shall be notified to the railway servants and the public in such manner as the Governor General in Council, from time to time, direct.

Power to cancel rules

The Governor General in Council may at any time cancel any such rule.

Copy and translation of Act, &c., to be shown at stations

A copy of this Act, and a copy of the time tables and tariff of charges which may, from time to time, be published for any railway by any Railway Administration shall be exhibited in some conspicuous place at each station of such railway, so that they may be easily seen and read.

All such documents shall be so exhibited in English and in the principal vernacular language of the district in which the station is situate, and in such other language, if any, as the Governor General in Council may direct.

CHAPTER III

CARRIAGE OF PROPERTY

Special contract limiting liability

10 Every agreement purporting to limit the obligation or responsibility imposed on a carrier by railway by the Indian Contract Act 1872, Sections 151 and 161, in the case of loss, destruction or deterioration of or damage to, property shall, in so far as it purports to limit such obligation or responsibility, be void unless—

(a) it is in writing signed by, or on behalf of, the person sending or delivering such property, and

(b) it is otherwise in a form approved by the Governor General in Council.

No liability for loss of gold, silver, &c., unless value declared and increased charge accepted

11 When any property mentioned in the second schedule be so sent by the carrier shall not be liable for loss, destruction, or deterioration of or damage to, such property, unless at the time of delivery the value and nature thereof have been declared by the person sending or delivering the same and an increased charge for the safe conveyance of the same, and an engagement to pay such charge, has been accepted by some railway servant specially authorized in this behalf.

When any property of which the value and nature have been declared under this section has been lost, destroyed, or damaged or has deteriorated, the compensation recoverable for such loss, destruction, damage or deterioration shall not exceed the value so declared.

12 A carrier by railway shall in no case be answerable for loss, destruction, or deterioration of, or damage to, any passenger's luggage, unless a railway servant has booked and given a receipt for the same

No liability for unbooked luggage

13 In any suit against a carrier by railway for compensation for loss, destruction, or deterioration of, or damage to, property delivered to a railway servant, it shall not be necessary for the plaintiff to prove in what manner such loss, destruction, deterioration, or damage was caused

Plaintiffs not required to prove negligence.

14 If any person fails to pay on demand any sum due by him to a carrier by railway for conveyance of any property or for demurrage or wharfage in respect of the same, the Railway Administration may detain the whole or any part of such property or, if the same have been removed from the railway any other property of such person then on such railway or thereafter coming into the possession of the Railway Administration,

Lien for money due for carriage, &c., of property

and may also sell by public auction in the case of perishable property at once, and in the case of other property on the expiration of at least fifteen days' notice thereof published in one or more of the local newspapers or, where there are no such newspapers, in such manner as the Local Government may, from time to time, direct, sufficient of such property to produce the sum payable as aforesaid, and all charges and expenses of such detention, notice, and sale, or, if such person fails to remove from the railway within a reasonable time any property so detained the whole of such property,

and may, out of the proceeds of the sale retain the sum so payable, together with all charges and expenses aforesaid, rendering the surplus, if any, of such proceeds, and so much of the property (if any) as remains unsold to the person entitled thereto

or such carrier may recover any such sum by suit

15 The owner or person having the care of any property which has been carried upon any railway or is brought into any station or ware house for the purpose of being carried upon a railway, shall, on demand by any railway servant appointed in this behalf by the Railway Administration, deliver to him an exact account in writing signed by such owner or person, of the quantity and description of such property

Written account of property to be given on demand

16 No passenger shall take with him on a railway and no person shall deliver or tender for carriage upon any railway any dangerous luggage or goods without giving notice of their nature to a railway servant, or, in the case of luggage or goods delivered or tendered for carriage, distinctly marking their nature on the outside of the package containing the same

Dangerous goods

Any railway servant may refuse to carry in a railway any luggage or parcel which he suspects to contain dangerous goods, and may require such luggage or parcel to be opened to ascertain the fact previously to carrying the same

and in case any such luggage or parcel is received for the purpose of being carried upon a railway any railway servant may stop the transit thereof until he is satisfied as to the nature of its contents

CHAPTER IV

CARRIAGE OF PASSENGERS

Passengers on payment of fares to be furnished with tickets 17 Every person desirous of travelling on a railway shall, upon payment of his fare, be furnished with a ticket specifying in English and the principal vernacular language of the district in which the ticket is issued the class of carriage for which and the place from and place to which the fare has been paid and the amount of such fare,

Tickets to be shown and given up on demand and every passenger shall, when required, show his ticket to any railway servant duly authorized to examine the same, and shall deliver up such ticket upon demand to any railway servant duly authorized to collect tickets.

Fares and tickets at intermediate stations 18 At the intermediate stations, the fares shall be deemed to be accepted and the tickets furnished only upon condition that there be room in the train for which the tickets are furnished.

Preferential right of ticket holders In case there is not room for all the passengers to whom tickets have been furnished, those who have obtained tickets for the longest distance shall have the preference, and those who have obtained tickets for the same distance shall have the preference according to the order in which they have received their tickets.

Proviso Provided that all officers and troops of Her Majesty on duty and all other persons on the business of the Government who by virtue of any contract with the Government or, in the case of a railway worked by Government, of any direction of the Governor General in Council are entitled to be conveyed on a railway in preference to, or in priority over, the public, shall be entitled to such preference and priority without reference to the distance for which or the order in which they have received their tickets.

as stated on and
in a reason
indicated

Fares to be prepaid 19 Except with the permission of the Railway Administration or of such officer as it appoints in this behalf, no person shall enter a railway carriage used on any railway for the purpose of travelling therein without having first paid his fare and obtained a ticket.

Power to remove persons suffering from infectious diseases 20 Any passenger found suffering from an infectious disease in a railway carriage or in any place on a railway may, if his remaining in such carriage or place is likely to spread the infection of such disease, be removed from such carriage or place by any railway servant.

any passenger so removed who has paid his proper fare to or at the place at which he is so removed shall be entitled, on returning his ticket to have such fare refunded.

CHAPTER V.

OFFENCES AND PROCEDURE

(A).—Offences by the Railway Administration

21 Any Railway Administration opening, in contravention of Section five, any railway, or any portion or extension of, or addition to, a railway, shall forfeit to Government the sum of one thousand rupees for every day during which the same continues open in contravention of that section

Penalty for opening Railway in contravention of Section 5

22 Any Railway Administration omitting to give notice as required by Section six, shall forfeit to Government the sum of one hundred rupees for every day during which such omission continues

For omitting to report accident

23. Any Railway Administration failing to deliver any return mentioned in Section seven within fourteen days after the same ought to be delivered, or to make or notify any rules as required by Section eight, or to exhibit any abstract or copy mentioned in Section nine in manner required by that section, shall forfeit to Government the sum of fifty rupees for every day during which such failure continues

For not sending return of accidents or making rules under Section 8, or exhibiting copy under Section 9

(B).—Offences by Railway servants.

24 Any station master or other person omitting to give notice as required by Section six shall be punished with fine which may extend to fifty rupees

For omitting to give notice of accident

25 Any railway servant who is in a state of intoxication whilst actually employed upon a railway in the discharge of any duty or who negligently omits to perform his duty, or who performs the same in an improper manner shall be punished with a fine which may extend to fifty rupees,

For drunkenness or breach of duty

or if the duty in any of the cases aforesaid be such that the negligent omission or improper performance thereof would be likely to endanger the safety of any person travelling or being upon such railway, such servant shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

26 If any railway servant in the discharge of his duty endangers the safety of any person—

For endangering the safety of persons

(a) by disobeying any general rule sanctioned and published and notified in the manner prescribed by Section eight or

(b) by disobeying any rule or order not inconsistent with the general rules aforesaid, and which such servant was bound by the terms of his employment to obey, and of which he had notice, or

(c) by any rash or negligent act or omission

he shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five hundred rupees or with both

27 Every railway servant shall be deemed a "public servant" within the meaning of Sections 161, 162 163 164 and 165 of the Indian Penal Code

For receiving bribes.

In the definition of legal remuneration contained in the said Section 161, the word "Government" shall for the purposes of this section, be deemed to include any employer of a railway servant as such

Amendment of Penal Code, Section 161.

For compelling passengers to enter carriages already full
 28 Any railway servant who compels or attempts to compel any passenger to enter a carriage or compartment containing the maximum number of passengers denoted thereon in accordance with a rule made and notified under Section eight, shall be punished with fine which may extend to one hundred rupees

(C).—*Offences by Persons generally*

For not giving account of goods, or giving false account.
 29 Any person required under Section fifteen to give an account of the quantity and description of any property who neglects or refuses to give such account,

or who wilfully gives a false account,

shall be punished with fine which may extend to five rupees for every maund (of 3200 tolahs) of such property, and such fine shall be in addition to any charge to which such property may be liable

For taking dangerous goods on Railway, or delivering such goods without notice
 30 Whoever, in contravention of Section sixteen takes with him any dangerous goods on a railway, or delivers or tenders any such goods for the purpose of being carried upon a railway, shall be punished with fine which may extend to two hundred rupees

For travelling without ticket or not showing or delivering up ticket
 31 Any passenger travelling on a railway without a proper ticket, or having such a ticket and not showing or delivering up the same when so required under Section seventeen, shall be liable to pay the fare of the class in which he is found travelling from the place whence the train originally started, unless he can prove that he has travelled a less distance only, in which case he shall be liable to pay the fare of the class aforesaid only from the place whence he has travelled

Every such fare shall, on application by a railway servant to a Magistrate and on proof of the passenger's liability, be recoverable from such passenger as if it were a fine, and shall when recovered, be paid to the Railway Administration

For evading payment of fare
 32 Any person who defrauds, or attempts to defraud any carrier by railway—

(a) by travelling, or attempting to travel, on any railway without having previously paid his fare,

(b) by riding or attempting to ride in or on a carriage or by a train of a higher class than that for which he has paid his fare

(c) by using or attempting to use a ticket on any day for which such ticket is not available,

(d) by continuing his journey in or upon any carriage beyond the place to which he has paid his fare without previously paying the fare for the additional distance,

or who, in any other manner whatever, attempts to evade the payment of his fare,

For altering ticket
 or who wilfully alters or defaces his ticket so as to render the date number, or other material portion thereof illegible

shall be punished with fine which may extend to fifty rupees, and shall also be liable to pay the fare (if any) which he ought to have paid and

such fare shall be recoverable in manner provided by Section thirty one, and shall, when recovered be paid to the Railway Administration

33 Any passenger who gets into or upon or attempts to get into or upon, or quits or attempts to quit, any carriage upon any railway while such carriage is in motion, shall be punished with fine which may extend to twenty rupees, For entering carriage in motion

and any passenger who rides, or attempts to ride, on the steps or any other part of a carriage upon any railway, except on those parts which are intended for the accommodation of passengers, For riding on the steps

shall be punished with fine which may extend to fifty rupees

34 Any person who, without the permission of the Railway Administration, rides or attempts to ride upon any locomotive engine or tender upon any railway, or in or upon any vehicle not appropriated to the carriage of passengers, For riding on engine tender &c

shall be punished with fine which may extend to one hundred rupees

35 Any person who without the consent of his fellow passengers, if any, in the same compartment, smokes in or upon any Railway carriage except in a carriage or compartment specially provided for the purpose, shall be punished with fine which may extend to twenty rupees For smoking,

and any person who persists in so smoking (except as aforesaid) after being warned by any railway servant to desist may, in addition to incurring the liability above mentioned, be removed by any railway servant from any such carriage and from the premises of the railway, and where he has paid his fare and obtained a ticket, shall forfeit such fare and ticket

36 Any person who is in a state of intoxication, or who commits any nuisance or act of indecency in any railway carriage, or upon any part of any railway, For intoxication or nuisance

or who wilfully and without lawful excuse interferes with the comfort of any passenger, or extinguishes any lamp in any railway carriage,

shall be punished with fine which may extend to fifty rupees, and may be removed by any railway servant from any such carriage and also from the premises of the railway, and, where he has paid his fare and obtained a ticket, shall forfeit such fare and ticket

37 If any carriage, compartment room or place be reserved by the Railway Administration for the exclusive use of females any male person who, without lawful excuse enters such carriage compartment room or place knowing the same to be reserved as aforesaid or remains therein after having been informed of its having been so reserved shall be punished with fine which may extend to one hundred rupees, For entering carriage or room reserved for females

and may be removed therefrom, and also from the premises of the railway, by any railway servant,

and, where he has paid his fare and obtained a ticket, shall forfeit such fare and ticket.

38 Whoever wilfully obstructs or impedes any railway servant in the discharge of his duty, shall be punished with fine which may extend to one hundred rupees For obstructing railway servant in his duty

39 Any passenger wilfully entering a carriage or compartment containing the maximum number of passengers which has been denoted For entering carriage already full

thereon in accordance with a rule made and notified under Section 8 ght, shall be punished with fine which may extend to one hundred rupees

For removing signals or injuring carriages, &c. 10 Any person who without authority or reasonable excuse makes alters, shows, hides, removes or extinguishes any signal or light upon any railway, or upon any engine, carriage wagon or other vehicle upon a railway,

or who negligently damages any engine, carriage, wagon or other vehicle belonging to a railway, or any warehouse building machine fence or other thing so belonging,

or who needlessly interferes with the means of communication provided in any train between the guard and the engine-driver or passengers

For trespass For refusing to leave on request 41 Any person who unlawfully enters upon a railway shall be punished with fine which may extend to twenty rupees, and if any person so entering refuses to leave such railway on being requested to do so by a railway servant or by any other person on behalf of the Railway Administration, he shall be punished with fine, which may extend to fifty rupees and may be immediately removed from such railway by such servant or other person as aforesaid

For cattle trespass within railway fences 42 The owner or person in charge of any bulls, cows bullocks calves elephants, camels buffaloes, horses, mares, geldings ponies colts fillies mules, asses, pigs, rams, ewes, sheep lambs goats and kids straying on any railway provided with fences suitable for the exclusion of such animals, shall be punished with fine which may extend to ten rupees for each animal, in addition to any amount that may be recovered under the Cattle Trespass Act, 1871

For wilfully driving cattle on fenced railway; on unfenced railway. Whenever any such animals are wilfully and unlawfully driven or knowingly and unlawfully permitted to be on any railway provided with fences suitable for the exclusion of such animals

and whenever any such animals are wilfully driven or knowingly permitted to be, on any railway not so provided otherwise than for the purpose of lawfully crossing the railway, or for any other lawful purpose

the person in charge of such animals, or if he cannot be identified, then the owner of the said animals, shall be punished with fine which may extend to fifty rupees for each animal in addition to any amount that may be recovered, under the same Act

Recovery of fines and payment of compensation All fines imposed under this section may, if the convicting Magistrate so direct be recovered in manner provided by Section twenty five of the said Cattle Trespass Act, 1871, and may be appropriated in whole or in part in compensation for loss or damage proved to his satisfaction

Amendment of Act I of 1871 Sections 11 and 26 The expression "public road" in Sections eleven and twenty one of the same Act shall be deemed to include a railway And any railway servant may exercise the powers of seizure provided by the said Section eleven

For opening or not properly shutting gates 43 Whoever knows that any engine or vehicle is approaching a railway station and attempts to pass, or drives or takes or attempts to drive or take any vehicle on a road or other thing across the railway,

and whoever at any time, in the absence of a gate keeper, omits to shut and fasten such gate as soon as he and any vehicle, animal or other thing under his charge have passed through the same,

shall be punished with fine which may extend to fifty rupees

44 Whenever any minor under twelve years of age unlawfully—

(a) places or throws, or attempts to place or throw, upon or across a railway any wood, stone or other thing, or

(b) removes or displaces, or attempts to remove or displace, any rail, sleeper, spike, key or other thing belonging to the permanent way of a railway, or

(c) throws or causes to fall, or attempts to throw or cause to fall against, into or upon any engine tender, carriage or other vehicle used upon a railway, any wood, stone or other thing,

such minor shall be deemed guilty of an offence, and the convicting Magistrate may, in his discretion direct either that the minor, if a male, shall be punished with whipping or that the father or guardian of the minor shall, within such reasonable time as the Magistrate may fix, execute a bond binding himself, in such penalty as the Magistrate may direct, to prevent the minor from repeating such offence

The amount of such bond, if forfeited, shall be recoverable as if it were a fine

Any person neglecting or refusing to execute a bond when required under this section so to do, shall be punished with fine which may extend to fifty rupees

45 Whoever wilfully does any act, or wilfully omits to do what he is legally bound to do, intending by such act or omission to endanger, or knowing that he is thereby likely to endanger the safety of any person travelling or being upon any railway, shall be punished with transportation (or in the case of a European or American, penal servitude) for a term of not less than seven years, or with imprisonment for a term which may extend to ten years

46 Whoever rashly or negligently does any act, or omits to do what he is legally bound to do and such act or omission is likely to endanger the safety of any person travelling or being upon a railway, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both

47 Every driver or conductor of an omnibus carriage or other vehicle shall, while in or upon any station yard or other premises forming part of a railway, obey the reasonable directions of any railway servants duly authorized in this behalf, and every person offending against this section shall be punished with fine which may extend to twenty rupees

(D) — Arrest of Offenders

48 If any person commits any offence punishable under this Act and there is reason to believe that he will abscond or his name and address are unknown and he refuses to give his name and address, or there is reason to believe that the name or address given by him is incorrect any railway servant or Police Officer or any other person whom such railway servant or Police Officer may call to his aid may without any warrant or written authority, arrest and detain such offender until he can be taken

For minors obstructing line or throwing stones at train

For wilful act or omission endangering persons on railway

For rash or negligent act

Disobedience of omnibus, &c drivers to Railway servants

Arrest for offences punishable under this Act of offender whose name is unknown, &c

before a Magistrate or give sufficient security for his appearance before such Magistrate, or is otherwise discharged by due course of law

Arrest for
offences
against cer-
tain sections

49 Every person committing any offence mentioned in Sections eight, twenty five, twenty six, thirty six, thirty seven, thirty-eight, forty four, forty five and forty six, may be arrested without any warrant or written authority by any railway servant or Police Officer, or by any other person whom such servant or officer may call to his aid,

and every person so arrested shall, without unnecessary delay be taken before a Magistrate authorized to punish him or to commit him for trial

(L) — Jurisdiction

Magistrates
having juris-
diction

50 No Magistrate other than a Presidency Magistrate and a Magistrate whose powers are not less than those of a Magistrate of the second class shall try any offence under this Act

Place of trial

Any person committing any offence against this Act or the rules made under it, shall be liable for such offence in any place in which he may be found or which the Local Government may, from time to time notify in this behalf, as well as in any other place in which he might be tried under any law for the time being in force

Every notification under this section shall be published in the local official Gazette, and a copy thereof shall also be exhibited in some conspicuous place at each of such railway stations as the Local Government may direct so that it may be easily seen and read

Saving of
prosecutions
under other
laws

(P) — Saving of other Criminal Laws
51 Nothing in this Act shall be deemed to prevent any person from being arrested, prosecuted or punished under any other law for any act or omission which constitutes an offence against this Act or the rules made under it,

Provided that no person shall be punished twice for the same offence

CHAPTER VI

MISCELLANEOUS

Power of
Government
to make rules
as to fences,
gates, and
bars

52 The Governor General in Council, or the Local Government with the previous sanction of the Governor General in Council, may from time to time, make rules requiring—

- (a) that boundary marks or fences be provided for any railway or any part thereof and for roads constructed in connection therewith
- (b) that gates or bars be erected at places where any railway crosses a road on the level, and
- (c) that persons be employed to open and shut such gates or bars and may by such rules determine what kind of fences shall for the purposes of Section forty two, be deemed to be suitable for the exclusion of cattle,

and direct that any Railway Administration wilfully neglecting or violating any rule made under this section shall forfeit to Government a sum not exceeding five hundred rupees for every such neglect or violation or, when such neglect or violation is continuous for every day during which it continues.

53 The Governor General in Council may from time to time by notification in the 'Gazette of India' declare what Government or other authority shall be deemed to be, for the purposes of this Act, the Local Government in respect of the whole or any part of a railway

Power to declare Local Government in respect of any railway

54 The Governor General in Council may by notification extend this Act or any portion thereof to any tramway worked by steam

Power to extend Act to steam tramways

THE FIRST SCHEDULE

ACTS REPEALED

(See Section 2)

| Number and year | Title |
|-----------------|---|
| XVIII of 1854 | An Act relating to Railways in India |
| XXXI of 1867 | An Act to render penal certain offences committed by servants of Railway Companies |
| LIII of 1870 | An Act to apply the provisions of Act No XVIII of 1854 to Railways belonging to or worked by Government |
| LXV of 1871 | An Act to amend the Railway Act |

THE SECOND SCHEDULE

(See Section 11)

- (a) Gold or silver coined or uncoined manufactured or unmanufactured
- (b) plated articles,
- (c) cloths and tissue and lace of which gold or silver forms part
- (d) precious stones jewellery, trinkets
- (e) watches clocks or time pieces of any description
- (f) Government securities,
- (g) Government stamps
- (h) bills of exchange hundis promissory notes bank notes orders or other securities for payment of money
- (i) maps writings title deeds
- (j) paintings engravings lithographs photographs carvings, sculpture and other works of art,
- (k) glass china, marble
- (l) silks in a manufactured or unmanufactured state and whether wrought up or not wrought up with other materials
- (m) shawls
- (n) lace,
- (o) opium,
- (p) ivory ebony sandalwood sandalwood oil
- (q) musical and scientific instruments.

ACT No IV OF 1883

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

*(Received the assent of the Governor-General
on the 16th February 1883)*

An Act to amend the Indian Railway Act, 1879

| | |
|--|---|
| Preamble | WHEREAS it is expedient to amend the Indian Railway Act 1879 in manner hereinafter appearing, It is hereby enacted as follows— |
| Short title Commence- ment | 1 This Act may be called the Indian Railway Act, 1883 and it shall come into force at once |
| New sections substituted for Section 5 of Act IV of 1879 | 2. For Section five of the said Act the following sections shall be substituted, namely — |
| Railway when to be opened | " 5 A Railway, or portion or extension of, or addition to a Railway shall not be opened for the public conveyance of passengers until the Railway Administration has given to the Governor General in Council notice in writing of the intention of opening the same and until the Governor General in Council has by order sanctioned the opening of the same |
| Governor- General in Council may appoint Inspecting officer | " 5 A The Governor General in Council may from time to time appoint by name or by virtue of their office, officers to be Inspecting officers under this Act |
| Sanction not to be given until after report by In- specting officer | " 5 B (1) The sanction referred to in Section five shall not be given until an officer appointed under Section 5 A has after inspection of the railway, portion, extension or addition as the case may be reported to the Governor General in Council that in his opinion the opening of the same would not be attended with danger to the public using it (2) Notwithstanding anything hereinbefore contained the Governor General in Council may, in any particular case or in any particular class of cases, by special order confer on any officer appointed under Section 5 A power to sanction the opening of a railway, portion, extension or addition, if in the officer's opinion the opening of the same will not be attended with danger to the public using it (3) In such case it shall not be necessary to make the report required by sub section (1), but the Governor General in Council may by order cancel the sanction given under sub section (2), or direct that the sanction shall be subject to such conditions as he thinks fit (4) The sanction given under this section may be either absolute or subject to such conditions as the Governor General in Council or the officer appointed under Section 5 A as the case may be thinks necessary for the safety of the public (5) When sanction for the opening of any railway, or portion or extension of, or addition to, any railway, is given subject to conditions and the Railway Administration fails or neglects to fulfil, or comply with the |

conditions, the sanction shall on the failure or neglect forthwith be deemed to be void, and the railway, or portion, or extension, or addition, as the case may be, shall not be used unless and until sanction is again obtained under this section for the opening thereof

"5 C If, after a railway has been opened as hereinbefore provided, any portion of it is so altered by the Railway Administration as to cause danger to, or affect the safety of, passengers carried thereon, the portion so altered shall not be used for the public conveyance of passengers unless and until sanction is obtained in accordance with the provisions of Section 5-B for the opening of it

When alterations affecting safety of passengers are made in Railway, sanction to be again obtained for opening

"5 D (1) Every officer appointed under Section 5-A shall for the purpose of the inspection, be deemed to be a public servant within the meaning of the Indian Penal Code and shall be subject to the control of the Governor General in Council, have the following powers namely —

Powers of Inspector of Railways

(a) he may enter on and inspect any railway or portion thereof which has been opened for the public conveyance of passengers, or any rolling stock used thereon,

(b) he may by an order in writing under his hand require the attendance of any railway servant whom he thinks fit to call before him and examine for the said purpose and may require any such servant to answer, or furnish returns regarding such inquiries for the said purpose as he thinks fit to make

(c) he may require and enforce the production of all books papers and documents belonging to or in the possession of any Railway Administration which in his opinion are necessary for the said purpose

"(2) Every Railway Administration whose railway or rolling stock is being inspected under this Act shall afford all reasonable facilities for making the inspection to the officer making it

"5 F When after inspecting any railway or portion of a railway or any rolling stock used thereon any officer appointed under Section 5-A reports to the Governor General in Council that in his opinion the use of the railway or portion or of any specified rolling stock will be attended with danger to the public using it, the Governor General in Council may by order direct that the railway or portion be closed, for the public conveyance of passengers or that the rolling stock so specified shall no longer be used as the case may be

Governor General in Council empowered to close Railway

"5-G (1) When a railway or portion of a railway has been closed under Section 5-F it shall not be re-opened for the public conveyance of passengers unless and until it has been inspected and its opening sanctioned in accordance with the provisions of Section 5-B

Re-opening of Railway

"(2) When the Governor General in Council has directed under Section 5-F that any rolling stock shall not be used the rolling stock shall not be used unless and until an officer appointed under Section 5-A reports that it is fit for use and the Governor General in Council sanctions its use

(2) But all rules, declarations and appointments made, sanctions and directions given, forms approved powers conferred and notifications published under any of those enactments, or under any enactment repealed by any of them, shall, so far as they are consistent with this Act, be deemed to have been respectively made, given approved, conferred and published under this Act.

(3) Any enactment or document referring to any of those enactments or to any enactment repealed by any of them shall, so far as may be, be construed to refer to this Act in to the corresponding portion thereof.

3. In this Act, unless there is something repugnant in the subject or context,—

Definitions

(1) "tramway" means a tramway constructed under the Indian Tramways Act, 1859, or any special Act relating to tramways.

(2) "ferry" includes a bridge of boats, pontoons, rafts, sawing bridge, a flying bridge and a temporary bridge, and the approaches to and landing places of a ferry.

(3) "inland water" means any canal, river, lake or navigable water in British India.

(4) "railway" means a railway in any portion of a railway, for the public carriage of passengers, animals or goods, and includes—

(a) all land within the fences or other boundary marks indicating the limits of the land appurtenant to a railway;

(b) all lines of rails, siding or branch or worked over for the purposes of, or in connection with, a railway;

(c) all stations, offices, warehouses, wharves, workshops, manufactories, fixed plant and machinery and other works constructed for the purposes of, or in connection with, a railway; and

(d) all ferries, ships, boats and rafts which are used in inland waters for the purposes of the traffic of a railway and belong to or are hired or worked by the authority administering the railway.

(5) "railway company" includes any persons whether incorporated or not, who are owners or lessees of a railway or parties to an agreement for working a railway.

(6) "railway administration" means an administration in which a railway administered by the Government or a Native State means the Manager of the railway and includes the Government or the Native State, and, in the case of a railway administered by a railway company, means the railway company.

(7) "railway servant" means any person employed by a railway administration in connection with the service of a railway.

(8) "Inspector" means an Inspector of Railways appointed under this Act.

(9) "goods" includes inanimate things of every kind.

(10) "rolling stock" includes locomotive engines, passenger coaches, wagons, trucks and trailers of all kinds.

(11) "traffic" includes rolling stock of every description as well as passengers, animals and goods.

(12) "through traffic" means traffic which is carried over the railways of two or more railway administrations.

(13) "rate" includes any fare, charge or other payment for the carriage of any passenger, animal or goods

(14) "terminals" includes charges in respect of stations, sidings, wharves, depôts, warehouses, cranes and other similar matters and of any services rendered thereat

(15) "pass" means an authority given by a railway administration or by an officer appointed by a railway administration in this behalf, and authorising the person to whom it is given to travel as a passenger on a railway gratuitously

(16) "ticket" includes a single ticket, a return ticket and a set on ticket

(17) "maund" means a weight of three thousand two hundred tola each tola being a weight of one hundred and eighty grains Troy and

(18) "Collector" means the chief officer in charge of the land revenue administration of a district, and includes any officer specially appointed by the Local Government to discharge the functions of a Collector under this Act.

CHAPTER II

INSPECTION OF RAILWAYS

Appointment
and duties of
Inspectors

1 (1) The Governor General in Council may appoint person by name or by virtue of their office, to be Inspectors of Railways

(2) The duties of an Inspector of Railways shall be—

(a) to inspect railways with a view to determine whether they are fit to be opened for the public carriage of passengers and to report thereon to the Governor General in Council as required by this Act,

(b) to make such periodical or other inspections of any railway or of any rolling stock used thereon as the Governor General in Council may direct,

(c) to make inquiry under this Act into the cause of any accident on a railway,

(d) to perform such other duties as are imposed on him by this Act or any other enactment for the time being in force relating to railways

Powers of
Inspectors
XLV of 1860,

5 An Inspector shall, for the purpose of any of the duties which he is required or authorised to perform under this Act, be deemed to be a public servant within the meaning of the Indian Penal Code and subject to the control of the Governor General in Council shall for that purpose have the following powers, namely—

(a) to enter upon and inspect any railway or any rolling stock used thereon,

(b) by an order in writing under his hand addressed to the railway administration, to require the attendance before him of any railway servant, and to require answers or returns to such inquiries as he thinks fit to make from such railway servant or from the railway administration,

(c) to require the production of any book or document belonging to or in the possession or control of any Railway Administration (except a communication between a railway company and its legal advisers) which it appears to him to be necessary to inspect.

6. A railway administration shall afford to the Inspector all reasonable facilities for performing the duties and exercising the powers imposed and conferred upon him by this Act. Facilities to be afforded to Inspectors

CHAPTER III

CONSTRUCTION AND MAINTENANCE OF WORKS

7. (1) Subject to the provisions of this Act and, in the case of immovable property not belonging to the Railway Administration, to the provisions of any enactment for the time being in force for the acquisition of land for public purposes and for companies, and, subject also, in the case of a railway company to the provisions of any contract between the company and the Government, a Railway administration may for the purpose of constructing a railway or the accommodation or other works connected therewith, and notwithstanding anything in any other enactment for the time being in force,— Authority of railway administrations to execute all necessary works

- (a) make or construct in, upon across, under or over any lands or any streets hills, valleys, roads, railways or tramway, or any rivers, canals, brooks, streams or other waters or any drains water pipes, gas pipes or telegraph lines, such temporary or permanent inclined planes, arches, tunnels, culverts, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, pier, cuttings and fences as the Railway Administration thinks proper
 - (b) alter the course of any rivers, brooks, streams or watercourses for the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under them, and divert or alter as well temporarily as permanently the course of any rivers, brooks, streams or watercourses or any roads, streets or ways or raise or sink the level thereof, in order the more conveniently to carry them over or under or by the side of the railway, as the Railway Administration thinks proper
 - (c) make drains or conduits into, through or under any lands adjoining the railway for the purpose of conveying water from or to the railway
 - (d) erect and construct such houses, warehouses, offices and other buildings and such yards, stations, wharves, engines, machinery, apparatus and other works and conveniences as the Railway Administration thinks proper
 - (e) alter, repair or discontinue such buildings, works and conveniences as aforesaid or any of them, and substitute others in their stead, and
 - (f) do all other acts necessary for making, maintaining, altering or repairing and using the railway
- (2) The exercise of the powers conferred on a Railway Administration by sub section (1) shall be subject to the control of the Governor General in Council

8. A Railway Administration may for the purpose of exercising the powers conferred upon it by this Act, alter the position of any pipe for the Alteration of pipes, wires and drains.

supply of gas, water or compressed air or the position of any electric wire or of any drain not being a main drain

Provided that—

(a) when the Railway Administration desires to alter the position of any such pipe, wire or drain it shall give reasonable notice of its intention to do so, and of the time at which it will begin to do so, to the local authority or company having control over the pipe, wire or drain, or, when the pipe, wire or drain is not under the control of a local authority or company, to the person under whose control the pipe, wire or drain is

(b) if a local authority, company or person receiving notice under proviso (a) may send a person to superintend the work and the Railway Administration shall execute the work to the reasonable satisfaction of the person so sent and shall make arrangements for continuing during the execution of the work the supply of gas, water, compressed air, electricity or the maintenance of the drainage, as the case may be

Temporary entry upon land for repairing or preventing accident.

(1) The Governor General in Council may authorise any Rail or Administration, in case of any ship or other accident happening or being apprehended to any cutting embankment or other work under the control of the Railway Administration to enter upon any lands adjoining its railway for the purpose of repairing or preventing the accident and to do all such works as may be necessary for the purpose

(2) In case of necessity the Railway Administration may enter upon the lands and do the works aforesaid without having obtained the previous sanction of the Governor-General in Council, but in such a case shall within seventy-two hours after such entry, make a report to the Governor-General in Council, specifying the nature of the accident or apprehended accident, and of the works necessary to be done and the power conferred on the Railway Administration by this subsection shall cease and determine if the Governor General in Council after considering the report, considers that the exercise of the power is not necessary for the public safety

Payment of compensation for damage caused by lawful exercise of powers under section 7, 8 or 9

(1) A Railway Administration shall do its best to avoid any damage caused by the exercise of the powers conferred by any of the three last foregoing sections and compensation shall be paid for any damage caused by the exercise thereof

(2) A suit shall not lie to recover such compensation, but in case of dispute the amount thereof shall on application to the Collector be determined and paid in accordance so far as may be with the provision of Sections 11 to 15, both inclusive and Sections 16 to 17 both inclusive of the Land Acquisition Act 1870, and the provisions of Sections 17 and 18 of that Act shall apply to the award of compensation

Act of 1870

Accommodation works

(1) A Railway Administration shall make and maintain the following works for the accommodation of the owners and occupiers of land adjoining the railway, namely—

(a) such and so many convenient crossings, bridge, arches culverts and passages over, under or by the sides of, or leading to or from the railway as may in the opinion of the Governor-General be

Council, be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway is made, and

- (b) all necessary arches, tunnels, culverts, drains, watercourses or other passages, over or under or by the sides of the railway, of such dimensions as will, in the opinion of the Governor General in Council be sufficient at all times to convey water as freely from or to the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be.

(2) Subject to the other provisions of this Act the work specified in clauses (a) and (b) of sub-section (1) shall be made during or immediately after the laying out or formation of the railway over the lands traversed thereby and in such manner as to cause as little damage or inconvenience as possible to persons interested in the lands so affected by the work.

(3) The foregoing provisions of this Act are subject to the following provisions, namely:—

- (a) A Railway Administration shall not be required to make any accommodation works in such manner as would prevent or obstruct the working or using of the railway, or to make any accommodation works with respect to which the owners and occupiers of the lands have agreed to receive and have been paid compensation in consideration of their not requiring the works to be made.

- (b) Save as hereinafter is in this chapter provided, a Railway Administration shall not, except on the requisition of the Governor General in Council be compelled to defray the cost of executing any further or additional accommodation works for the use of the owners or occupiers of the lands after the expiration of ten years from the date on which the railway passing through the lands was first opened for public traffic.

- (c) Where a Railway Administration has provided suitable accommodation for the crossing of a road or stream, and the road or stream is afterwards diverted by the act or neglect of the persons having the control thereof, the Administration shall not be compelled to provide other accommodation for the crossing of the road or stream.

(4) The Governor General in Council may appoint a time for the commencement of any work to be executed under sub-section (1), and if fourteen days next after that time the Railway Administration fails to commence the work or, having commenced, fails to proceed diligently to execute it in a sufficient manner, the Governor General in Council may execute it and recover from the Railway Administration the cost incurred by him in the execution thereof.

12. If an owner or occupier of any land affected by a railway considers the works made under the last foregoing section to be insufficient for the commodious use of the land or if the Local Government or a local authority desires to construct a public road or other work over or under or across a railway, he or it as the case may be may at any time require the Railway Administration to make at his or its expense such further accommodation works as he or it thinks necessary and are agreed to by the Railway Admin-

Power for owner, occupier or local authority to cause additional accommodation works to be made.

Administration or as, in case of difference of opinion, may be authorized by the Governor General in Council

Fences, screens, gates and bars 13 The Governor General in Council may require that within a time to be specified in the requisition or within such further time as he may appoint in this behalf,—

- (a) boundary-marks or fences be provided or renewed by a Railway Administration for a railway or any part thereof and for road constructed in connection therewith,
- (b) any works in the nature of a screen near to or adjoining the side of any public road constructed before the making of a railway be provided or renewed by a Railway Administration for the purpose of preventing danger to passengers on the road by reason of horses or other animals being frightened by the sight or noise of the rolling stock moving on the railway
- (c) suitable gates, chains, bars, stiles or hand rails be erected or renewed by a Railway Administration at places where a railway crosses a public road on the level,
- (d) persons be employed by a Railway Administration to open and shut such gates, chains or bars

Over and under bridges

14 (1) Where a Railway Administration has constructed a railway across a public road on the level, the Governor General in Council may at any time if it appears to him necessary for the public safety, require the Railway Administration within such time as he thinks fit, to carry the road either under or over the railway by means of a bridge or arch with convenient ascents and descents and other convenient approaches instead of crossing the road on the level, or to execute such other works as in the circumstances of the case, may appear to the Governor General in Council to be best adapted for removing or diminishing the danger arising from the level crossing

(2) The Governor General in Council may require as a condition of making a requisition under sub section (1), that the local authority if any, which maintains the road shall undertake to pay the whole of the cost to the Railway Administration of complying with the requisition or such portion of the cost as the Governor General in Council thinks just

Removal of trees dangerous to or obstructing the working of a railway

15 (1) In either of the following cases, namely —

- (a) where there is danger that a tree standing near a railway may fall on the railway so as to obstruct traffic
- (b) when a tree obstructs the view of any fixed signal

the Railway Administration may with the permission of any Magistrate fell the tree or deal with it in such other manner as will in the opinion of the Railway Administration avert the danger or remove the obstruction as the case may be

(2) In case of emergency the power mentioned in sub section (1) may be exercised by a Railway Administration without the permission of a Magistrate

(3) Where a tree felled or otherwise dealt with under sub section (1) or sub section (2) was in existence before the railway was constructed or the signal was fixed any Magistrate may upon the application of the

persons interested in the tree, award to those persons such compensation as he thinks reasonable.

(4) Such an award, subject where made in a presidency town by any Magistrate other than the Chief Presidency Magistrate, or where made elsewhere by any Magistrate other than the District Magistrate, to revision by the Chief Presidency Magistrate, or the District Magistrate, as the case may be, shall be final.

(5) A Civil Court shall not entertain a suit to recover compensation for any tree felled or otherwise dealt with under this section.

CHAPTER IV

OPENING OF RAILWAYS

16. (1) A Railway Administration may, with the previous sanction of the Governor General in Council, use upon a railway locomotive engines or other motive power, and rolling stock to be drawn or propelled thereby

Right to use
locomotives

(2) But rolling stock shall not be moved upon a railway by steam or other motive power until such general rules for the railway as may be deemed to be necessary have been made, sanctioned and published under this Act.

17. (1) Subject to the provisions of sub section (2), a Railway Administration shall, one month at least before it intends to open any railway for the public carriage of passengers, give to the Governor General in Council notice in writing of its intention

Notice of
intended
opening of a
railway

(2) The Governor General in Council may in any case, if he thinks fit, reduce the period of, or dispense with, the notice mentioned in sub section (1).

18 A railway shall not be opened for the public carriage of passengers until the Governor General in Council, or an Inspector empowered by the Governor-General in Council in this behalf, has by order sanctioned the opening thereof for that purpose

Sanction of
the Govern-
ment a condi-
tion precedent
to the opening
of a railway

19 (1) The sanction of the Governor General in Council under the last foregoing section shall not be given until an Inspector has, after inspection of the railway, reported in writing to the Governor General in Council—

Procedure in
sanctioning
the opening
of a railway

(a) that he has made a careful inspection of the railway and rolling stock,

(b) that the moving and fixed dimensions prescribed by the Governor General in Council have not been infringed

(c) that the weight of rails, strength of bridges, general structural character of the works, and the size of and maximum gross load upon the axles of any rolling-stock are such as have been prescribed by the Governor-General in Council

(d) that the railway is sufficiently supplied with rolling stock

(e) that general rules for the working of the railway when opened for the public carriage of passengers have been made, sanctioned and published under this Act and

(f) that in his opinion the railway can be opened for the public carriage of passengers without danger to the public using it

(2) If in the opinion of the Inspector the railway cannot be so opened without danger to the public using it, he shall state that opinion together with the grounds therefor to the Governor General in Council, and the Governor General in Council may thereupon order the Railway Administration to postpone the opening of the railway

(3) An order under the last foregoing sub section must set forth the requirements to be complied with as a condition precedent to the opening of the railway being sanctioned, and shall direct the postponement of the opening of the railway until those requirements have been complied with or the Governor General in Council is otherwise satisfied that the railway can be opened without danger to the public using it

(4) The sanction given under this section may be either absolute or subject to such conditions as the Governor General in Council thinks necessary for the safety of the public

(5) When sanction for the opening of a railway is given subject to conditions and the Railway Administration fails to fulfil those conditions the sanction shall be deemed to be void and the railway shall not be worked or used until the conditions are fulfilled to the satisfaction of the Governor General in Council

Application
of the provisions of the
three last
foregoing
sections to
material
alterations of
railway

20. (1) The provisions of Sections 17, 18 and 19 with respect to the opening of a railway shall extend to the opening of the works mentioned in sub section (2) when those works form part of or are directly connected with, a railway used for the public carriage of passengers and have been constructed after the inspection which preceded the first opening of the railway.

(2) The works referred to in sub section (1) are additional lines of railway, deviation lines, stations, junctions and crossings on the level and any alteration or reconstruction materially affecting the structural character of any work to which the provisions of Sections 17, 18 and 19 apply or are extended by this section

Facetional
provision

21 When an accident has occurred resulting in a temporary suspension of traffic, and either the original line and works have been rapidly restored to their original standard, or a temporary diversion has been laid for the purpose of restoring communication, the original line and works so restored or the temporary diversion as the case may be may in the absence of the Inspector, be opened for the public carriage of passengers subject to the following conditions, namely —

(a) that the railway servant in charge of the works undertaken by reason of the accident has certified in writing that the opening of the restored line and works, or of the temporary diversion will not in his opinion be attended with danger to the public using the line and works or the diversion and

(b) that notice by telegraph of the opening of the line and works or the diversion shall be sent, as soon as may be to the Inspector appointed for the railway

Power to
make rules
with respect
to the open-
ing of rail-
ways

22 The Governor General in Council may make rules defining the cases in which and in those cases the extent to which, the procedure prescribed in sections 17 to 20 (both inclusive) may be dispensed with

23. (1) When, after inspecting any open railway used for the public carriage of passengers, or any rolling stock used thereon, an Inspector is of opinion that the use of the railway or of any specified rolling stock will be attended with danger to the public using it, he shall state the opinion, together with the grounds therefor, to the Governor General in Council, and the Governor General in Council may thereupon order that the railway be closed for the public carriage of passengers, or that the use of the rolling stock so specified be discontinued, or that the railway or the rolling stock so specified be used for the public carriage of passengers on such conditions only as the Governor General in Council may consider necessary for the safety of the public.

Power to close an opened railway

(2) An order under sub section (1) must set forth the grounds on which it is founded.

24. (1) When a railway has been closed under the last foregoing section, it shall not be re opened for the public carriage of passengers until it has been inspected, and its re opening sanctioned, in accordance with the provisions of this Act.

Re opening of a closed railway

(2) When the Governor General in Council has ordered under the last foregoing section that the use of any specified rolling stock be discontinued, that rolling stock shall not be used until an Inspector has reported that it is fit for use and the Governor General in Council has sanctioned its use.

(3) When the Governor General in Council has imposed under the last foregoing section any conditions with respect to the use of any railway or rolling stock, those conditions shall be observed until they are withdrawn by the Governor General in Council.

25. (1) The Governor General in Council may, by general or special order, authorize the discharge of any of his functions under this Chapter by an Inspector, and may cancel any sanction or order given by an Inspector discharging any such function, or attach thereto any condition which the Governor General in Council might have imposed if the sanction or order had been given by himself.

Delegation of powers under this Chapter to Inspectors

(2) A condition imposed under sub section (1) shall for all the purposes of this Act have the same effect as if it were attached to a sanction or order given by the Governor General in Council.

CHAPTER V

RAILWAY COMMISSIONERS AND TRAFFIC PATRONS

Railway Commissioners

26. (1) For the purposes of this Chapter the Governor General in Council shall, as occasion may in his opinion require, appoint a commission styled a Railway Commission (in this Act referred to as the Commissioners) and consisting of one Law Commissioner and two Lay Commissioners.

Composition of Railway Commission

(2) The Commissioners shall sit at such times and in such places as the Governor General in Council appoint.

(3) The Law Commissioner shall be such Judge of the High Court having jurisdiction in reference to European British subjects as the Chief of Criminal Procedure, 1882, in the place where the Commissioners are to sit.

Act 1892

as, in the case of a High Court established under the Statute 24 and 25 Victoria, chapter 104, the Chief Justice or, in the case of the Chief Court of the Punjab, the Senior Judge or in the case of the Court of the Recorder of Rangoon, the Chief Commissioner of Burma may, on the request of the Governor General in Council, assign by writing under his hand

(4) The Law Commissioners shall be appointed by the Governor-General in Council, and one at least of them shall be of experience in railway business

27 The Commissioners shall take cognizance of such cases only as are referred to them by the Governor General in Council

Restriction
of jurisdiction
of
Railway
Commission
to cases
specially
referred

Reference
of cases to
Railway
Commission

28 In any of the following circumstances, namely —

(a) where complaint is made to the Governor General in Council of anything done or any omission made by a railway administration in violation or contravention of any provision of this Chapter,

(b) where any difference which is under the provisions of any agreement required or authorised to be referred to arbitration or is between railway administrations and the railway administrations apply to the Governor General in Council to have it referred to the Commissioners,

(c) where any other difference being a difference between railway administrations or one to which a railway administration is a party, arises and the parties thereto apply to the Governor General in Council to have it referred to the Commissioners the Governor General in Council may if he thinks fit refer the case to the Commissioners for decision

Constitution
of Railway
Commission
in session

Powers of
Railway
Commission

29 The three Commissioners shall attend at the hearing of any case referred to them for decision under this Chapter and the Law Commissioner shall preside at the hearing

30 (1) In hearing any such case the Commissioners shall have all the powers, which may be exercised in the hearing of an original civil suit by a High Court

(2) The decision shall if the Commissioners differ in opinion be in accordance with the opinion of the majority, and the final order in the case shall be by way of injunction and not otherwise

(3) At the hearing the Commissioners may permit any party to appear before them either by himself or by any legal practitioner entitled to practise in any High Court

Appeals from
orders of
Railway
Commission

31 (1) An appeal shall not lie from any order of the Commissioners upon any question of fact on which two of the Commissioners are agreed

(2) Subject to the provisions of sub section (1) an appeal shall lie from an order of the Commissioners—

(a) where the Law Commissioner was the Recorder or Additional Recorder of Rangoon to the High Court of Judicature at Fort William in Bengal and

(b) in any other case, to the High Court of which the Law Commissioner was a member

(3) Such an appeal must be presented within six months from the date of the order appealed from, and shall be heard by a bench of as many Judges, not being fewer than three, as the High Court may by rule prescribe

(4) In the hearing of the appeal the High Court shall, subject to the other provisions of this Chapter, have all the powers which it has as an Appellate Court under the Code of Civil Procedure, and may make any order which the Commissioners could have made

32 Notwithstanding any appeal to the High Court from an order of the Commissioners, the order shall, unless the Commissioners or the majority of them see fit to suspend it, continue in operation until it is reversed or varied by that Court

Operation of
orders of
Railway
Commission

33. (1) The Commissioners, in the exercise of their jurisdiction under this Chapter, may, from time to time, with the general or special sanction of the Governor General in Council, call in one or more persons of engineering or other technical knowledge to act as assessors

Assessors

(2) There shall be paid to such persons such remuneration as the Governor General in Council upon the recommendation of the Commissioners may direct

34 The Governor General in Council may make rules regulating proceedings before the Commissioners and enabling the Commissioners to carry into effect the provisions of this Chapter and prescribing fees to be taken in relation to proceedings before the Commissioners

Power of
Governor-
General in
Council to
make rules
for the pur-
poses of this
Chapter

35 The costs of and incidental to any proceedings before the Commissioners or the High Court under this Chapter shall be in the discretion of the Commissioners or the High Court, as the case may be, and the payment of costs awarded by the Commissioners may be enforced by the Court of which the Law Commissioner was a Judge as if the payment had been ordered by a decree of a High Court

Costs of pro-
ceedings
under this
Chapter

36 (1) The Court of which the Law Commissioner was a Judge may, if it appears on the application of any person who was a party to the proceedings before the Commissioners or on appeal before the High Court, or of the representative of any such person, that an injunction made under this Chapter by the Commissioners or by a High Court has not been obeyed by the party enjoined, order such party to pay a sum not exceeding one thousand rupees for every day during which the injunction is disobeyed after the date of the order directing such payment

Execution of
order of Rail-
way Commis-
sion and
High Court

(2) The payment of such sum may be enforced by the Court which made the order as if that Court had given a decree for the same and the Court may direct that the whole or any part of the sum shall be paid to the person making the application under sub section (1) or to the Government

37 A document purporting to be signed by the Commissioners or any of them, shall be received in evidence without proof of the signature and shall, until the contrary is proved be deemed to have been so signed and to have been duly executed or issued by the Commissioners.

Evidence of
documents

Submission
to the Governor
General in Council of
special
reports by
Railway Com-
mission

38 The Commissioners shall, as soon as may be after the disposal of each case referred to them, submit to the Governor General in Council a special report on the case, and the Governor General in Council shall cause the report to be published in such manner as he thinks fit for the information of persons interested in the subject matter thereof

Dissolution
of Railway
Commission

39 Except for the purpose of the last foregoing section, a Railway Commission shall be deemed to be dissolved at the close of the last of the sittings of the Commissioners for the decision of the cases referred to them

Provided that, on the application of any person who was a party to the proceedings before the Commissioners, or of the representative of any such person, the Governor General in Council may, if he thinks fit, in any case in which the order passed by the Commissioners is not open to appeal, re-appoint the Commissioners for the purpose of hearing an application for a review of their decision and of granting the same and rehearing the case if they think that the case should be reheard

Finality of
orders of Rail-
way Commis-
sion subject
to the fore-
going pro-
visions of this
Chapter

40 Subject to the foregoing provisions of this Chapter and to any direction of Her Majesty in Council, an order of the Commissioners shall be final and shall not be questioned in or restrained by any Court

Bar of juris-
diction of
ordinary
Courts in
certain
matters cog-
nizable by
Railway
Commission

41 Except as provided in this Act, no suit shall be instituted or proceeding taken for anything done or any omission made by a railway administration in violation or contravention of any provision of this Chapter or of any order made thereunder by the Commissioners or by a High Court

Traffic Facilities

Duty of rail-
way adminis-
trations to
arrange for
receiving and
forwarding
traffic
without
unreasonable
delay and
without
partiality

42 (1) Every railway administration shall according to its powers afford all reasonable facilities for the receiving, forwarding and delivering of traffic upon and from the several railways belonging to or worked by it and for the return of rolling stock

(2) A railway administration shall not make or give any undue or unreasonable preference or advantage to or in favour of any particular person or railway administration, or any particular description of traffic in any respect whatsoever, or subject any particular person or railway administration or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever

(3) A railway administration having or working railways which form part of a continuous line of railway communication or having its terminus or station within one mile of the terminus or station of another railway administration, shall afford all due and reasonable facilities for receiving and forwarding by one of such railways all the traffic arriving by the other at such terminus or station without any reasonable delay and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public persons of using such railways as a continuous line of communication and so that all

reasonable accommodation may by means of such railways be at all times afforded to the public in that behalf

(4) The facilities to be afforded under this section shall include the due and reasonable receiving forwarding and delivering by every railway administration at the request of any other railway administration of through traffic to and from the railway of any other railway administration at through rates

Provided as follows —

- (a) the railway administration requiring the traffic to be forwarded shall give written notice of the proposed through rate to each forwarding railway administration, stating both its amount and its apportionment and the route by which the traffic is proposed to be forwarded. The proposed through rate for animals or goods may be per truck or per maund,
- (b) each forwarding railway administration shall, within the prescribed period after the receipt of such notice, by written notice inform the railway administration requiring the traffic to be forwarded whether it agrees to the rate, apportionment and route, and, if it has any objection what the grounds of the objection are,
- (c) if at the expiration of the prescribed period no such objection has been sent by any forwarding railway administration the rate shall come into operation at the expiration of that period
- (d) if an objection to the rate apportionment or route has been sent within the prescribed period, the Governor General in Council may, if he thinks fit on the request of any of the railway administrations, refer the case to the Commissioners for their decision
- (e) if the objection is to the granting of the rate or to the route the Commissioners shall consider whether the granting of the rate is a due and reasonable facility in the interests of the public and whether, regard being had to the circumstances the route proposed is a reasonable route and shall allow or refuse the rate accordingly or fix such other rate as may seem to the Commissioners to be just and reasonable
- (f) if the objection is only to the apportionment of the rate and the case has been referred to the Commissioners the rate shall come into operation at the expiration of the prescribed period but the decision of the Commissioners as to its apportionment shall be retrospective. In the case of any other objection the period of the rate shall be suspended until the Commissioners make their order in the case,
- (g) the Commissioners in apportioning the through rate shall take into consideration all the circumstances of the case and shall allow special expense incurred in respect of the construction, maintenance or working of the route, or any part thereof, as well as any special charges which any railway administration is entitled to make in respect thereof
- (h) the Commissioners shall not in any case compel any railway administration to accept lower freight rates than the freight rates which the administration may fix for the same bulk of goods being charged for like traffic carried by a like mode of transport on any

other line of communication between the same points being the points of departure and arrival of the through route.

(i) subject to the foregoing provisions of this sub-section the Commissioners shall have full power to decide that any proposed through rate is due and reasonable notwithstanding that a less amount may be allotted to any forwarding railway administration out of the through rate than the maximum rate which the railway administration is entitled to charge and to allow and apportion the through rate accordingly,

(j) the prescribed period mentioned in this sub-section shall be one month, or such longer period as the Governor General in Council may by general or special order prescribe.

Undue preference in case of unequal rates for like traffic or services

43 (1) Whenever it is shown that a railway administration charges one trader or class of traders or the traders in any local area lower rates for the same or similar animals or goods or for similar rates for the same or similar services than it charges to other traders or classes of traders or to the traders in another local area the burden of proving that such lower charges do not amount to an undue preference shall lie on the railway administration.

(2) In deciding whether a lower charge does or does not amount to an undue preference, the Commissioners may so far as they think reasonable in addition to any other considerations affecting the case take into consideration whether such lower charge is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made.

Provision for facilities and equal treatment where ships or boats are used which are not part of a Railway

44 Where a railway administration is a party to an agreement for procuring the traffic of the railway to be carried on any inland water by any ferry ship boat or raft which does not belong to or is not worked by the railway administration the provisions of the foregoing sections applicable to a railway shall extend to the ferry ship boat or raft in so far as it is used for the purposes of the traffic of the railway.

Terminals

45 A railway administration may charge reasonable terminal

Power of Railway Commission to fix terminals

46 (1) The Governor General in Council may if he thinks fit refer to the Commissioners for decision any question or dispute which may arise with respect to the terminal charges by a railway administration, and the Commissioners may thereupon decide what is a reasonable sum to be paid to the railway administration in respect of terminals.

(2) In deciding the question or dispute the Commissioners shall have regard only to the expenditure reasonably necessary to provide the accommodation in respect of which the terminals are charged, the pecuniary outlay which may have been actually incurred by the railway administration in providing that accommodation.

CHAPTER VI

WORKING OF RAILWAYS

General

47 (1) Every railway company and, in the case of a railway administered by the Government, an officer to be appointed by the Governor General in Council in this behalf, shall make general rules consistent with this Act for the following purposes namely — General rules.

- (a) for regulating the mode in which and the speed at which rolling stock used on the railway is to be moved or propelled,
- (b) for providing for the accommodation and convenience of passengers and regulating the carriage of their luggage
- (c) for declaring what shall be deemed to be for the purposes of this Act, dangerous or offensive goods and for regulating the carriage of such goods,
- (d) for regulating the conditions on which the railway administration will carry passengers suffering from infectious or contagious disorders and providing for the disinfection of carriages which have been used by such passengers,
- (e) for regulating the conduct of the railway servants
- (f) for regulating the terms and conditions on which the railway administration will warehouse or retain goods at any station on behalf of the consignee or owner, and,
- (g) generally, for regulating the travelling upon, and the use, working and management of the railway

(2) The rules may provide that any person committing a breach of any of them shall be punished with fine which may extend to any sum not exceeding fifty rupees, and that in the case of a rule made under clause (e) of sub-section (1), the railway servant shall forfeit a sum not exceeding one month's pay which sum may be deducted by the railway administration from his pay

(3) A rule made under this section shall not take effect until it has received the sanction of the Governor General in Council and been published in the *Gazette of India*

Provided that where the rule is in the terms of a rule which has already been published at length in the *Gazette of India*, a notification in that Gazette referring to the rule already published and announcing the adoption thereof shall be deemed a publication of a rule in the *Gazette of India* within the meaning of this sub-section

(4) The Governor General in Council may cancel any rule made under this section, and the authority required by sub-section (1) to make rules thereunder may at any time, with the previous sanction of the Governor General in Council rescind or vary any such rule

(5) Every rule purporting to have been made for any railway under Section 8 of the Indian Railway Act 1879 and appearing from the *Gazette of India* to be intended to apply to the railway at the commencement of this Act shall notwithstanding any irregularity in the making or publication of the rule, be deemed to have been made and to have taken effect under this section IV of 1879

(6) Every railway administration shall keep at each station on its railway a copy of the general rules for the time being in force under this section on the railway, and shall allow any person to inspect it free of charge at all reasonable times.

Disposal of
differences
between
railways
regarding
conduct of
joint traffic.

48 Where two or more railway administrations whose railways have a common terminus or a portion of the same line of rails in common or form separate portions of one continued line of railway communication are not able to agree upon arrangements for conducting at such common terminus or at the point of junction between them, their joint traffic with safety to the public, the Governor General in Council, upon the application of either or any of the administrations, may decide the matters in dispute between them, so far as those matters relate to the safety of the public, and may determine whether the whole or what proportion of the expenses attending on such arrangements shall be borne by either or any of the administrations respectively.

Agreements
with the
Governor-
General in
Council for
construction
or lease of
rolling-stock

49 Any railway company, not being a company for which the Statute 42 and 43 Victoria Chapter 41, provides, may from time to time make and carry into effect agreements with the Governor General in Council for the construction of rolling stock, plant or machinery used on or in connection with, railways, or for leasing or taking on lease any rolling-stock, plant, machinery or equipments required for use on a railway, or for the maintenance of rolling-stock.

Powers of
Railway
Companies
to enter into
working
agreements

50 Any railway company, not being a company for which the Statute 42 and 43 Victoria Chapter 41, provides, may from time to time make with the Governor General in Council, and carry into effect, or with the sanction of the Governor General in Council, make with any other railway administration, and carry into effect, any agreement with respect to any of the following purposes, namely—

- (a) the working use, management and maintenance of any railway
- (b) the supply of rolling stock and machinery necessary for any of the purposes mentioned in clause (a) and of officers and servants for the conduct of the traffic of the railway
- (c) the payments to be made and the conditions to be performed with respect to such working, use, management and maintenance
- (d) the interchange accommodation and conveyance of traffic being on coming from or intended for the respective railways of the contracting parties, and the fixing, collecting, appropriation and appropriation of the revenues arising from that traffic
- (e) generally, the giving effect to any such provisions or stipulations with respect to any of the purposes hereinafter in this section mentioned as the contracting parties may think fit and mutual

they agree on

Provided that the agreement shall not affect any of the rates which the railway administrations parties thereto are from time to time respectively authorised to demand and receive from any person and that every party shall, notwithstanding the agreement, be entitled to the use and benefit of the railways of any railway administration parties to the agreement, on the same terms and conditions, and on payment of the same rates as he would be if the agreement had not been entered into.

51 Any railway company not being a company for which the Statute 42 and 43 Victoria, Chapter 41, provides, may from time to time exercise with the sanction of the Governor General in Council all or any of the following powers, namely —

Establishment of ferries and roadways for accommodation of traffic

- (a) it may establish for the accommodation of the traffic of its railway, any ferry equipped with machinery and plant of good quality and adequate in quantity to work the ferry
- (b) it may work for purposes other than the accommodation of the traffic of the railway any ferry established by it under this section
- (c) it may provide and maintain on any of its bridges roadways for foot passengers, cattle, carriages, carts or other traffic,
- (d) it may and maintain roads for the accommodation of traffic passing to or from its railway
- (e) it may provide and maintain any means of transport which may be required for the reasonable convenience of passengers, animals or goods carried or to be carried on its railway
- (f) it may charge tolls on the traffic using such ferries, roadways, roads or means of transport as it may provide under this section, according to tariffs to be arranged from time to time with the sanction of the Governor General in Council

52 Every railway administration shall in forms to be prescribed by the Governor General in Council, prepare, half yearly or at such intervals as the Governor General in Council may prescribe, such returns of its capital and revenue transactions and of its traffic as the Governor General in Council may require and shall forward a copy of such returns to the Governor General in Council at such times as he may direct

Returns

Carriage of property

53 (1) Every railway administration shall determine the maximum load for every wagon or truck in its possession and shall exhibit the words or figures representing the load so determined in a conspicuous manner on the outside of every such wagon or truck

Maximum load for wagons

(2) Every person owning a wagon or truck which passes over a railway shall similarly determine and exhibit the maximum load for the wagon or truck

(3) The gross weight of any such wagon or truck bearing on the axles when the wagon or truck is loaded to such maximum load shall not exceed such limit as may be fixed by the Governor General in Council for the class of axle under the wagon or truck

54 (1) Subject to the control of the Governor General in Council a railway administration may impose conditions not inconsistent with this Act or with any general rule thereunder, with respect to the receiving, forwarding or delivering of any animals or goods

Lower for railway administrations to impose conditions for working traffic

(2) The railway administration shall keep at each station on its railway a copy of the conditions for the time being in force under sub-section (1) at the station, and shall allow any person to inspect it free of charge at all reasonable times

(3) A railway administration shall not be bound to carry any animal suffering from any infectious or contagious disorder

Lien for
rates, termi-
nals and other
charges

55 (1) If a person fails to pay on demand made by or on behalf of railway administration any rate, terminal or other charge due from him in respect of any animals or goods, the railway administration may detain the whole or any of the animals or goods or if they have been removed from the railway, any other animals or goods of such person then being in or thereafter coming into its possession

(2) When any animals or goods have been detained under sub-section (1), the railway administration may sell by public auction in the case of perishable goods at once, and in the case of other goods or of animals on the expiration of at least fifteen days' notice of the intended auction published in one or more of the local newspapers or, where there are no such newspapers, in such manner as the Governor-General in Council may prescribe, sufficient of such animals or goods to produce a sum equal to the charge, and all expenses of such detention, notice and sale including, in the case of animals, the expenses of the feeding watering and tending thereof

(3) Out of the proceeds of the sale the railway administration may retain a sum equal to the charge and the expenses aforesaid and may pay the surplus, if any, of the proceeds and such of the animals or goods (if any) as remain unsold, to the person entitled thereto

(4) If a person on whom a demand for any rate, terminal or other charge due from him has been made fails to remove from the railway within a reasonable time any animals or goods which have been detained under sub-section (1), or any animals or goods which have remained unsold after a sale under sub-section (2) the railway administration may sell the whole of them and dispose of the proceeds of the sale as nearly as may be under the provisions of sub-section (3)

(5) Notwithstanding anything in the foregoing sub-sections, the railway administration may recover by suit any such rate terminal or other charge as aforesaid or balance thereof

Disposal of
unclaimed
things on a
railway

56 (1) When any animals or goods have come into the possession of a railway administration for carriage or otherwise and are not claimed by the owner or other person appearing to the railway administration to be entitled thereto, the railway administration shall, if such owner or person is known, cause a notice to be served upon him, requiring him to remove the animals or goods

(2) If such owner or person is not known, or the notice cannot be served upon him, or he does not comply with the requisition in the notice, the railway administration may, within a reasonable time subject to the provisions of any other enactment for the time being in force, sell the animals or goods as nearly as may be under the provisions of the last foregoing section, rendering the surplus if any, of the proceeds of the sale to any person entitled thereto.

Power for
railway ad-
ministrations
to require in-
demnities on
the delivery of
goods in cer-
tain cases

57 Where any animals, goods or sale proceeds in the possession of a railway administration are claimed by two or more persons or the ticket or receipt given for the animals or goods is not forthcoming the railway administration may withhold delivery of the animals, goods or sale proceeds until the person entitled in its opinion to recover them has given an indemnity, to the satisfaction of the railway administration against the

claims of any other person with respect to the animals, goods or sale proceeds

58 (1) The owner or person having charge of any goods which are brought upon a railway for the purpose of being carried thereon, and the consignee of any goods which have been carried on a railway shall, on the request of any railway servant appointed in this behalf by the railway administration deliver to such servant an account in writing signed by such owner or person, or by such consignee, as the case may be, and containing such a description of the goods as may be sufficient to determine to the rate which the railway administration is entitled to charge in respect thereof

Requisitions
for written
accounts of
description
of goods

(2) If such owner, person or consignee refuses or neglects to give such an account, and refuses to open the parcel or package containing the goods in order that their description may be ascertained, the railway administration may, (a) in respect of goods which have been brought for the purpose of being carried on the railway, refuse to carry the goods unless in respect thereof a rate is paid not exceeding the highest rate which may be in force at the time on the railway for any class of goods or, (b) in respect of goods which have been carried on the railway, charge a rate not exceeding such highest rate

(3) If an account delivered under sub section (1) is materially false with respect to the description of any goods to which it purports to relate, and which have been carried on the railway, the railway administration may charge in respect of the carriage of the goods a rate not exceeding double the highest rate which may be in force at the time on the railway for any class of goods

(4) If any difference arises between a railway servant and the owner or person having charge or the consignee, of any goods which have been brought to be carried or have been carried on a railway, respecting the description of goods of which an account has been delivered under this section the railway servant may detain and examine the goods

(5) If it appears from the examination that the description of the goods is different from that stated in an account delivered under sub section (1), the person who delivered the account, or, if that person is not the owner of the goods then that person and the owner jointly and severally, shall be liable to pay to the railway administration the cost of the detention and examination of the goods, and the railway administration shall be exonerated from all responsibility for any loss which may have been caused by the detention or examination thereof.

(6) If it appears that the description of the goods is not different from that stated in an account delivered under sub section (1) the railway administration shall pay the cost of the detention and examination, and be responsible to the owner of the goods for any such loss as aforesaid

59 (1) No person shall be entitled to take with him or to require a railway administration to carry, any dangerous or offensive goods upon a railway

Dangerous or
offensive
goods

(2) No person shall take any such goods with him upon a railway without giving notice of their nature to the station master or other railway servant in charge of the place where he brings the goods, railway, or shall tender or deliver any such goods for carriage on

way without distinctly marking their nature on the outside of the package containing them or otherwise giving notice in writing of their nature to the railway servant to whom he tenders or delivers them

(3) Any railway servant may refuse to receive such goods for carriage and when such goods have been so received without such notice as is mentioned in sub section (1) having to his knowledge been given may refuse to carry them or may stop their transit.

(4) If any railway servant has reason to believe any such goods to be contained in a package with respect to the contents whereof such notice as is mentioned in sub section (2) has not to his knowledge been given, he may cause the package to be opened for the purpose of ascertaining its contents

IV of 1884

(5) Nothing in this section shall be construed to derogate from the Indian Explosives Act, 1884, or any rule under that Act and nothing in sub sections (1), (3) and (4) shall be construed to apply to any goods tendered or delivered for carriage by order or on behalf of the Government or to any goods which an officer, soldier, sailor or police officer or a person enrolled as a volunteer under the Indian Volunteers Act 1857 may take with him upon a railway in the course of his employment or duty as such

XI of 1869

Exhibition to the public of authority for quoted rates

(6) At every station at which a railway administration quotes a rate to any other station for the carriage of traffic other than passengers and their luggage, the railway servant appointed by the administration to quote the rate shall, at the request of any person whom, to him at all reasonable times, and without payment of any fee, the rate-books or other documents in which the rate is authorised by the administration or administrations concerned

Requisitions on railway administrations for details of gross charges

51 (1) Where any charge is made by and paid to a railway administration in respect of the carriage of goods over its railway, the administration shall, on the application of the person by whom or on whose behalf the charge has been paid, render to the applicant an account showing how much of the charge comes under each of the following heads, namely —

- (a) the carriage of the goods on the railway,
- (b) terminals,
- (c) demurrage, and
- (d) collection, delivery and other expenses

but without particularising the several items of which the charges under each head consists

(2) The application under sub section (1) must be in writing and be made to the railway administration within one month after the date of the payment of the charge by or on behalf of the applicant and the account must be rendered by the administration within two months of the receipt of the application

Carriage of passengers

Communication between passengers and railway servants in charge of trains.

62 The Governor General in Council may require any railway administration to provide and maintain in proper order, in any train worked by it which carries passengers, such efficient means of communication between the passengers and the railway servants in charge of the train as the Governor General in Council has approved

63. Every railway administration shall fix, subject to the approval of the Governor General in Council, the maximum number of passengers which may be carried in each compartment of every description of carriage, and shall exhibit the number so fixed in a conspicuous manner inside or outside each compartment, in English or one or more of the vernacular languages in common use in the territory traversed by the railway, or both in English and in one or more of such vernacular languages, as the Governor General in Council, after consultation with the railway administration may determine
64. (1) On and after the first day of January, 1891, every railway administration shall in every train carrying passengers reserve for the exclusive use of females one compartment at least of the lowest class of carriage forming a part of the train
- (2) One such compartment so reserved shall, if the train is to run for a distance exceeding fifty miles, be provided with a closet
65. Every railway administration shall cause to be posted in a conspicuous and accessible place at every station on its railway, in English and in a vernacular language in common use in the territory where the station is situate, a copy of the time tables for the time being in force on the railway, and lists of the fares chargeable for travelling from the station where the lists are posted to every place for which card tickets are ordinarily issued to passengers at that station
66. (1) Every person desirous of travelling on a railway, shall, upon payment of his fare, be supplied with a ticket, specifying the class of carriage for which, and the place to which, the fare has been paid and the amount of the fare
- (2) The matters required by sub section (1) to be specified on a ticket shall be set forth—
- (a) if the class of carriage to be specified thereon is the lowest class, then in a vernacular language in common use in the territory traversed by the railway, and
- (b) if the class of carriage to be so specified is any other than the lowest class, then in English
67. (1) Fares shall be deemed to be accepted, and tickets to be issued, subject to the condition of there being room available in the train for which the tickets are issued
- (2) A person to whom a ticket has been issued and for whom there is not room available in the train for which the ticket was issued shall, on returning the ticket within three hours after the departure of the train, be entitled to have his fare at once refunded
- (3) A person for whom there is not room available in the class of carriage for which he has purchased a ticket and who is obliged to travel in a carriage of a lower class shall be entitled on delivering up his ticket to a refund of the difference between the fare paid by him and the fare payable for the class of carriage in which he travelled
68. No person shall, without the permission of a railway servant, enter any carriage on a railway for the purpose of travelling thereon as a passenger unless he has with him a proper passenger ticket

Maximum number of passengers for each compartment

Reservation of compartments for females

Exhibition of time tables and tables of fares at stations.

Supply of tickets on payment of fares

Provision for case in which tickets have been issued for trains not having room available for additional passengers

Prohibition against travelling without fare or ticket

Exhibition
and surrender
of passes and
tickets

Return and
season
tickets

Power to
refuse to
carry persons
suffering
from in-
fections or
contagious
disorder

69 Every passenger by railway shall on the requisition of any railway servant appointed by the railway administration in this behalf present his pass or ticket to the railway servant for examination, and at or near the end of the journey for which the pass or ticket was issued, or, in the case of a season pass or ticket, at the expiration of the period for which it is current, deliver up the pass or ticket to the railway servant.

70 A return ticket or season ticket shall not be transferable and may be used only by the person for whose journey to and from the places specified thereon it was issued.

71 (1) A railway administration may refuse to carry except in accordance with the conditions prescribed under section 47, sub-section (i), clause (d) a person suffering from any infectious or contagious disorder.

(2) A person suffering from such a disorder shall not enter or travel upon a railway without the special permission of the station master or other railway servant in charge of the place where he enters upon the railway.

(3) A railway servant giving such permission as is mentioned in sub-section (2) must arrange for the separation of the person suffering from the disorder from other persons being or travelling upon the railway.

CHAPTER VII

RESPONSIBILITY OF RAILWAY ADMINISTRATIONS AS CARRIERS

Measure of
the general
responsibility
of a railway
administra-
tion as a
carrier of
animals and
goods

72 (1) The responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway shall subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872.

(2) An agreement purporting to limit that responsibility shall be so far as it purports to effect such limitation be void unless it—

- is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods;
- is otherwise in a form approved by the Governor-General in Council.

III of 1865.

(3) Nothing in the common law of England or in the Carriers Act 1865 regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility as mentioned in section defined of a railway administration.

Further pro-
vision with
respect to the
liability of a
railway ad-
ministration
as a carrier
of animals

73 (1) The responsibility of a railway administration under the foregoing section for the loss, destruction or deterioration of animals delivered to the administration to be carried on a railway shall not in any case exceed, in the case of elephants or horses five hundred rupees a head or, in the case of camels or horned cattle fifty rupees a head or, in the case of sheep, goats, dogs or other animals ten rupees a head unless the person sending or delivering them to the administration caused them to be declared or declared them at the time of their delivery for carriage by railway, to be respectively of higher value than five hundred, fifty or ten rupees a head, as the case may be.

(2) Where such higher value has been declared, the railway administration may charge, in respect of the increased risk a percentage upon the excess of the value so declared over the respective sums aforesaid.

(3) In every proceeding against a railway administration for the recovery of compensation for the loss, destruction or deterioration of any animal the burden of proving the value of the animal and where the animal has been injured, the extent of the injury shall lie upon the person claiming the compensation.

74. A railway administration shall not be responsible for the loss, destruction or deterioration of any luggage belonging to or in charge of a passenger unless a railway servant has booked and taken receipt therefor. Further provision with respect to the liability of a railway administration as a carrier of luggage.

75. (1) When any articles mentioned in the second schedule are contained in any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds one hundred rupees, the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway, and, if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk. Further provision with respect to the liability of a railway administration as a carrier of articles of special value.

See 34 Act 65

(2) When any parcel or package of which the value has been declared under sub-section (1) has been lost or destroyed or has deteriorated, the compensation recoverable in respect of such loss, destruction or deterioration shall not exceed the value so declared, and the burden of proving the value so declared to have been the true value shall notwithstanding anything in the declaration, lie on the person claiming the compensation.

(3) A railway administration may make it a condition of carrying a parcel declared to contain any article mentioned in the second schedule that a railway servant authorised in this behalf has been satisfied by examination or otherwise that the parcel actually contains the article declared to be therein.

76. In any suit against a railway administration for compensation for loss, destruction or deterioration of animals or goods delivered to a railway administration for carriage by railway, it shall not be necessary for the plaintiff to prove how the loss, destruction or deterioration was caused. Burden of proof in suits in respect of loss of animals or goods.

77. A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by a railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of delivery of the animals or goods for carriage by railway. Notification of claims in regards of overcharges and to compensation for loss.

Exonerat from re-
sponsibility
in a case of
goods falsely
described

76 Notwithstanding anything in the foregoing provisions of this Chapter, a railway administration shall not be responsible for the loss, destruction or deterioration of any goods with respect to the description of which an account materially false has been delivered under sub-section (1) of section 58 if the loss, destruction or deterioration is in any way brought about by the false account, nor in any case for an amount exceeding the value of the goods if such value were calculated in accordance with the description contained in the false account.

Settlement of compensa-
tion for in-
juries to
officers,
soldiers and
followers on
duty

77 Where an officer, soldier or follower, while being or travelling as such on duty upon a railway belonging to and worked by the Government loses his life or receives any personal injury in such circumstances that if he were not an officer, soldier or follower being or travelling as such on duty upon the railway compensation would be payable under Act No. XIII of 1855 or to him, as the case may be, the form and amount of the compensation to be made in respect of the loss of his life or his injury shall, where there is any provision in this behalf in the military regulations to which he was immediately before his death or is subject be determined in accordance with those regulations and not otherwise.

Suits for compensation
for injury to
through
booked
traffic

80 Notwithstanding anything in any agreement purporting to limit the liability of a railway administration with respect to traffic while on the railway of another administration, a suit for compensation for loss of the life of, or personal injury to a passenger, or for loss, destruction or deterioration of animals or goods where the passenger was or the animals or goods were booked through over the railways of two or more railway administrations, may be brought either against the railway administration from which the passenger obtained his pass or purchased his ticket, or to which the animals or goods were delivered by the consignor thereof, as the case may be or against the railway administration on whose railway the loss, injury, destruction or deterioration occurred.

Limitation of liability of
railway ad-
ministration
in respect of
traffic on
inland waters
by vessel not
being part
of railway.

81 (1) Where a railway administration under contract to carry animals or goods by any inland water procures the same to be carried in a vessel which is not a railway as defined in this Act the responsibility of the railway administration for the loss, destruction or deterioration of the animals or goods during their carriage in the vessel shall be the same as if the vessel were such a railway.

Limitation of liability of
railway ad-
ministration
in respect of
accidents at
sea.

82 (1) When a railway administration contracts to carry passengers, animals or goods partly by railway and partly by sea a condition exempting the railway administration from responsibility for any loss of life, personal injury or loss of or damage to animals or goods which may happen during the carriage by sea from the act of God, fire, lightning, enemies, fire accidents, from mutiny, boilers and steam and all other accidents, every other dangers and accidents of the sea, rivers and navigation of whatever nature and kindsoever shall without limitation of time be deemed to be part of the contract, and, subject to that condition the railway administration shall, irrespective of the nationality or ownership of the ship used for the carriage by sea, be responsible for any loss of life, personal injury or loss of or damage to animals or goods which may be sustained.

during the carriage by sea, to the extent to which it would be responsible under the Merchant Shipping Act, 1851, and the Merchant Shipping Act Amendment Act, 1862, if the ship were registered under the former of those Acts and the railway administration were owner of the ship, and not to any greater extent

17 & 18
Vict., c. 10
25 & 26-4
Vict., c. 63

(2) The burden of proving that any such loss or injury or damage as is mentioned in sub-section (1) happened during the carriage by sea shall lie on the railway administration

CHAPTER VIII

ACCIDENTS

83 When any of the following accidents occurs in the course of working a railway, namely —

Report of
railway ac-
cidents

- (a) any accident attended with loss of human life, or with grievous hurt as defined in the Indian Penal Code, or with serious injury to property, V.L. of 1862
- (b) any collision between trains of which one is a train carrying passengers,
- (c) the derailment of any train carrying passengers or of any part of such a train,
- (d) any accident of a description usually attended with loss of human life or with such grievous hurt as aforesaid or with serious injury to property,
- (e) any accident of any other description which the Governor-General in Council may notify in this behalf in the Gazette of India,

the railway administration working the railway and, if the accident happens to a train belonging to any other railway administration, the other railway administration also shall, without unnecessary delay, send notice of the accident to the Local Government and to the Inspector appointed for the Railway, and the station master, nearest to the place at which the accident occurred or where there is a station master; the railway servant in charge of the section of the railway on which the accident occurred shall, without unnecessary delay, give notice of the accident to the Magistrate of the district in which the accident occurred and to the officer in charge of the Police station within the local limits of which it occurred, or to such other Magistrate and police officer as the Governor-General in Council appoints in this behalf

84 The Governor-General in Council may make rules, consistent with this Act and any other enactment for the time being in force, for all or any of the following purposes, namely —

Power to
make rules
regarding
notices of
and in-
juries
into acci-
dents

- (a) for prescribing the forms of the notices mentioned in the last foregoing section, and the particulars of the accident which those notices are to contain
- (b) for prescribing the class of accidents of which notice is to be sent by telegraph immediately after the accident has occurred,
- (c) for prescribing the duties of railway servants, police officers, Inspectors and Magistrates on the occurrence of an accident.

Submission
of return of
accidents.

85 Every railway administration shall send to the Governor General in Council a return of accidents occurring upon its railway which are attended with personal injury or not, in such form and manner and at such intervals of time as the Governor General in Council directs.

Provision for
compulsory
medical
examination
of person in-
jured in rail-
way accident

86 Whenever any person injured by an accident on a railway claims compensation on account of the injury, any Court or person having authority by law or consent of parties to determine the claim may order that the person injured be examined by some duly qualified medical practitioner named in the order and not being a witness on either side and may make such order with respect to the costs of the examination as it or he thinks fit.

CHAPTER IX

PENALTIES AND OFFENCES.

Forfeitures by Railway Companies

Penalty for
default in
compliance
with require-
ment under
section 13

87. If a railway company fails to comply with any requirement made under section 13 it shall forfeit to the Government the sum of two hundred rupees for the default and a further sum of fifty rupees for every day after the first during which the default continues.

Penalty for
contravention
of section 16,
18, 19, 20, 21
or 24

88 If a railway company moves any rolling stock upon a railway by steam or other motive power in contravention of section 16, sub-section (2), or opens or uses any railway or work in contravention of section 18, section 19, section 20 or section 21, or reopens any railway or uses any rolling stock in contravention of section 24, it shall forfeit to the Government the sum of two hundred rupees for every day during which the motive power, railway, work or rolling stock is used in contravention of any of those sections.

Penalty for
not having
certain docu-
ments kept
or exhibited
at stations
under section
47, 54 or 63

89 If a railway company fails to comply with the provisions of section 47, sub-section (b), section 54, sub-section (2), or section 63, with respect to the books or other documents to be kept open to inspection or conspicuously posted at stations on its railway, it shall forfeit to the Government the sum of fifty rupees for every day during which the default continues.

Penalty for
not making
rules as re-
quired by
section 47

90 If a railway company fails to comply with the provisions of section 47 with respect to the making of general rules, it shall forfeit to the Government the sum of fifty rupees for every day during which the default continues.

Penalty for
failure to
comply with
decision
under sec-
tion 48

91 If a railway company refuses or neglects to comply with any decision of the Governor General in Council under section 48 it shall forfeit to the Government the sum of two hundred rupees for every day during which the refusal or neglect continues.

Penalty for
delay in sub-
mitting re-
turns under
section 52
or 85

92 If a railway company fails to comply with the provisions of section 52 or section 85 with respect to the submission of any return it shall forfeit to the Government the sum of fifty rupees for every day during which the default continues after the fourteenth day from the date prescribed for the submission of the return.

93. If a railway company contravenes the provisions of section 53 or section 63, with respect to the maximum load to be carried in any wagon or truck, or the maximum number of passengers to be carried in any compartment, or the exhibition of such load on the wagon or truck or of such number in or on the compartment, or knowingly suffers any person owning a wagon or truck passing over its railway to contravene the provisions of the former of those sections, it shall forfeit to the Government the sum of twenty rupees for every day during which either section is contravened.
- Penalty for neglect of provisions of section 53 or 63 with respect to carrying capacity of rolling-stock.
94. If a railway company fails to comply with any requisition of the Governor-General in Council under section 62 for the provision and maintenance in proper order, in any train worked by it, which carries passengers, of such efficient means of communication as the Governor-General in Council has approved, it shall forfeit to the Government the sum of twenty rupees for each train run in disregard of the requisition.
- Penalty for failure to comply with requisition under section 62 for maintenance of means of communication between passengers and railway servants.
95. If a railway company fails to comply with the requirements of section 64 with respect to the reservation of compartments for females or the provision of closets thereon, it shall forfeit to the Government the sum of twenty rupees for every train in respect of which the default occurs.
- Penalty for failure to reserve compartments for females under section 64.
96. If a railway company omits to give such notice of an accident as is required by section 83 and the rules for the time being in force under section 84, it shall forfeit to the Government the sum of one hundred rupees for every day during which the omission continues.
- Penalty for omitting to give the notices of accidents required by section 83 and under section 84.
97. (1) When a railway company has through any act or omission forfeited any sum to the Government under the foregoing provisions of this Chapter, the sum shall be recoverable by suit in the District Court having jurisdiction in the place where the act or omission or any part thereof occurred.
- Recovery of penalties.
- (2) The suit must be instituted with the previous sanction of the Governor-General in Council, and the plaintiff therein shall be the Secretary of State for India in Council.
- (3) The Governor-General in Council may remit the whole or any part of any sum forfeited by a railway company to the Government under the foregoing provisions of this Chapter.
98. Nothing in those provisions shall be construed to preclude the Government from resorting to any other mode of proceeding instead of, or in addition to, such a suit as is mentioned in the last foregoing section, for the purpose of compelling a railway company to discharge any obligation imposed upon it by this Act.
- Alternative or supplementary character of remedies afforded by the foregoing provisions of this Chapter.

Offences by Railway Servants

- Breach of duty imposed by section 60** 99 If a railway servant whose duty it is to comply with the provisions of section 60 negligently or wilfully omits to comply therewith he shall be punished with fine which may extend to twenty rupees
- Drunkenness** 100 If a railway servant is in a state of intoxication while on duty he shall be punished with fine which may extend to fifty rupees or where the improper performance of the duty would be likely to endanger the safety of any person travelling or being upon a railway, with imprisonment for a term which may extend to one year, or with fine, or with both
- Endangering the safety of persons** 101 If a railway servant, when on duty, endangers the safety of any person—
 (a) by disobeying any general rule made, sanctioned, published and notified under this Act, or
 (b) by disobeying any rule or order which is not inconsistent with a such general rule and which such servant was bound by the terms of his employment to obey, and of which he had notice or
 (c) by any rash or negligent act or omission,
 he shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to five hundred rupees or with both
- Compelling passengers to enter carriages already full** 102 If a railway servant compels or attempts to compel or cause any passenger to enter a compartment which already contains the maximum number of passengers exhibited therein or thereon under section 64, he shall be punished with fine which may extend to twenty rupees
- Omission to give notice of accident** 103 If a station master or a railway servant in charge of a station or a railway omits to give such notice of an accident as is required by section 65 and the rules for the time being in force under section 67 he shall be punished with fine which may extend to fifty rupees
- Obstructing level crossings** 104 If a railway servant unnecessarily—
 (a) allows any rolling stock to stand across a place where a railway crosses a public road on the level or
 (b) keeps a level crossing closed against the public
 he shall be punished with fine which may extend to twenty rupees
- False returns** 105 If any return which is required by this Act is filed in any particular to the knowledge of any person who signs it that person shall be punished with fine which may extend to five hundred rupees or with imprisonment which may extend to one year, or with both

Other Offences

- Giving false account of goods** 106 If a person requested under section 38 to give an account with respect to any goods gives an account which is materially false and if he is not the owner of the goods, the owner also shall be punished with fine which may extend to ten rupees for every maund or piece of a maund of the goods, and the fine shall be in addition to a levy rate or other charge to which the goods may be liable
- Unlawfully bringing dangerous or offensive goods upon a railway** 107 If in contravention of section 59 a person takes with him a dangerous or offensive goods upon a railway, or tenders or delivers or causes to be taken goods for carriage upon a railway, he shall be punished with fine which may extend to five hundred rupees, and shall also be responsible for any loss, injury, or damage which may be caused by reason of such goods having been so brought upon the railway

108 If a passenger, without reasonable and sufficient cause, makes use of or interferes with any means provided by a railway administration for communication between passengers and the railway servants in charge of a train, he shall be punished with fine which may extend to fifty rupees

Needlessly interfering with means of communication in a train

109. (1) If a passenger having entered a compartment which is reserved by a railway administration for the use of a certain passenger, or which already contains the maximum number of passengers exhibited therein or thereon under section 67, refuses to leave it when required to do so by any railway servant, he shall be punished with fine which may extend to twenty rupees

Entering compartment reserved or already full or resisting entry into a compartment not full

(2) If a passenger resists the lawful entry of another passenger into a compartment not reserved by the railway administration for the use of the passenger resisting or not already containing the maximum number of passengers exhibited therein or thereon under section 67, he shall be punished with fine which may extend to twenty rupees

110 (1) If a person without the consent of his fellow passengers, if any in the same compartment, smokes in any compartment except a compartment specially provided for the purpose, he shall be punished with fine which may extend to twenty rupees

Smoking

(2) If any person persists in so smoking after being warned by any railway servant to desist, he may, in addition to incurring the liability mentioned in sub-section (1), be removed by any railway servant from the carriage in which he is travelling

111. If a person, without authority in his behalf, pulls down or wilfully injures any board or document set up or posted by order of a railway administration on a railway or travelling stock, or if he writes or alters any of the letters or figures upon any such board or document, he shall be punished with fine which may extend to fifty rupees

Defacing public notices

112 If a person, with intent to defraud a railway administration —
(a) enters in contravention of section 18 any carriage on a railway, or
(b) uses or attempts to use a single pass or single ticket which has already been used on a previous journey or, in the case of a return ticket, a half thereof which has already been used

Fraudulently travelling or attempting to do so with a single pass or ticket

he shall be punished with fine which may extend to one hundred rupees, in addition to the amount of the single fare for any distance which he may have travelled

113 (1) If a passenger travels in a train without having a proper pass or a proper ticket with him, or, being in or having alighted from a train, fails or refuses to present for examination or to deliver up his pass or ticket immediately on requisition being made therein for under section 67, he shall be liable to pay, on the demand of any railway servant appointed by the railway administration in this behalf, the excess of the fare payable in this section mentioned in addition to the ordinary single fare for the distance which he has travelled, or where there is no station at the station from which the train originally started, the fare for the distance from which the train originally started, if the ticket is found to be travelling in the train have been examined and found to be valid, or if the train the ordinary single fare for the place where the ticket was examined or in case of their having been examined and found to be valid just examined.

Travelling without pass or ticket or without presenting or delivering up pass or ticket on requisition

117. (1) If a person suffering from an infectious or contagious disorder enters or travels upon a railway in contravention of section 71, sub-section (2), he and any person having charge of him upon the railway when he so entered or travelled thereon, shall be punished with fine which may extend to twenty rupees, in addition to the forfeiture of any fare which either of them may have paid and of any pass or ticket which either of them may have obtained or purchased, and may be removed from the railway by any railway servant

Being or suffering person to travel on railway with infectious or contagious disorder

(2) If any such railway servant as is referred to in Section 71 sub-section (2), knowing that a person is suffering from any infectious or contagious disorder, wilfully permits the person to travel upon a railway without arranging for his separation from other passengers he shall be punished with fine which may extend to one hundred rupees

118 (1) If a passenger enters or leaves, or attempts to enter or leave, any carriage while the train is in motion or elsewhere than at the side of the carriage adjoining the platform or other place appointed by the railway administration for passengers to enter or leave the carriage or opens the side door of any carriage while the train is in motion he shall be punished with fine which may extend to twenty rupees

Entering carriage in motion or otherwise improperly travelling on a railway

(2) If a passenger, after being warned by a railway servant to desist, persists in travelling on the roof steps or footboard of any carriage or on an engine, or in any other part of a train not intended for the use of passengers, he shall be punished with fine which may extend to fifty rupees and may be removed from the railway by any railway servant

119 If a male person, knowing a carriage, compartment room or other place to be reserved by a railway administration for the exclusive use of females, enters the place without lawful excuse or having entered it remains therein after having been desired by any railway servant to leave it, he shall be punished with fine which may extend to one hundred rupees, in addition to the forfeiture of any fare which he may have paid and of any pass or ticket which he may have obtained or purchased and may be removed from the railway by any railway servant

Entering carriage or other place reserved for females

120 If a person in any railway carriage or upon any part of a railway

(a) is in a state of intoxication, or

(b) commits any nuisance or act of indecency, or uses obscene or abusive language, or

(c) wilfully and without lawful excuse interferes with the comfort of any passenger or extinguishes any lamp,

Drunkenness or nuisance on a railway.

he shall be punished with fine which may extend to fifty rupees, in addition to the forfeiture of any fare which he may have paid and of any pass or ticket which he may have obtained or purchased, and may be removed from the railway by any railway servant

121 If a person wilfully obstructs or impedes any railway servant in the discharge of his duty, he shall be punished with fine which may extend to one hundred rupees.

Obstructing railway servant in his duty

122 (1) If a person unlawfully enters upon a railway, he shall be punished with fine which may extend to twenty rupees

Trespass and refusal to desist from trespass

(2) If a person so entering refuses to leave the railway on being requested to do so by any railway servant or by any other person on behalf of the railway administration, he shall be punished with fine which may

extend to fifty rupees, and may be removed from the railway by such servant or other person

Disobedience of omnibus drivers to directions of railway servants 123 If a driver or conductor of a tramcar, omnibus, carriage or other vehicle while upon the premises of a railway disobeys the reasonable directions of any railway servant or Police officer, he shall be punished with fine which may extend to twenty rupees

Opening or not properly shutting gates

124 In either of the following cases, namely—

(a) if a person knowing or having reason to believe that an engine or train is approaching along a railway, opens any gate set up on either side of the railway across a road, or passes or attempts to pass, or drives or takes, or attempts to drive or take, any animal, vehicle or other thing across the railway

(b) if, in the absence of a gatekeeper, a person omits to shut and fasten such a gate as aforesaid as soon as he and any animal vehicle or other thing under his charge have passed through the gate,

the person shall be punished with fine which may extend to fifty rupees

Cattle trespass

125 (1) The owner or person in charge of any cattle straying on a railway provided with fences suitable for the exclusion of cattle shall be punished with fine which may extend to five rupees for each head of cattle, in addition to any amount which may have been recovered or may be recoverable under the Cattle trespass Act 1871

I of 1871.

(2) If any cattle are wilfully driven, or knowingly permitted to be on any railway otherwise than for the purpose of lawfully crossing the railway or for any other lawful purpose the person in charge of the cattle or, at the option of the railway administration, the owner of the cattle shall be punished with fine which may extend to ten rupees for each head of cattle, in addition to any amount which may have been recovered or may be recoverable under the Cattle trespass Act 1871

(3) Any fine imposed under this section may, if the Court so directs be recovered in manner provided by section 26 of the Cattle-trespass Act, 1871

(4) The expression "public road" in Sections 11 and 26 of the Cattle trespass Act, 1871, shall be deemed to include a railway, and any railway servant may exercise the powers conferred on officers of police by the former of those sections

(5) The word 'cattle' has the same meaning in this section as in the Cattle trespass Act, 1871

126 If a person unlawfully—

(a) puts or throws upon or across any railway any wood stone or other matter or thing, or

(b) takes up, removes, loosens or displaces any rail sleeper or other matter or thing belonging to any railway, or

(c) turns, moves, unlocks or diverts any points or other machinery belonging to any railway, or

(d) makes or shows or hides or removes, any signal or light upon or near to any railway, or

(e) does or causes to be done or attempts to do any other act or thing in relation to any railway,

Malevolently wrecking or attempting to wreck a train

with intent, or with knowledge that he is likely, to endanger the safety of any person travelling or being upon the railway, he shall be punished with transportation for life or with imprisonment for a term which may extend to ten years.

127 If a person unlawfully throws or causes to fall or strike at, against, into or upon any rolling stock forming part of a train any wood, stone or other matter or thing with intent, or with knowledge that he is likely to endanger the safety of any person being in or upon such rolling stock or in or upon any other rolling stock forming part of the same train, he shall be punished with transportation for life or with imprisonment for a term which may extend to ten years.

Maliciously hurting or attempting to hurt persons travelling by railway

128 If a person by any unlawful act or by any wilful omission or neglect, endangers or causes to be endangered the safety of any person travelling or being upon any railway, or obstructs or causes to be obstructed or attempts to obstruct any rolling stock upon any railway, he shall be punished with imprisonment for a term which may extend to two years.

Endangering safety of persons travelling by railway by wilful act or omission

129 If a person rashly or negligently does any act, or omits to do what he is legally bound to do and the act or omission is likely to endanger the safety of any person travelling or being upon a railway, he shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

Endangering safety of persons travelling by railway by rash or negligent act or omission

130 (1) If a minor under the age of twelve years is with respect to any railway guilty of any of the acts or omissions mentioned or referred to in any of the four last foregoing sections, he shall be deemed, notwithstanding anything in section 82 or section 83 of the Indian Penal Code to have committed an offence and the Court convicting him may, if it thinks fit direct that the minor, if a male, shall be punished with whipping or may require the father or guardian of the minor to execute, within such time as the Court may fix, a bond binding himself, in such penalty as the Court directs, to prevent the minor from being again guilty of any of those acts or omissions.

Special provision with respect to the commission by children of acts endangering safety of persons travelling by railway

(2) The amount of the bond, if forfeited shall be recoverable by the Court as if it were a fine imposed by itself.

(3) If a father or guardian fails to execute a bond under sub section (1) within the time fixed by the Court, he shall be punished with fine which may extend to fifty rupees.

Procedure

131 (1) If a person commits any offence mentioned in Section 100, 101, 119, 120, 121, 126, 127, 128 or 129 or in Section 130, sub section (1), he may be arrested without warrant or other written authority by any railway servant or police officer, or by any other persons whom such servant or officer may call to his aid.

Arrest for offences against certain sections.

(2) A person so arrested shall, with the least possible delay, be taken before a Magistrate having authority to try him or commit him for trial.

132 (1) If a person commits any offence under this Act other than an offence mentioned in the last foregoing section or fails or refuses to pay any excess charge or other sum demanded under Section 113, and there is

Arrest of persons likely to abscond or unknown

reason to believe that he will abscond, or his name and address are unknown, and he refuses on demand to give his name and address, or there is reason to believe that the name or address given by him is incorrect any railway servant or police officer, or any other person whom such railway servant or police officer may call to his aid, may without warrant or other written authority, arrest him

(2) The person arrested shall be released on his giving bail, or, if his true name and address are ascertained, on his executing a bond without sureties, for his appearance before a Magistrate when required

(3) If the person cannot give bail and his true name and address are not ascertained, he shall with the least possible delay be taken before the nearest Magistrate having jurisdiction

X of 1882

(4) The provisions of Chapters XXIX and XLII of the Code of Criminal Procedure 1882, shall, so far as may be apply to bail given and bonds executed under this section

Magistrates
having juris-
diction under
Act

133 No Magistrate other than a Presidency Magistrate or than a Magistrate whose powers are not less than those of a Magistrate of the second class shall try any offence under this Act

Place of trial

134 (1) any person committing any offence against this Act or any rule thereunder shall be triable for such offence in any place in which he may be or which the Local Government may notify in this behalf, as well as in any other place in which he might be tried under any law for the time being in force

(2) Every notification under sub section (1) shall be published in the local official Gazette, and a copy thereof shall be exhibited for the information of the public in some conspicuous place at each of such railway stations as the Local Government may direct

CHAPTER X

SUPPLEMENTAL PROVISIONS.

Taxation of
railways by
local
authorities

135. Notwithstanding anything to the contrary in any enactment, or in any agreement or award based on any enactment the following rules shall regulate the levy of taxes in respect of railways and from railway administrations in aid of the funds of local authorities namely —

(1) A railway administration shall not be liable to pay any tax in aid of the funds of any local authority unless the Governor General in Council has by notification in the official Gazette, declared the railway administration to be liable to pay the tax

(2) While a notification of the Governor General in Council under clause (1) of this section is in force, the railway administration shall be liable to pay to the local authority either the tax mentioned in the notification or, in lieu thereof such sum, if any, as an officer appointed in this behalf by the Governor General in Council may, having regard to all the circumstances of the case, from time to time, determine to be fair and reasonable

(3) The Governor General in Council may at any time revoke or vary a notification under clause (1) of this section

(4) Nothing in this section is to be construed as debarring any railway administration from entering into a contract with any local authority

for the supply of water or light or for the scavenging of railway premises or for any other service which the local authority may be rendering or be prepared to render within any part of the local area under its control

(5) 'Local authority' in this section means a local authority as defined in the General Clauses Act 1887 and includes any authority legally entitled to or entrusted with the control or management of any fund for the maintenance of watchmen or for the conveyance of a river

136 (1) None of the rolling stock machinery plant tools fittings materials or effects used or provided by a railway administration for the purpose of the traffic on its railway or of its stations or workshops shall be liable to be taken in execution of any decree or order of any Court without the previous sanction of the Governor General in Council

(2) Nothing in sub section (1) is to be construed as affecting the authority of any Court to attach the earnings of a railway in execution of a decree or order

137 (1) Every railway servant shall be deemed to be a public servant for the purposes of Chapter IX of the Indian Penal Code

(2) In the definition of legal remuneration in Section 161 of that Code the word Government shall for the purposes of sub section (1) be deemed to include any employee of a railway servant as such

(3) A railway servant shall not—

(a) purchase or bid for either in person or by agent in his own name or in that of another or jointly or in shares with others any property put up to auction under Section 55 or Section 56 or

(b) in contravention of any direction of the railway administration in this behalf engage in trade

(4) Notwithstanding anything in Section 21 of the Indian Penal Code, a railway servant shall not be deemed to be a public servant for any of the purposes of that Code except those mentioned in sub section (1)

138 If a railway servant is discharged or suspended from his office or dies absconds or absents him self and he or his wife or widow or any of his family or representatives refuses or neglects after notice in writing for that purpose to deliver up to the railway administration or to a person appointed by the railway administration in this behalf any station dwelling house office or other building with its appurtenances or any books papers or other matters belonging to the railway administration and in the possession or custody of such railway servant at the occurrence of any such event as aforesaid any Magistrate of the first class may, on application made by or on behalf of the railway administration order any police officer with proper assistance to enter upon the building and remove any person found therein and take possession thereof or to take possession of the books papers or other matters and to deliver the same to the railway administration in a person appointed by the railway administration in that behalf

139 Any notice determination direction requisition appointment expression of opinion approval or sanction to be given or signified on the part of the Governor General in Council for any of the purposes of or in relation to this Act or any of the powers or provisions therein contained shall be sufficient and binding if in writing signed by a Secretary Deputy

I of 1887

Restriction on execution against railway property

Railway servants to be public servants for the purposes of Chapter IX of the Indian Penal Code

Procedure for summary delivery to railway administration of property detained by a railway servant

Mode of signifying communications from the Governor General in Council

Secretary, Under-Secretary or Assistant Secretary to the Government of India or by any other officer or servant authorised to act on behalf of the Governor General in Council in respect of the matters to which the same may relate and the Governor General in Council shall not in any case be bound in respect of any of the matters aforesaid unless by some writing signed in manner aforesaid.

Service of
notices on
railway ad-
ministra-
tions

140 Any notice or other document required or authorised by this Act to be served on a railway administration may be served in the case of a rule administered by the Government or a Native State on the Manager or Agent in the case of a railway administered by a railway company on the Agent in India of the railway company—

- (a) by delivering the notice or other document to the Manager or Agent or
- (b) by leaving it at his office or
- (c) by forwarding it by post in a prepaid letter addressed to the Manager or Agent at his office and registered under Part III of the Indian Post Office Act 1861

XIV of 1866

Service of
notices by
railway ad-
ministra-
tions

141 Any notice or other document required or authorised by this Act to be served on any person by a railway administration may be served—

- (a) by delivering it to the person or
- (b) by leaving it at the usual or last known place of abode of the person or
- (c) by forwarding it by post in a prepaid letter addressed to the person at his usual or last known place of abode and registered under Part III of the Indian Post Office Act 1861

Presumption
where notice
is served by
post

142 Where a notice or other document is served by post it shall be deemed to have been served at the time when the letter containing it would be delivered in the ordinary course of post and in proving such service it shall be sufficient to prove that the letter containing the notice or other document was properly addressed and registered.

Provisions
with respect
to rules

143 (1) A rule under Section 22 Section 24 or Section 24 or the cancellation, rescission or variation of a rule under any of those sections or under Section 17, sub-section (4) shall not take effect until it has been published in the Gazette of India.

(2) Where any rule made under this Act or the cancellation, rescission or variation of any such rule is required by this Act to be published in the Gazette of India it shall besides being so published be further notified to persons affected thereby in such manner as the Governor General in Council by general or special order directs.

(3) The Governor General in Council may amend or vary any rule made by him under this Act.

Delegation of
powers of
Governor
General in
Council

144 (1) The Governor General in Council may by notification in the Gazette of India invest absolutely or subject to conditions any Local Government with any of the powers or functions of the Governor General in Council under this Act with respect to any railway and may by like notification declare what Local Government shall for the purposes of the exercise of powers or functions so conferred be deemed to be the Local Government in respect of the railway.

(2) The provisions of Section 139 with respect to proceedings of the Governor General in Council shall so far as they can be made applicable, apply to proceedings of a Local Government exercising the powers or discharging the functions of the Governor General in Council in pursuance of a notification under sub-section (1)

145 (1) The manager of a railway administered by the Government or a Native State, and the Agent in India of a railway administered by a railway company, may, by instrument in writing, authorise any railway servant or other person to act for or represent him in any proceeding before any Civil, Criminal or other Court

Representation of Managers and Agents of Railways in Courts

(2) A person authorized by a Manager or Agent to conduct prosecutions on behalf of a railway administration shall notwithstanding any thing in Section 493 of the Code of Criminal Procedure 1882 be entitled to conduct such prosecutions without the permission of the Magistrate

A of 1882

146 The Governor General in Council may, by notification in the Gazette of India extend this Act or any portion thereof to any tramway worked by steam or other mechanical power

Power to extend Act to steam tramways

147 The Governor General in Council may by a like notification, exempt any railway from any of the provisions of this Act

Power to exempt railway from Act

148 (1) For the purposes of Section 3, clauses (5), (6) and (7), and Sections 4 to 19 (both inclusive), 17 to 52 (both inclusive) 59, 79, 83 to 92 (both inclusive), 96, 97, 98, 100, 101, 103, 104, 107, 111, 122, 124 to 132 (both inclusive), 134 to 138 (both inclusive), 140, 141, 144, 145, and 147, the word "railway," whether it occurs alone or as a prefix to another word, has reference to a railway or portion of a railway under construction and to a railway or portion of a railway not used for the public carriage of passengers, animals or goods as well as to a railway falling within the definition of that word in Section 3, clause (4)

Matters supplemental to the definitions of "railway" and "railway servant"

(2) For the purposes of Sections 5, 21, 83, 100, 101, 103, 104, 121, 122, 125 and 137, sub-sections (1), (2) and (4), and Section 138, the expression "railway servant" includes a person employed upon a railway in connection with the service thereof by a person fulfilling a contract with the railway administration

149 In sections 194 and 195 of the Indian Penal Code, for the words "by this Code or the law of England" the words "by the law of British India or England" shall be substituted

Amendment of the Indian Penal Code

150 For that portion of the preamble to the Sindh Pishin Railway Act, 1887, which begins with the words "so far as it applies" and ends with the words "in its entirety," the words "should apply in its entirety to that part of the Sindh Pishin section of the North Western Railway which lies beyond the Province of Sindh" shall be substituted

Amendment of the Sindh Pishin Railway Act, 1887

THE FIRST SCHEDULE

ENACTMENTS REPEALED

(See Section 2)

| Number and year | Title | Extent of repeal |
|---|----------------------------|--|
| <i>Acts of the Governor General in Council</i> | | |
| III of 1865 | Carniers Act, 1865 | Section 7 (so far as it relates to railways) and Section 10 |
| IV of 1879 | Indian Railway Act 1879 | The whole |
| IV of 1883 | Indian Railway Act, 1883 | The whole |
| XI of 1880 | Indian Tramway Act 1880 | Section 49 |
| XX of 1886 | Upper Burma Laws Act, 1886 | So much as relates to Acts IV of 1879 and IV of 1883 |
| <i>Acts of the Lieutenant-Governor of Bengal in Council</i> | | |
| II of 1882 | Bengal Embankment Act 1882 | Section 16 and in section 17 the proviso to the first paragraph of that section, the words "or under the section last preceding" and the words "or railroad" wherever they occur |

THE SECOND SCHEDULE

ARTICLES TO BE DECLARED AND INSURED

(See Section 75)

- (a) gold and silver, coined or uncoined, manufactured or unmanufactured
- (b) plated articles,
- (c) cloths and tissue and lace of which gold or silver forms part, not being the uniform or part of the uniform of an officer, soldier, sailor, police officer or person enrolled as a volunteer under the Indian Volunteers Act 1869 or of any public officer, British or foreign, entitled to wear uniform,
- (d) pearls, precious stones, jewellery and trinkets,
- (e) watches clocks and timepieces of any description,
- (f) Government securities,

- (g) Government stamps,
- (h) bills of exchange, hundis, promissory-notes, bank notes, and orders or other securities for payment of money,
- (i) maps, writings and title-deeds,
- (j) paintings, engravings, lithographs, photographs, carvings, sculpture and other works of art,
- (k) art pottery and all articles made of glass, china or marble,
- (l) silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials,
- (m) shawls,
- (n) lace and furs,
- (o) opium,
- (p) ivory, ebony, coral and sandalwood,
- (q) musk, sandalwood oil and other essential oils used in the preparation of tir or other perfume,
- (r) musical and scientific instruments,
- (s) any article of special value which the Governor General in Council may, by notification in the Gazette of India, add to this schedule.

ACT III OF 1865.

An Act relating to the rights and liabilities of Common Carriers. Passed on the 14th February 1865

WHEREAS it is expedient not only to enable common carriers to limit their liability for loss of or damage to property delivered to them to be carried, but also to declare their liability for loss of or damage to such property occasioned by the negligence or criminal acts of themselves, their servants or agents, it is enacted as follows:—

I This Act may be cited as "The Carriers' Act, 1865."

II In this Act, unless there be something repugnant in the subject or context—

"Common carrier" denotes a person other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately.

"Person" includes any association or body of persons, whether incorporated or not.

Words in the singular number include the plural, and words in the plural include the singular.

III No common carrier shall be liable for the loss of or damage to property delivered to him to be carried exceeding in value one hundred rupees and of the description contained in the schedule to this Act, unless the person delivering such property to be carried, or some person duly authorized in that behalf, shall have expressly declared to such carrier or his agent the value and description thereof.

IV. Every such carrier may require payment for the risk undertaken in carrying property exceeding in value one hundred rupees and of the description aforesaid, at such rate of charge as he may fix. Provided that, to entitle such carrier to payment at a rate higher than his ordinary rate of charge, he shall have caused to be exhibited in the place where he carries on the business of receiving property to be carried, notice of the higher rate of charge required, printed or written in English and in the vernacular language of the country wherein he carries on such business.

V. In case of the loss of or damage to property exceeding in value one hundred rupees, and of the description aforesaid, delivered to such carrier to be carried, when the value and description thereof shall have been declared and payment shall have been required in manner provided for by this Act, the person entitled to recover in respect of such loss or damage shall also be entitled to recover any money actually paid to such carrier in consideration of such risk as aforesaid.

VI. The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the schedule to this Act, shall not be deemed to be limited or affected by any public notice, but any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act XXII, of 1863 (*to provide for taking land for works of public utility to be constructed by private persons or companies, and for regulating the construction and use of works on land so taken*) may, by special contract, signed by the owner of such property so delivered as last aforesaid, or by some person duly authorized in that behalf by such owner, limit his liability in respect of the same.

VII. The liability of the owner of any railroad or tramroad constructed under the provisions of the said Act XXII of 1863, for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the schedule to this Act, shall not be deemed to be limited or affected by any special contract, but the owner of such railroad or tramroad shall be liable for the loss of or damage to property delivered to him to be carried only when such loss or damage shall have been caused by negligence or a criminal act on his part or on that of his agents or servants.

VIII. Notwithstanding anything heretofore contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants.

IX. In any suit brought against a common carrier for the loss, damage, or non delivery of goods entrusted to him for carriage it shall not be necessary for the plaintiff to prove that such loss damage or non delivery was owing to the negligence or criminal act of the carrier, his servants or agents.

X. Nothing in this Act shall affect the provisions contained in the ninth, tenth, and eleventh sections of Act No XVIII of 1851 (*relating to Railways in India*).

SCHEDULE.

Gold and silver coin
 Gold and silver in a manufactured or unmanufactured state
 Precious stones and pearls
 Jewellery
 Time pieces of any description
 Trinkets
 Bills and hundis
 Currency notes of the Government of India, or notes of any banks,
 or securities for payment of money, English or foreign
 Stamps and stamped paper
 Maps, prints, and works of art
 Writings
 Title deeds
 Gold or silver plate or plated articles
 Glass
 China
 Silk in a manufactured or unmanufactured state, and whether wrought
 up or not wrought up with other materials
 Shawls and lace
 Cloths and tissues embroidered with the precious metals, or of
 which such metals form part
 Articles of ivory, ebony, or sandal-wood

ACT No XIII OF 1855

PASSED BY THE LEGISLATIVE COUNCIL OF INDIA.

(Received the assent of the Governor-General on March 27, 1855)
An Act to provide compensation to families for loss occasioned by
the death of a person caused by actionable wrong

WHEREAS no action or suit is now maintainable in any Court against a person who, by his wrongful act, neglect, or default, may have caused the death of another person and it is oftentimes right and expedient that the wrong doer in such case should be answerable in damages for the injury so caused by him It is enacted as follows —

I Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act neglect or default, is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued, shall be liable to an action or suit for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime And it is enacted further, that every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused and shall be brought by and in the name of the executor administrator or representative of the person deceased and in every such

action the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the beforementioned parties or any of them, in such shares as the Court by its judgment or decree shall direct

II. Provided always that not more than one action or suit shall be brought for and in respect of the same subject matter of complaint and that every such action shall be brought within twelve calendar months after the death of such deceased person, provided that, in any such action or suit the executor, administrator or representative of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered shall be deemed part of the assets of the estate of the deceased

III. The plaintiff in any such action or suit shall give full particulars of the person or persons for whom, or on whose behalf, such action or suit shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered

IV. The following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject matter, that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender and the word 'person' shall apply to bodies politic and corporate, and the word 'parent' shall include father and mother and grandfather and grandmother, and the word 'child' shall include son and daughter, and grandson and granddaughter, and stepson and step daughter.

THE PROVIDENT FUNDS ACT, 1897.

ACT IV OF 1897.

(As Amended by Act IV of 1903)

[Passed on the 11th March, 1897.]

An act to amend the law relating to Government and other Provident Funds

Whereas it is expedient to amend the law relating to Government and other Provident Funds, It is hereby enacted as follows —

- 1 (1) This Act may be called the Provident Funds Act 1897
- (2) It extends to the whole of British India, including British Beluchistan, and
- (3) It shall come into force at once
- 2 In this Act—
 - (1) "Provident Fund" means a fund in which the subscriptions or deposit of a *ny* class or classes of employees are received and held on their individual accounts, and includes any contributions credited in respect of, and any interest accruing on, such subscriptions or deposits under the rules of the Fund
 - (2) "Government Provident Fund" means a Provident Fund constituted by the authority of the Government for any class or classes of its employees
 - (3) "Railway Provident Fund" means a Provident Fund constituted by the authority of the Government of India, or of any Company which administers a railway or tramway in British India, either under a special Act of Parliament or under contract with the Secretary of State in Council or the Government of India, for any class or classes of the employees on, or in connection with, such railway or tramway and
 - (4) "compulsory deposit" means a subscription or deposit which is not repayable on the demand or at the option, of the subscriber or depositor, and includes any contribution which may have been credited in respect of, and any interest or increment which may have accrued on such subscription or deposit under the rules of the Fund
- 3 (1) When a subscriber to, or depositor in, any Government or Railway Provident Fund dies and the sum standing to his credit in the books of the Fund does not exceed two thousand rupees, the officer or person whose duty it is to make payment of such sum may pay it as follows —
 - (a) he may pay it to any person entitled to receive it according to the rules of the Fund or, in the absence of any rule of the Fund to the contrary, to any person nominated in writing by the deceased subscriber or depositor to receive it,
 - (b) in any case not here in before provided for, he may pay it to any person appearing to him to be entitled to receive it

Title extent
and com-
mencement

Definitions.

Payment
from Govern-
ment or Rail-
way Provi-
dent Fund
on death of
subscriber
or depositor

(2) The provisions of sub section (1) shall apply to any such sum which at the commencement of this Act stands to the credit of any subscriber or depositor already deceased

(3) Nothing in this section shall affect the validity of the rules of any Fund in so far as such rules may provide for the disposal of sums exceeding two thousand rupees

Protection
to deposits
and other
sums in
certain cases

4 (1) Compulsory deposits in any Government or Railway Provident Fund shall not be liable to any attachment under any decree or order of a Court of Justice in respect of any debt or liability incurred by a subscriber to, or the depositor in, any such Fund, and neither the Official Assignee nor a Receiver appointed under Chapter XX of the Code of Civil Procedure shall be entitled to, or have any claim on any such compulsory deposit

(2) Any sum standing to the credit of any subscriber to, or depositor in any such Fund at the time of his decease and payable under the rules of the Fund or under this Act, to the widow or the children or partly to the widow and partly to the children, of the subscriber or depositor, or to such person as may be authorized by law to receive payment on her or their behalf, shall vest in the widow or the children, or partly in the widow and partly in the children as the case may be, free from any debt or other liability incurred by the deceased, or incurred by the widow or by the children, or by any one or more of them before the death of such subscriber or depositor.

(3) Nothing in sub section (2) shall apply in the case of any such subscriber or depositor as aforesaid dying before the thirteenth day of March 1903

Protection
for anything
done in good
faith under
this Act

5 No suit or other legal proceeding shall lie against any person in respect of anything done or in good faith intended to be done in pursuance of the provisions of this Act,

Power to
extend Act
to other
Provident
Fund

6 The Governor General in Council may, in his discretion by notification in the official Gazette, extend the provisions of this Act to any Provident Fund established for the benefit of its employees by any local authority within the meaning of the Local Authorities Loans Act, 1871

Saving as to
estates of
soldiers

7 Nothing in section 3 shall apply to money belonging to the estate of any European officer, non commissioned officer or soldier dying in Her Majesty's service in India, or of any European who at the time of his death was a deserter from such service

APPENDIX C.

RISK NOTE, FORM A.

(Approved by the Governor General in Council under Section 72 (2) (b) of the Indian Railways Act, 1A of 1890)

(To be used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit)

_____ Station,

_____ 19

Whereas the consignment of _____

_____ tendered by ^{me}/_{us} as per Forwarding Order No _____ of this date, for despatch by the _____ Railway administration or their transport agents or carriers to _____ station, and for which ^I/_{we} have received Railway Receipt No _____ of same date, is in bad condition, ^{and}/_{or} liable to damage, leakage or wastage in transit, as follows —

^I/_{we}, the undersigned do hereby agree and undertake to hold the said Railway administration and all other Railway administrations working in connection therewith, and also other transport agents or carriers employed by them respectively, over whose Railways or by or through whose transport agency or agencies the said goods may be carried in transit from _____ station to _____ station harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same

WITNESS

Signature of sender — _____

(Signature) _____

Rank or { Father's Name _____
Caste _____ Age _____

(Residence) _____

WITNESS

(Signature) _____ Profession — _____

(Residence) _____ Residence — _____

RISK NOTE, FORM B. (OLD).

[Approved by the Governor-General in Council under Section (72) (2)(b) of the Indian Railways Act, IX of 1890]

(To be used when the sender elects to despatch at a 'Special reduced' or 'Owner's risk' rate articles or animals for which an alternative "Ordinary" or 'Risk acceptance' rate is quoted in the tariff)

_____ STATION

_____ 191

Whereas the consignment of _____

_____ tendered by $\frac{\text{no}}{\text{na}}$, as per Forwarding Order No _____ of this date, for despatch by the _____ railway administration or their transport agents or carriers to _____ station, and for which $\frac{I}{wa}$ have received Railway

Receipt No _____ of same date, is charged at a special reduced rate instead of at the ordinary tariff rate chargeable for such consignment, $\frac{I}{wa}$, the undersigned do, in consideration of such lower charge, agree and undertake to hold the said railway administration and all other railway administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively, over whose railways or by or through whose transport agency or agencies the said goods or animals may be carried in transit from _____ station to

_____ station harmless and free from all responsibility for any loss destruction or deterioration of, or damage to the said consignment from any cause whatever before, during and after transit over the said railway or other railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment

Signature of sender _____

WITNESS

(Signature) _____ Rank or { Father's name _____
(Residence) _____ { Caste _____ Age _____

WITNESS

(Signature) _____ Profession _____
(Residence) _____ Residence _____

RISK NOTE FORM B. (Revised)

[Approved by the Governor General in Council under Section 72 (2) (b) of the Indian Railways Act, IV of 1890]

(To be used when the sender elects to despatch at a
'Special reduced' or 'Owners risk' rate articles
or animals for which an alternative 'Ordinary or
'Risk acceptance' rate is quoted in the Tariff)

_____ STATION,

_____ 19

Where the consignment of _____

_____ tendered by ^{me}/_{us} as per Forwarding Order
No _____ of this date, for despatch by the _____ Railway administra-
tion or their transport agents or carriers to _____ station and for which ^I/_{we}
have received Railway Receipt No _____ of same date is charged at a special
reduced rate instead of at the ordinary tariff rate chargeable for such consignment ^I/_{we}
the undersigned do, in consideration of such lower charge agree and undertake to
hold the said Railway administration and all other Railway administrations working
in connection therewith and also all other transport agents or carriers employed by
them respectively over whose Railways or by or through whose transport agency or
agencies the said goods or animals may be carried in transit from _____
station to _____ station harmless and free from all responsibility for any
loss, destruction or deterioration of or damage to the said consignment from any
cause whatever except for the loss of a complete consignment or of one or more com-
plete packages forming part of a consignment due either to the wilful neglect of the
Railway administration or to the wilful neglect of its servants transport
agents or carriers employed by them before during and after transit over the said
Railway or other Railway lines working in connection therewith or by any other trans-
port agency or agencies employed by them respectively for the carriage of the whole or
any part of the said consignment provided the term wilful neglect be not held to
include fire robbery from a running train or any other unforeseen event or accident

WITNESS

Signature of Sender _____

(Signature) _____ Rank or { Father's Name _____
(Residence) _____ { Caste _____ Age _____

WITNESS

(Signature) _____ Profession _____
(Residence) _____ Residence _____

NOTE — The above form is for the convenience of the public translated into the vernacular on the reverse
but the form in English is the authoritative form and the Railway administration accepts no responsibility
for the correctness of the vernacular translation.

RISK NOTE FORM C.

[Approved by the Governor-General in Council under Section 72 (2) (b) of the Indian Railways Act, IX of 1890]

(To be used when at sender's request open wagons carts or boats are used for the conveyance of goods liable to damage when so carried, and which, under other circumstances would be carried in covered wagons carts or boats)

_____ Station,

_____ 19 ,

Whereas the consignment of _____

_____ tendered by $\frac{we}{us}$ as per Forwarding Order No _____ of this date, for despatch by the _____ Railway administration or their transport agents or carriers to _____ station, and for which

$\frac{I}{we}$ have received Railway Receipt No _____ of same date, is at $\frac{my}{our}$ request

loaded in open wagons, carts or boats, to be so carried to destination $\frac{I}{we}$, the undersigned, do hereby agree and undertake to hold the said Railway administration and all other Railway administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively, over whose Railways or by or through whose transport agency or agencies the said goods may be carried in transit from _____ station to _____ station harmless and free from all responsibility for any destruction or deterioration of, or damage to the said consignment which may arise by reason of the consignment being conveyed in open wagons, carts or boats during transit over the said Railway or other Railways working in connection therewith or during transit by any other transport agency or agencies employed by them, respectively

Witness,

Signature of Sender _____

(Signature) _____ Rank or { Father's name _____

(Residence) _____ Caste _____ Age _____

Witness

(Signature) _____ Profession _____

(Residence) _____ Residence _____

RISK NOTE FORM D.

[Approved by the Governor-General in Council under Section 72 (2) (b) of the Indian Railways Act, IX of 1890]

(To be used when the sender elects to despatch at a 'Special reduced' or 'Owner's risk' rate dangerous explosive or combustible articles or which an alternative "ordinary" or 'Risk acceptance' rate is quoted in the Tariff)

STATION,

19

Whereas the consignment of _____

_____ tendered by $\frac{me}{us}$ as per Forwarding Order No _____ of this date, for despatch by the _____ Railway administration or their transport agents or carriers to _____ station, and for which $\frac{I}{we}$ have received Railway Receipt No _____ of same date, is charged at special reduced rate instead of at the ordinary tariff rate chargeable for such consignment $\frac{I}{we}$, the undersigned, do, in consideration of such lower charge, agree and undertake to hold the said Railway administration, and all other Railway administrations working in connection therewith and also all other transport agents or carriers employed by them, respectively, over whose Railway or by or through whose transport agency or agencies the said goods may be carried in transit from _____ station to _____ station harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway administration or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them, respectively, for carriage of the whole or any part of the said consignment, provided the term 'wilful neglect' be not held to include fire robbery from a running train or any other unforeseen event or accident

$\frac{I}{we}$ further agree to accept responsibility for any consequences to the property of the aforesaid Railway administration (&) and of their transport agents and carriers, or to the property of other persons that may be in the course of conveyance, which may be caused by the explosion of, or otherwise, by the said consignment, and that all risk and responsibility whether to the Railway administration (&) or their transport agents and carriers, to their servants or to others, remains solely and entirely with $\frac{me}{us}$

WITNESS

Signature of Sender _____

(Signature) _____

(Residence) _____

Rank or { Father's Name _____
Casta _____ Age _____

WITNESS

(Signature) _____

(Residence) _____

Profession _____

Residence _____

NOTE—This above form is for the convenience of its public translated into the vernacular on the reverse, but the form in English is the authoritative form and the Railway administration accepts no responsibility for the correctness of the vernacular translation

RISK NOTE FORM F.

(Approved by the Governor-General in Council under Section 72 (2) (b) of the Indian Railways Act, IX of 1890)

(To be used when booking horses, mules and ponies tendered for despatch in cattle trucks or horse wagons instead of in horse boxes)

_____ STATION

_____ 19__

Whereas the consignment of _____

_____ tendered by $\frac{me}{us}$ as per Forwarding Order No _____ of this date, for despatch by the _____ Railway administration to _____ station, and for which $\frac{I}{we}$ have received Railway Receipt No _____ of same date, is at $\frac{my}{our}$ request and in consideration of the payment by $\frac{me}{us}$ of cattle truck or horse wagon rate in lieu of horse box rate loaded in cattle trucks or horse wagons instead of horse boxes to be so carried to destination,

And whereas the said Railway administration has notified that it will not be liable for damage or loss arising from fright or restiveness, or delay not caused by the negligence or misconduct of its servants, and such condition is accepted by $\frac{me}{us}$

$\frac{I}{We}$, the undersigned do hereby agree and undertake to hold the said Railway administration and all other Railway administrations working in connection therewith over whose Railways the said animal(s) may be carried in transit from _____ station to _____ station harmless and free from all responsibility in excess of Rs 50 (per head) for any loss, destruction or deterioration of, or damage to, the said consignment during transit over the said Railway or other Railways working in connection therewith

WITNESS

Signature of Sender _____

(Signature) _____

(Residence) _____

Rank or { Father's Name _____
Caste _____ Age _____

WITNESS

(Signature) _____

(Residence) _____

Profession _____

Residence _____

RISK NOTE, FORM G.

[Approved by the
of
(To be used as an
of dangerous ex
alternative 'or

Case
an
d

in the tariff, when the sender desires to enter into a
general agreement instead of executing a separate
Risk Note for each consignment)

Station,
191

Whereas all consignments of (a) _____ for which the
_____ Railway administration quotes both owner's risk or special reduced
rates and Railway risk or ordinary rates are (unless $\frac{I}{we}$ shall have entered into
a special contract in relation to any particular consignment) despatched by $\frac{me}{us}$
at $\frac{my}{our}$ own risk and are charged for by the _____ Railway administration at
special reduced or owner's risk rates, instead of at ordinary tariff or Railway risk
rates $\frac{I}{we}$, the undersigned, in consideration of such consignments being charged for
at the special reduced or owner's risk rates, do hereby agree and undertake to hold
the _____ Railway administration and all other Railway administrations,
working in connection therewith, and also other transport agents or carriers
employed by them, respectively, over whose railways or by or through whose trans-
port agency or agencies the said consignments of (a) _____ may be
carried in transit from _____ station to _____
station, harmless and free from all responsibility for any loss, destruction or
deterioration of, or damage to, all or any such consignments from any cause whatever

other railway lines working in connection therewith, or by any other transport
agency or agencies employed by them, respectively, for the carriage of the whole or
any part of the said consignments, provided the term "wilful neglect" be not held
to include fire robbery from a running train or any other unforeseen event or
accident

$\frac{I}{we}$ further agree to accept responsibility for any consequences to the property of
the aforesaid Railway administration(s) and of their transport agents and carriers
or to the property of other persons that may be in the course of conveyance, which
may be caused by the explosion of, or otherwise, by all or any of the said consign-
ments, and that all risk and responsibility whether to the railway administration(s)
or their transport agents and carriers, to their servants or to others, remain solely
and entirely with $\frac{me}{us}$

WITNESS,

(Signature) _____

(Address) _____

WITNESS

(Signature) _____

(Address) _____

Signature of sender _____

Rank or { Father's Name _____

Caste _____ Age _____

Profession _____

Residence _____

(a) Here insert the commodity it is desired to carry at owner's risk

If this Risk Note is used locally the portions referring to foreign railways must be crossed out

The above form is, for the convenience of the public, translated into the vernacular on the reverse
but the form is, in fact, the same as the original form and the Railway administration accepts no responsibility
for the correctness of the vernacular translation

RISK NOTE, FORM H. (OLD).

[Approved by the Governor General in Council under Section 72
(2) (b) of the Indian Railways Act IX of 1890.]

(To be used as an alternative to Risk Note, Form B, when a sender desires to enter into a general agreement instead of executing a separate Risk Note for each consignment)

_____ STATION,

— — — — — 19

Whereas all consignments of goods or animals for which the _____ railway administration quotes both owner's risk or special reduced rates and railway risk or ordinary rates are (unless $\frac{1}{100}$ shall have entered into a special contract in relation to any particular consignment) despatched by $\frac{100}{100}$ at $\frac{100}{100}$ own risk and are charged for by the _____ railway administration at special reduced or owner's risk rates instead of at ordinary tariff or railway risk rates $\frac{1}{100}$ the undersigned, in consideration of such consignments being charged for at the special reduced or owner's risk rates, do hereby agree and undertake to hold the _____ railway administration and all other railway administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively, over whose railways or by or through whose transport agency or agencies the said goods or animals may be carried in transit from _____ station to _____ station harmless and free from all responsibility for any loss destruction or deterioration of or damage to all or any of such consignments from any cause whatever before, during and after transit over the said railway or other railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for carriage of the whole or any part of the said consignments

Signature of sender _____

WITNESS

| | | | |
|-------------------|---------|---|-----------------------|
| (Signature) _____ | Rank or | { | Father's name _____ |
| (Residence) _____ | | | Caste _____ Age _____ |

WITNESS

| | |
|-------------------|-----------------|
| (Signature) _____ | Residence _____ |
|-------------------|-----------------|

| | |
|-------------------|------------------|
| (Residence) _____ | Profession _____ |
|-------------------|------------------|

(Approved by the Governor General in Council under Section 72 (2) (b) of the Indian Railways Act, IX of 1890)

(To be used as an alternative to Risk Note Form B, when a sender desires to enter into a general agreement instead of executing a separate Risk Note for each consignment.)

STATION.

19

Whereas all consignments of goods or animals for which the _____ Railway administration quotes both owner's risk or special reduced rates and Railway risk or ordinary rates are (unless $\frac{x}{100}$ shall have entered into a special contract in relation to any particular consignment) despatched by $\frac{me}{us}$ at $\frac{my}{our}$ own risk and are charged for by the _____ Railway administration at special reduced or owner's risk rates instead of at ordinary tariff or railway risk rates, $\frac{x}{100}$ the undersigned, in consideration of such consignments being charged for at the special reduced owner's risk rates do hereby agree and undertake to hold the _____ Railway administration and all other Railway administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively over whose Railways or by or through whose transport agency or agencies the said goods or animals may be carried in transit from _____ station to _____ station harmless and free from all responsibility for any loss, destruction or deterioration of or damage to all or any of such consignments from any cause whatever except for the loss of a

section therewith or by any other transport agency or agencies employed by, and respectively for carriage of the whole or any part of the said consignments provided the term "wilful neglect" be not held to include fire robbery from a running train or any unforeseen event or accident

Signature of Sender _____

WITNESS

(Signature) _____ Rank or { Father's Name _____
(Residence) _____ Caste _____ Age _____

WITNESS

(Signature) _____ Profession _____
(Residence) _____ Residence _____

NOTE — The above form is, for the convenience of the public translated into the vernacular on the reverse but the form in English is the authoritative form, and the Railway Administration accepts no responsibility for the correctness of the vernacular translation.

RISK NOTE FORM X.

[Approved by the Governor General in Council under Section 72 (2) (b)
of the Indian Railways Act, IX of 1890]

(To be used when the sender elects to despatch an excepted
article or articles specified in the second schedule to the
Indian Railways Act, IX of 1890 whose value
exceeds one hundred rupees without
payment of the percentage on value
authorized in Section 75 of
that Act)

_____ STATION,

_____ 191

Whereas the consignment of _____

_____ tendered by $\frac{me}{us}$, as per Forwarding Order
No _____ of this date, for despatch by the _____ Railway administration
or their transport agents or carriers to _____ station and for which $\frac{I}{we}$
have received Railway Receipt No _____ of same date is charged at the ordinary
rates for carriage, and whereas $\frac{I}{we}$ have been required to pay and elected not to pay a
percentage on the value of the consignment by way of compensation for increased
risk, $\frac{I}{we}$ the undersigned do therefore agree and undertake to hold the said Railway
administration and all other Railway administrations working in connection therewith
and also all other transport agents or carriers employed by them respectively, over
whose Railways or by or through whose transport agency or agencies the said goods
may be carried in transit from _____ station to _____ station
harmless and free from all responsibility for any loss, destruction or deterioration of,
or damage to the said consignment from any cause whatever before during and after
transit over the said Railway or other Railway lines working in connection therewith
or by any other transport agency or agencies employed by them respectively for the
carriage of the whole or any part of the said consignment

WITNES

Signature of Sender _____

(Signature)

(Residence) _____

Rank or { Father's Name
Caste _____ Age _____

WITNES

(Signature)

(Residence) _____

Profession _____

Residence _____

RISK NOTE FORM Y.

[Approved by the Governor-General in Council under Section 72 (2) (b) of the Indian Railways Act, IX of 1890]

(To be used as an alternative to Risk Note (Form X) when the sender elects to enter into a general agreement for a term not exceeding six months, for the despatch of "excepted" articles specified in the second schedule to the Indian Railways Act, IX of 1890 whose value exceeds one hundred rupees without payment of the percentage on value authorized in Section 75 of that Act instead of executing a separate Risk Note for each consignment)

_____ STATION,

_____ 191

Whereas the consignments of _____
tendered by $\frac{m}{n}$ for despatch by the _____
Railway administration or their transport agents or carriers are charged at the ordinary rates for carriage, and whereas $\frac{I}{w}$ have been required to pay or engage to pay and elected not to pay or engage to pay a percentage on the value of the consignments by way of compensation for increased risk, $\frac{I}{w}$, the undersigned, do therefore agree and undertake, except in relation to any particular consignment for which $\frac{I}{w}$ may have entered into a special contract, to hold the said Railway administration and all other Railway administrations working in connection therewith and also all other transport agents or carriers employed by them, respectively over whose Railways or by or through whose transport agency or agencies the said goods may be carried in transit, harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignments from any cause whatever before, during and after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them, respectively, for the carriage of the whole or any part of the said consignments

WITNESS

Signature of Sender _____

(Signature) _____

(Residence) _____

Rank or { Father's Name _____
Caste _____ Age _____

WITNESS

(Signature) _____

(Residence) _____

Profession _____

Residence _____

A B — When this Risk Note is used locally, the portions referring to Foreign Railways must be scored out.

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| of Ry. servants for non-delivery of goods, liability of Ry Co for .. | 196, 200, 203, 204 |
| of Ry servants or agents, Ry Co protected from liability for, for loss of goods of special value not insured | 72, 73, 76, 77, 78, 86, 90, 138—140, 145, 146 |
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| Onus of proving .. | 181, 486, 494—496 |

Negligence—contd.

| | |
|---|--|
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| on the part of Ry Co, presumption of, in leaving the carriage door open | 534, 544, 553 |
| passenger lawfully attempting to avoid danger or in- convenience is not guilty of | 522, 523, 526, 528 |
| Ry Co guilty of, in not keeping the station properly lighted | 551, 556—559, 562, 564, 569, 570 |
| in keeping the platform in a danger- ous state | 554, 556, 557, 562, 569 |
| in allowing a train to overshoot platform | 554, 557—562, 569, 570 |
| in not warning a passenger against alighting | 551, 560, 561, 562, 566, 569, 570 |
| in not providing night watchman | 605, 606, 608, 610, 611, 612, 616, 617, 625 |
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| “ “ through a closed gate | 884 |
| “ “ and not having his train under control | 876—878 |
| in omitting to stop his train and obtain line- clear certificate | 872, 873 |
| in starting a train without receiving line- clear ticket | 905, 906 |
| in uncoupling engine of a train without seeing that brakes were on | 891—898 |
| in passing a danger signal when the line was not clear and smashing level crossing gates | 885—887 |
| in starting his train with a wrong line-clear ticket disregarding signal against him | 924—926 |
| of a gateman in being asleep on duty and failing to lower signal and open gate | 881—883 |
| to permit a train to enter station... | 885, 887 |
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Negligence—contd

| | |
|--|---------------|
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| in allowing his train to remain unprotected between two stations | 911—915 |
| of a jemadar in not locking points properly and endangering the safety of the public | 890 |
| in not having locked the facing points before allowing a train to come into the station | 878—880 |
| of a station master in allowing a mail train on a siding where a goods train was standing | 932—934 |
| in allowing a train to run on a wrong line without taking prescribed precautions | 917, 921 |
| in failing to see that facing points were securely locked before allowing a train to come into the station | 878—880 |
| in not personally observing that the rear portion of a train was missing before giving line clear for another train | 916 |
| in allowing a train to start after having given line clear for a train from the opposite direction | 935—937 |
| in allowing a train to proceed to the next station without previously obtaining a line clear message | 938—940 |
| in preparing line clear certificate and handing it over to the guard of a down train before the arrival of an up train | 927, 931, 932 |
| in failing to see that the signal was kept at danger | 907, 910 |
| in causing death by rash and negligent act by wrongly preparing line clear message beforehand and starting train | 899, 905 |
| of a signaller in omitting to be present and answer signals and messages | 870, 871 |

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| | |
|---|--|
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| <i>how the goods booked under Risk note were lost</i> | 13 20 29, 37, 42, 44 45, 46 |
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| <i>that loss of goods occurred while in the custody of Ry Co</i> | 190, 191, 193 194 |
| <i>that goods were not stolen by Ry servants or their Agents</i> | 307, 308 309, 311 316 |
| <i>that Ry Co took as much care of the goods as a bailee</i> | 400, 209, 220 424 486, 488, 489, 494, 495 496 |
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| | |
|---|---------------|
| that particular points were correctly set | 946—951 |
| in allowing his train to remain unprotected between two stations | 911—915 |
| of a jemadar in not locking points properly and endanger ing the safety of the public | 890 |
| in not having locked the facing points before allowing a train to come into the station | 878—880 |
| of a station master in allowing a mail train on a siding where a goods train was stand ing | 932—934 |
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| in not personally observing that the rear portion of a train was missing before giving line clear for another train | 916 |
| in allowing a train to start after having given line clear for a train from the opposite direction | 935—937 |
| in allowing a train to proceed to the next station without previously obtaining a line clear message | 938—940 |
| in preparing line clear certificate and handing it over to the guard of a down train before the arrival of an up train | 927, 931, 932 |
| in failing to see that the signal was kept at danger | 907, 910 |
| in causing death by rash and negli gent act by wrongly preparing line clear message beforehand and starting train | 899, 905 |
| of a signaller in omitting to be present and answer signals and messages | 870, 871 |

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 - in passing a danger signal when the line was not clear and smashing level crossing gates 885—887
 - in running his train against signals through closed gates 884
 - in uncoupling engine of a train without seeing that brakes were on 891, 893
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THE PROVIDENT FUNDS ACT, 1897.

ACT IV OF 1897.

(As Amended by Act IV of 1903)

[Passed on the 11th March, 1897.]

An act to amend the law relating to Government and other Provident Funds

Whereas it is expedient to amend the law relating to Government and other Provident Funds, It is hereby enacted as follows —

1 (1) This Act may be called the Provident Funds Act, 1897

(2) It extends to the whole of British India, including British Beluchistan, and

(3) It shall come into force at once

2 In this Act—

(1) "Provident Fund" means a fund in which the subscriptions or deposit of any class or classes of employees are received and held on their individual accounts, and includes any contributions, credited in respect of, and any interest accruing on, such subscriptions or deposits under the rules of the Fund

(2) "Government Provident Fund" means a Provident Fund constituted by the authority of the Government for any class or classes of its employees

(3) "Railway Provident Fund" means a Provident Fund constituted by the authority of the Government of India, or of any Company which administers a railway or tramway in British India, either under a special Act of Parliament or under contract with the Secretary of State in Council or the Government of India, for any class or classes of the employees on, or in connection with, such railway or tramway and

(4) "compulsory deposit" means a subscription or deposit which is not repayable on the demand, or at the option, of the subscriber or depositor, and includes any contribution which may have been credited in respect of, and any interest or increment which may have accrued on such subscription or deposit under the rules of the Fund

3 (1) When a subscriber to, or depositor in, any Government or Railway Provident Fund dies, and the sum standing to his credit in the books of the Fund does not exceed two thousand rupees, the officer or person whose duty it is to make payment of such sum may pay it as follows —

(a) he may pay it to any person entitled to receive it according to the rules of the Fund or, in the absence of any rule of the Fund to the contrary, to any person nominated in writing by the deceased subscriber or depositor to receive it,

(b) in any case not here in before provided for, he may pay it to any person appearing to him to be entitled to receive it

Title extent
and com-
mencement

Definitions.

Payment
from Govern-
ment or Rail-
way Provi-
dent Fund
on death of
subscriber
or depositor

(2) The provisions of sub section (1) shall apply to any such sum which at the commencement of this Act stands to the credit of any subscriber or depositor already deceased

(3) Nothing in this section shall affect the validity of the rules of any Fund in so far as such rules may provide for the disposal of sums exceeding two thousand rupees

Protection
to deposits
and other
sums in
certain cases

4 (1) Compulsory deposits in any Government or Railway Provident Fund shall not be liable to any attachment under any decree or order of a Court of Justice in respect of any debt or liability incurred by a subscriber to, or the depositor in, any such Fund, and neither the Official Assignee nor a Receiver appointed under Chapter XX of the Code of Civil Procedure shall be entitled to, or have any claim on any such compulsory deposit

(2) Any sum standing to the credit of any subscriber to, or depositor in any such Fund at the time of his decease and payable under the rules of the Fund or under this Act, to the widow or the children, or partly to the widow and partly to the children, of the subscriber or depositor, or to such person as may be authorized by law to receive payment on her or their behalf, shall vest in the widow or the children, or partly in the widow and partly in the children as the case may be, free from any debt or other liability incurred by the deceased, or incurred by the widow or by the children, or by any one or more of them before the death of such subscriber or depositor.

(3) Nothing in sub section (2) shall apply in the case of any such subscriber or depositor as aforesaid dying before the thirteenth day of March 1903

Protection
for anything
done in good
faith under
this Act

5 No suit or other legal proceeding shall lie against any person in respect of anything done or in good faith intended to be done in pursuance of the provisions of this Act,

Power to
extend Act
to other
Provident
Fund

6 The Governor-General in Council may, in his discretion by notification in the official Gazette, extend the provisions of this Act to any Provident Fund established for the benefit of its employees by any local authority within the meaning of the Local Authorities Laws Act, 1871

Saving as to
estates of
soldiers

7 Nothing in section 3 shall apply to money belonging to the estate of any European officer, non commissioned officer or soldier dying in Her Majesty's service in India or of any European who at the time of his death was a deserter from such service.

APPENDIX C.

RISK NOTE, FORM A.

(Approved by the Governor General in Council under Section 72 (2) (b) of the Indian Railways Act, 1X of 1890)

(To be used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit)

_____ Station,

_____ 19

Whereas the consignment of _____

_____ tendered by $\frac{ms}{us}$ as per Forwarding Order No _____ of this date, for despatch by the _____ Railway administration or their transport agents or carriers to _____ station, and for which $\frac{1}{we}$ have received Railway Receipt No _____ of same date, is in bad condition, ^{and} _{or} liable to damage, leakage or wastage in transit, as follows —

$\frac{I}{we}$ the undersigned do hereby agree and undertake to hold the said Railway administration and all other Railway administrations working in connection therewith, and also other transport agents or carriers employed by them respectively, over whose Railways or by or through whose transport agency or agencies the said goods may be carried in transit from _____ station to _____ station harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same

WITNESS

Signature of sender _____

(Signature) _____

(Residence) _____

Rank or

{ Father's Name _____
Caste _____ Age _____

WITNESS

(Signature) _____ Profession _____

(Residence) _____ Residence _____

RISK NOTE, FORM B. (OLD).

[Approved by the Governor-General in Council under Section (72) (2)(b) of the Indian Railway Act, IX of 1890]

(To be used when the sender elects to despatch at a "Special reduced" or "Owner's risk" rate articles or animals for which an alternative "Ordinary" or "Risk acceptance" rate is quoted in the tariff)

_____ STATION.

_____ 191

Whereas the consignment of _____

_____ tendered by $\frac{ms}{us}$, as per

Forwarding Order No _____ of this date, for despatch by the _____ railway administration or their transport agents or carriers to _____ station, and for which $\frac{f}{ws}$ have received Railway

Receipt No _____ of same date, is charged at a special reduced rate instead

of at the ordinary tariff rate chargeable for such consignment, $\frac{f}{ws}$, the undersigned,

do, in consideration of such lower charge, agree and undertake to hold the said railway administration and all other railway administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively, over whose railways or by or through whose transport agency or agencies the said goods or animals may be carried in transit from _____ station to

_____ station harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever before, during and after transit over the said railway or other railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment

Signature of sender _____

WITNESS.

(Signature) _____ Rank or { Father's name _____
(Residence) _____ { Caste _____ Age _____

WITNESS.

(Signature) _____ Profession _____
(Residence) _____ Residence _____

RISK NOTE FORM B. (Revised)

[Approved by the Governor General in Council under Section 72 (2) (b) of the Indian Railway Act, IX of 1890]

(To be used when the sender elects to despatch at a "Special reduced" or "Owners risk" rate articles or animals for which an alternative "Ordinary" or "Risk acceptance" rate is quoted in the Tariff)

STATION,

19

Where the consignment of _____

_____ tendered by ^{me}/_{us} as per Forwarding Order No _____ of this date, for despatch by the _____ Railway administration or their transport agents or carriers to _____ station, and for which ^I/_{we} have received Railway Receipt No _____ of same date is charged at a special reduced rate instead of at the ordinary tariff rate chargeable for such consignment, ^I/_{we} the undersigned, do, in consideration of such lower charge, agree and undertake to hold the said Railway administration and all other Railway administrations working in connection therewith and all other transport agents or carriers employed by them respectively over whose Railways or by or through whose transport agency or agencies the said goods or animals may be carried in transit from _____ station to _____ station harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to the said consignment from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway administration or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before during and after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment provided the term wilful neglect be not held to include fire, robbery from a running train or any other unforeseen event or accident

WITNESS

Signature of Sender _____

(Signature) _____ Rank or { Father's Name _____
(Residence) _____ { Caste _____ Age _____

WITNESS

(Signature) _____ Profession _____
(Residence) _____ Residence _____

Note — The above form is for the convenience of the public translated into the vernacular on the reverse but the form in English is the authoritative form and the Railway administration accepts no responsibility for the correctness of the vernacular translation

RISK NOTE FORM C.

[Approved by the Governor-General in Council under Section 72 (2) (b) of the Indian Railways Act IX of 1890]

(To be used when, at sender's request open wagons carts or boats are used for the conveyance of goods liable to damage when so carried, and which, under other circumstances would be carried in covered wagons carts or boats)

_____ STATION,

_____ 19

Whereas the consignment of _____

_____ tendered by $\frac{me}{us}$ as per Forwarding Order No _____ of this date, for despatch by the _____ Railway administration or their transport agents or carriers to _____ station, and for which

$\frac{I}{we}$ have received Railway Receipt No _____ of same date, is at $\frac{my}{our}$ request

loaded in open wagons, carts or boats to be so carried to destination $\frac{I}{we}$, the under signed, do hereby agree and undertake to hold the said Railway administration and all other Railway administrations working in connection therewith and also all other transport agents or carriers employed by them respectively over whose Rail ways or by or through whose transport agency or agencies the said goods may be carried in transit from _____ station to _____ station harmless and free from all responsibility for any destruction or deterioration of, or damage to the said consignment which may arise by reason of the consignment being conveyed in open wagons carts or boats during transit over the said Railway or other Railways working in connection therewith or during transit by any other transport agency or agencies employed by them respectively

Witness,

Signature of Sender _____

(Signature) _____

(Residence) _____

Rank or { Father's name _____
Caste _____ Age _____

Witness

(Signature) _____

(Residence) _____

Profession _____

Residence _____

RISK NOTE FORM D.

[Approved by the Governor General in Council under Section 72 (2) (b) of the Indian Railways Act, IX of 1890]

(To be used when the sender elects to despatch at a 'Special reduced' or 'Owner's risk' rate dangerous, explosive or combustible articles or which an alternative "ordinary" or "Risk acceptance" rate is quoted in the Tariff)

STATION,
19

Whereas the consignment of

tendered by $\frac{me}{us}$ as per Forwarding Order No. _____ of this date, for despatch by the _____ Railway administration or their transport agents or carriers to _____ station, and for which $\frac{I}{ws}$ have received Railway Receipt No. _____ of same date, is charged at special reduced rate instead of at the ordinary tariff rate chargeable for such consignment $\frac{I}{ws}$, the undersigned, do, in consideration of such lower charge, agree and undertake to hold the said Railway administration, and all other Railway administrations working in connection therewith and also all other transport agents or carriers employed by them, respectively, over whose Railway or by or through whose transport agency or agencies the said goods may be carried in transit from _____ station to _____ station harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway administration or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them, respectively, for carriage of the whole or any part of the said consignment, provided the term "wilful neglect" be not held to include fire robbery from a running train or any other unforeseen event or accident

$\frac{I}{ws}$ further agree to accept responsibility for any consequences to the property of the aforesaid Railway administration (a) and of their transport agents and carriers, or to the property of other persons that may be in the course of conveyance, which may be caused by the explosion of, or otherwise, by the said consignment, and that all risk and responsibility whether to the Railway administration (b) or their transport agents and carriers, to their servants or to others, remains solely and entirely with $\frac{me}{us}$

WITNESS

(Signature) _____
(Residence) _____

Signature of Sender _____
Rank or { Father's Name _____
Caste _____ Age _____

WITNESS

(Signature) _____
(Residence) _____

Profession _____
Residence _____

NOTE—(1) The above form is for the convenience of the public translated into the vernacular on the reverse but the form in English is the authoritative form and the Railway administration accepts no responsibility for the correctness of the vernacular translation

RISK NOTE FORM E

[Approved by the Governor General in Council under Section 72 (2) (b) of the Indian Railways Act, IX of 1890]

(To be used when booking elephants or horses of a declared value exceeding Rs 500 a head, or Rs 50 a head, for animals Rs 10 percentage of the value of the animal of Rs 1000)

of 1890

Whereas $\frac{I}{we}$, the undersigned have tendered to the _____ Station, _____ of this date, below, for which $\frac{I}{we}$ have received Railway Ticket No _____ of this date,

And whereas $\frac{I}{we}$ have paid to the said _____ Railway administration only their ordinary freight charge without any extra charge for insurance,

And whereas the said Railway administration for such ordinary freight charged hold itself responsible for proved damages to (each of) the said animal (s) caused by neglect or misconduct of its servants to the extent of the value mentioned below,

And whereas the said Railway administration has notified that it will not be liable for damage or loss arising from feight or restiveness or delay not caused by the negligence or misconduct of its servants and such condition is accepted by $\frac{me}{us}$;

$\frac{I}{we}$, the undersigned do, in consideration of the foregoing terms and conditions, hereby agree and undertake that the responsibility of the said Railway administration and all other Railway administrations working in connection therewith and also all other transport agents or carriers employed by them respectively, over whose Rail ways or by or through whose transport agency or agencies the said animal (s) may be carried in transit from _____ station to _____ station for the loss, destruction or deterioration of or damage to (each of), the said animal (s) shall not exceed the value mentioned below —

| ANIMALS. | | | ANIMALS | | |
|----------|---------------|----------------|---------|---------------|----------------|
| No | Description | Value of each. | No. | Description | Value of each. |
| | | Rs | | | Rs |
| | Elephants | 500 | | Donkeys | 10 |
| | Horses | 500 | | Sheep | 10 |
| | Mules | 50 | | Goats | 10 |
| | Camels | 50 | | Dogs | 10 |
| | Horned Cattle | 50 | | Other Animals | 10 |

WITNESS

Signature of Sender

(Signature) _____

Rank or

{ Father's Name _____

(Residence) _____

{ Caste _____

Age _____

WITNESS

(Signature) _____

Profession _____

(Residence) _____

Residence _____

RISK NOTE FORM F.

(Approved by the Governor General in Council under Section 72 (2) (b) of the Indian Railways Act, IX of 1890)

(To be used when booking horses, mules, and ponies tendered for despatch in cattle trucks or horse wagons instead of in horse boxes)

_____ STATION

_____ 19__

Whereas the consignment of _____

_____ tendered by $\frac{ms}{us}$ as per Forwarding Order No _____ of this date, for despatch by the _____ Railway administration to _____ station, and for which $\frac{1}{ms}$ have received Railway Receipt No _____ of same date, is at $\frac{ms}{odr}$ request and in consideration of the payment by $\frac{ms}{us}$ of cattle truck or horse wagon rate in lieu of horse box rate loaded in cattle trucks or horse wagons instead of horse boxes to be so carried to destination,

And whereas the said Railway administration has notified that it will not be liable for damage or loss arising from freight or restiveness, or delay not caused by the negligence or misconduct of its servants, and such condition is accepted by $\frac{ms}{us}$,

$\frac{1}{ws}$, the undersigned do hereby agree and undertake to hold the said Railway administration and all other Railway administrations working in connection therewith over whose Railways the said animal(s) may be carried in transit from _____ station to _____ station harmless and free from all responsibility in excess of Rs 50 (per head) for any loss, destruction or deterioration of or damage to, the said consignment during transit over the said Railway or other Railways working in connection therewith

WITNESS

Signature of Sender _____

(Signature) _____

(Residence) _____

Rank or { Father's Name _____
Caste _____ Age _____

WITNESS

(Signature) _____

(Residence) _____

Profession _____

Residence _____

RISK NOTE, FORM G.

[Approved by the Governor-General in Council under Section 72 (d), (b) of the Indian Railways Act, IX of 1890]

(To be used as an alternative to Risk Note (Form D) in the case of dangerous explosive or combustible articles for which an alternative 'ordinary' or 'risk acceptance' rate is quoted in the tariff, when the sender desires to enter into a general agreement instead of executing a separate Risk Note for each consignment)

Whereas all consignments of (a) _____ for which the _____ Station, 191 _____ Railway administration quotes both owner's risk or special reduced rates and Railway risk or ordinary rates are (unless $\frac{I}{we}$ shall have entered into a special contract in relation to any particular consignment) despatched by $\frac{me}{us}$ at $\frac{my}{our}$ own risk and are charged for by the _____ Railway administration at special reduced or owner's risk rates, instead of at ordinary tariff or Railway risk rates, $\frac{I}{we}$, the undersigned, in consideration of such consignments being charged for at the special reduced or owner's risk rates, do hereby agree and undertake to hold the _____ Railway administration and all other Railway administrations, working in connection therewith, and also other transport agents or carriers employed by them respectively, over whose railways or by or through whose transport agency or agencies the said consignments of (a) _____ may be carried in transit from _____ station to _____ station, harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, all or any such consignments from any cause whatever _____ make packages _____

or carriers employed by them before during and after transit over the said _____ other railway lines working in connection therewith, or by any other transport agency or agencies employed by them, respectively, for the carriage of the whole or any part of the said consignments, provided the term "wilful neglect" be not held to include fire robbery from a running train or any other unforeseen event or accident

$\frac{I}{we}$ further agree to accept responsibility for any consequences to the property of the aforesaid Railway administration(s) and of their transport agents and carriers or to the property of other persons that may be in the course of conveyance, which may be caused by the explosion of, or otherwise, by all or any of the said consignments, and that all risk and responsibility whether to the railway administration(s) or their transport agents and carriers, in their servants or to others, remain solely and entirely with $\frac{me}{us}$

| | | | |
|-------------------|---------------|---------------------------|-----------|
| WITNESS | | Signature of sender _____ | |
| (Signature) _____ | Rank or _____ | Father's Name _____ | |
| (Address) _____ | | Caste _____ | Age _____ |
| WITNESS | | Profession _____ | |
| (Signature) _____ | | Residence _____ | |
| (Address) _____ | | | |

(a) Here insert the commodity it is desired to carry at owner's risk
 N.B.—When this Risk Note is used locally, the portions referring to foreign railways must be scored out
 The above form is for the convenience of the public translated into the vernacular on the reverse but this form in English is the authoritative form and the Railway administration accepts no responsibility for the correctness of the vernacular translation

RISK NOTE, FORM H. (OLD).

[Approved by the Governor General in Council under Section 72
(2) (b) of the Indian Railways Act, IX of 1890.]

(To be used as an alternative to Risk Note, Form B, when a sender desires to enter into a general agreement instead of executing a separate Risk Note for each consignment)

STATION,

— 10 —

Whereas all consignments of goods or animals for which the railway administration quotes both owner's risk or special reduced rates and railway risk or ordinary rates are (unless $\frac{1}{100}$ shall have entered into a special contract in relation to any particular consignment) despatched by $\frac{100}{100}$ at $\frac{100}{100}$ own risk and are charged for by the railway administration at special reduced or owner's risk rates instead of at ordinary tariff or railway risk rates $\frac{1}{100}$ the undersigned, in consideration of such consignments being charged for at the special reduced or owner's risk rates, do hereby agree and undertake to hold the railway administration and all other railway administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively, over whose railways or by or through whose transport agency or agencies the said goods or animals may be carried in transit from station to station harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, all or any of such consignments from any cause whatever before, during and after transit over the said railway or other railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for carriage of the whole or any part of the said consignments

Signature of sender

WITNESS

(Signature) _____ Rank or { Father's name _____
(Residence) _____ Caste _____ Age _____

WITNESS

(Signature) _____ Residence _____
(Residence) _____ Profession _____

RISK NOTE, FORM G.

[A]

S. No. 72 (2), (b)

(To be
of da
alte
)in the case
r which an
is quoted
into a
parateSTATION,
191

Whereas all consignments of (a) _____ for which the
_____ Railway administration quotes both owner's risk or special reduced
rates and Railway risk or ordinary rates are (unless $\frac{I}{we}$ shall have entered into
a special contract in relation to any particular consignment) despatched by $\frac{we}{us}$
at $\frac{my}{our}$ own risk and are charged for by the _____ Railway administration at
special reduced or owner's risk rates, instead of at ordinary tariff or Railway risk
rates, $\frac{I}{we}$, the undersigned, in consideration of such consignments being charged for
at the special reduced or owner's risk rates, do hereby agree and undertake to hold
the _____ Railway administration and all other Railway administrations,
working in connection therewith, and also other transport agents or carriers
employed by them, respectively, over whose railways or by or through whose trans-
port agency or agencies the said consignments of (a) _____ may be
carried in transit from _____ station to _____
station, harmless and free from all responsibility for any loss, destruction or
deterioration of, or damage to, all or any such consignments from any cause whatever
_____ of one or more complete packages
_____ at the Railway
_____ transport agents
_____ said railway of
_____ their transport
agency or agencies employed by them, respectively, for the carriage of the whole or
any part of the said consignments provided the term "wilful neglect" be not held
to include fire robbery from a running train or any other unforeseen event or
accident

$\frac{I}{we}$ further agree to accept responsibility for any consequences to the property of
the aforesaid Railway administration(s) and of their transport agents and carriers
or to the property of other persons that may be in the course of conveyance which
may be caused by the explosion of, or otherwise, by all or any of the said consi-
gnments, and that all risk and responsibility whether to the railway administration(s)
or their transport agents and carriers, to their servants or to others, remain solely
and entirely with $\frac{me}{us}$

WITNESS

Signature of sender _____

(Signature) _____

Rank or { Father's Name _____

(Address) _____

Caste _____ Age _____

WITNESS

(Signature) _____

Profession _____

(Address) _____

Residence _____

(a) Here insert the commodity it is desired to carry at owner's risk

According to foreign railways must be scored out
stated into the vernacular on the reverse
any administration accepts no responsibility

RISK NOTE, FORM H. (OLD).

[Approved by the Governor-General in Council under Section 72
(2) (b) of the Indian Railways Act, IX of 1890.]

(To be used as an alternative to Risk Note, Form B, when a sender desires to enter into a general agreement instead of executing a separate Risk Note for each consignment)

STATION,

19

Whereas all consignments of goods or animals for which the railway administration quotes both owner's risk or special reduced rates and railway risk or ordinary rates are (unless $\frac{1}{100}$ shall have entered into a special contract in relation to any particular consignment) despatched by $\frac{me}{100}$ at $\frac{my}{100}$ own risk and are charged for by the railway administration at special reduced or owner's risk rates instead of at ordinary tariff or railway risk rates $\frac{1}{100}$, the undersigned, in consideration of such consignments being charged for at the special reduced or owner's risk rates, do hereby agree and undertake to hold the railway administration and all other railway administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively, over whose railways or by or through whose transport agency or agencies the said goods or animals may be carried in transit from station to station harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, all or any of such consignments from any cause whatever before, during and after transit over the said railway or other railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for carriage of the whole or any part of the said consignments.

Signature of sender

WITNESS

(Signature) _____ by { Father's name _____
(Residence) _____ Rank or { Caste _____ Age _____

WITNESS

(Signature) _____ Residence _____
(Residence) _____ Profession _____

RISK NOTE, FORM G.

[Approved by the Governor-General in Council under Section 72 (2) (b) of the Indian Railways Act, IX of 1890]

(To be used as an alternative to Risk Note (Form D) in the case of dangerous explosive or combustible articles for which an alternative 'ordinary' or 'risk acceptance' rate is quoted in the tariff, when the sender desires to enter into a general agreement instead of executing a separate Risk Note for each consignment)

STATION,
191

Whereas all consignments of (a) _____ for which the _____ Railway administration quotes both owner's risk or special reduced rates and Railway risk or ordinary rates are (unless $\frac{I}{we}$ shall have entered into a special contract in relation to any particular consignment) despatched by $\frac{me}{us}$ at $\frac{my}{our}$ own risk and are charged for by the _____ Railway administration at special reduced or owner's risk rates, instead of at ordinary tariff or Railway risk rates $\frac{I}{we}$, the undersigned, in consideration of such consignments being charged for at the special reduced or owner's risk rates, do hereby agree and undertake to hold the _____ Railway administration and all other Railway administrations, working in connection therewith, and also other transport agents or carriers employed by them, respectively, over whose railways or by or through whose transport agency or agencies the said consignments of (a) _____ may be carried in transit from _____ station to _____ station, harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, all or any such consignments from any cause whatever

_____ package
_____ f
other railway lines working in connection therewith, or by any other transport agency or agencies employed by them, respectively, for the carriage of the whole or any part of the said consignments, provided the term "wilful neglect" be not held to include fire, robbery from a running train or any other unforeseen event or accident

$\frac{I}{we}$ further agree to accept responsibility for any consequences to the property of the aforesaid Railway administration(s) and of their transport agents and carriers or to the property of other persons that may be in the course of conveyance, which may be caused by the explosion of, or otherwise, by all or any of the said consignments, and that all risk and responsibility whether to the railway administration(s) or their transport agents and carriers, to their servants or to others, remain solely and entirely with $\frac{me}{us}$

WITNESS
(Signature) _____ Rank or { Signature of sender _____
(Address) _____ { Father's Name _____
Caste _____ Age _____
WITNESS
(Signature) _____ Profession _____
(Address) _____ Residence _____

(a) Here insert the commodity it is desired to carry at owner's risk.
N.B.—When this Risk Note is used locally, its portions referring to foreign railways must be scored out.
The above form is, for the convenience of the public, translated into the vernacular on the reverse but this form (English) is the authoritative form and the Railway administration accepts no responsibility for the correctness of the vernacular translation.

RISK NOTE FORM X.

[Approved by the Governor General in Council under Section 72 (2) (b)
of the Indian Railways Act, IX of 1890]

(To be used when the sender elects to despatch an 'excepted'
article or articles specified in the second schedule to the
Indian Railways Act, IX of 1890 whose value
exceeds one hundred rupees, without
payment of the percentage on value
authorized in Section 75 of
that Act)

STATION,

— 191

Whereas the consignment of _____
_____ tendered by ^{me}_{us}, as per Forwarding Order
No. _____ of this date, for despatch by the _____ Railway administration
or their transport agents or carriers to _____ station, and for which ^I_{we}
have received Railway Receipt No. _____ of same date, is charged at the ordinary
rates for carriage, and whereas ^I_{we} have been required to pay and elected not to pay, a
percentage on the value of the consignment by way of compensation for increased
risk, ^I_{we} the under-signed, do therefore agree and undertake to hold the said Railway
administration and all other Railway administrations working in connection therewith,
and also all other transport agents or carriers employed by them respectively, over
whose Railways or by or through whose transport agency or agencies the said goods
may be carried in transit from _____ station to _____ station
harmless and free from all responsibility for any loss, destruction or deterioration of,
or damage to, the said consignment from any cause whatever before during and after
transit over the said Railway or other Railway lines working in connection therewith
or by any other transport agency or agencies employed by them respectively for the
carriage of the whole or any part of the said consignment

WITNESS

Signature of Sender —————

(Signature)

(Residence) —

Rank or { Father's Name
Caste — — — — — Age —

WITNESS

(Signature) —

Profession —————

(Residence) —

Residence —————

RISK NOTE FORM Y.

[Approved by the Governor General in Council under Section 72 (2) (b) of the Indian Railways Act, IX of 1890]

(To be used as an alternative to Risk Note (Form X) when the sender elects to enter into a general agreement for a term not exceeding six months for the despatch of "excepted" articles specified in the second schedule to the Indian Railways Act, IX of 1890, whose value exceeds one hundred rupees without payment of the percentage on value authorized in Section 75 of that Act, instead of executing a separate Risk Note for each consignment)

STATION,

191

Whereas the consignments of _____
tendered by $\frac{m}{n}$ for despatch by the _____
Railway administration or their transport agents or carriers are charged at the ordinary rates for carriage, and whereas $\frac{I}{w}$ have been required to pay or engage to pay and elected not to pay or engage to pay a percentage on the value of the consignments by way of compensation for increased risk, $\frac{I}{w}$, the undersigned, do therefore agree and undertake, except in relation to any particular consignment for which $\frac{I}{w}$ may have entered into a special contract, to hold the said Railway administration and all other Railway administrations working in connection therewith and also all other transport agents or carriers employed by them respectively, over whose Railways or by or through whose transport agency or agencies the said goods may be carried in transit, harmless and free from all responsibility for any loss, destruction or deterioration of or damage to, the said consignments from any cause whatever before during and after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them, respectively, for the carriage of the whole or any part of the said consignments

WITNESS

Signature of Sender _____

(Signature) _____

Rank or

Father's Name _____

(Residence) _____

Caste _____ Age _____

WITNESS

(Signature) _____

Profession _____

(Residence) _____

Residence _____

N.B.—When this Risk Note is used locally the portions referring to Foreign Railways must be scored out

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RISK NOTE FORM Y.

[Approved by the Governor General in Council under Section 72 (2) (b) of the Indian Railways Act, IX of 1890]

(To be used as an alternative to Risk Note (Form X) when the sender elects to enter into a general agreement for a term not exceeding six months, for the despatch of "excepted" articles specified in the second schedule to the Indian Railways Act, IX of 1890, whose value exceeds one hundred rupees without payment of the percentage on value authorized in Section 75 of that Act instead of executing a separate Risk Note for each consignment)

_____ STATION,

_____ 191

Whereas the consignments of _____ tendered by $\frac{m}{n}$ for despatch by the _____ Railway administration or their transport agents or carriers are charged at the ordinary rates for carriage, and whereas $\frac{I}{w_0}$ have been required to pay or engage to pay and elected not to pay or engage to pay a percentage on the value of the consignments by way of compensation for increased risk, $\frac{I}{w_0}$, the undersigned, do therefore agree and undertake, except in relation to any particular consignment for which $\frac{I}{w_0}$ may have entered into a special contract, to hold the said Railway administration and all other Railway administrations working in connection therewith and also all other transport agents or carriers employed by them, respectively, over whose Railways or by or through whose transport agency or agencies the said goods may be carried in transit, harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignments from any cause whatever before, during and after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them, respectively, for the carriage of the whole or any part of the said consignments

WITNESS

Signature of Sender _____

(Signature) _____

Rank or

Father's Name _____

(Residence) _____

Caste _____ Age _____

WITNESS

(Signature) _____

Profession _____

(Residence) _____

Residence _____

N.B.—When this Risk Note is used locally the portions referring to Foreign Railways must be scored out.

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